INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

VISTABELLA, AEGEAN SEA, ILIAD AND PLATE PRINCESS

Note by the Secretariat

Objective of document:	To inform the 1971 Fund Administrative Council of the latest developments regarding the *Vistabella*, *Aegean Sea*, *Iliad* and *Plate Princess* incidents.
Summary of the incidents and recent developments:	***Vistabella*** The Court of Appeal in Guadeloupe rendered a judgement in favour of the 1971 Fund for €1 289 483 plus interest and costs. The 1971 Fund brought summary legal proceedings against the insurer in Trinidad and Tobago to enforce the judgement. The insurer opposed the enforcement. In July 2012 the Court of Appeal in Trinidad and Tobago decided in favour of the insurer. The 1971 Fund requested leave to appeal against the judgement to the Privy Council. In March 2013, the 1971 Fund was granted leave to appeal to the Privy Council. Thereafter the Fund's lawyers lodged notice of appeal at the Privy Council and agreed the Statement of Facts and Issues with the insurer's lawyers. The Privy Council set a date for a hearing in June 2014. Following the instructions given by the 1971 Fund Administrative Council to the Director in October 2013 for the purpose of the winding up of the 1971 Fund, the Fund's lawyers are is discussing a possible out-of-court settlement with the insurer. ***Aegean Sea*** In a judgement delivered in July 2012 the Court of First Instance awarded the last outstanding claimant in this case, a fish pond owner, €363 746 but since the claimant had not included the pilot/Spanish Government in the proceedings, the 1971 Fund would only be liable in respect of 50% of the awarded amount, ie €181 873. The 1971 Fund has appealed against the judgement. The Spanish State will, under the agreement with the 1971 Fund, pay any amounts awarded by the Courts. In a judgement delivered in October 2013, and corrected in November 2013, the claimant was awarded some €243 000. The Director has contacted the Spanish Ambassador in London who has taken an active role in ensuring that the payment by the Spanish Government is made as soon as possible. In April 2014, the Director was informed that the Spanish Government would pay the judgement within three weeks, ie before the May 2014 session of the 1971 Fund Administrative Council.

Iliad

Five hundred and twenty-seven claims totalling €11 million were filed in the limitation proceedings. However, the Court-appointed liquidator assessed the claims at €2 217 755. All claims are time-barred against the 1971 Fund except for a claim from the shipowner and his insurer (the North of England P&I Club) in respect of reimbursement for any compensation payments in excess of the shipowner's limitation amount and for indemnification under Article 5.1 of the 1971 Fund Convention.

At a hearing at the Court of Nafplion in November 2013, the 1971 Fund supported the shipowner and the North of England P&I Club's objections disputing the claims in their entirety.

Following the instructions given by the Administrative Council to the Director in October 2013, in March 2013 the Director approached the North of England P&I Club to discuss a possible out-of-court settlement and made an offer of €250 000. As at 10 April 2014 the Club has not responded to the offer.

Plate Princess

In 1997, two fishermen's unions, FETRAPESCA and Puerto Miranda Union, presented claims in the Civil Court of Caracas against the shipowner and the master of the *Plate Princess*. In February 2009, the Maritime Court of First Instance accepted the claim by the Puerto Miranda Union and ordered the shipowner to pay BsF 2 844 983 (£270 466)[<1><2>] and the 1971 Fund, although not a defendant, to pay BsF 400 628 022 (£38 million) plus costs. The judgement was confirmed by the Maritime Court of Appeal and the Supreme Court.

In March 2011, the Maritime Court of First Instance also accepted the claim by FETRAPESCA and ordered payment of damages in an amount to be quantified by court experts. The 1971 Fund appealed against this judgement.

In early 2013, the Maritime Court of First Instance accepted a request from the Puerto Miranda Union to order an embargo of contributions due from Petróleos de Venezuela SA (PDVSA), Venezuela's State-owned oil company, to the Fund. The Court did not specify whether it referred to the 1971 Fund or the 1992 Fund or both. The Court also ordered the embargo of any Fund's assets in Venezuela.

In accordance with the instructions given to the Director by the 1971 Fund Administrative Council at its October 2013 session, the 1971 Fund discontinued all legal representation and defence in legal proceedings in Venezuela.

In January 2014, the Puerto Miranda Union obtained an order for an embargo of the assets belonging to the IOPC Funds. From the order, it is not clear whether the order refers to the 1971 Fund, the 1992 Fund or to both. As at 10 April 2014 the order has not been served upon the 1971 Fund.

<1> The exchange rate used in this document (as at 3 March 2014) is £1 = BsF 10.5188.

<2> In January 2008 the Bolivar Fuerte (BsF) replaced the Bolivar (Bs) at the rate of 1 BsF = 1000 Bs. Until December 2011 the Bolivarian Republic of Venezuela used the term Bolivar Fuerte (BsF) to distinguish the new currency from the old currency or Bolivar (Bs). However, since the old currency was taken out of circulation in January 2012, the Venezuelan Central Bank decided that the use of the word 'Fuerte' was no longer necessary. Therefore, the name of the actual Venezuelan currency is now Bolivar (Bs). To avoid any confusion, we will continue to use the term Bolivar Fuerte (BsF) to distinguish the actual Venezuelan currency (from 2008) from the previous currency (pre 2008).

	The Director has informed the UK Government (Foreign and Commonwealth Office (FCO) and Department for Transport) of the arrest order and has requested the lawyers acting for the FCO to advise whether the Privileges and Immunities available to the 1971 Fund and the 1992 Fund in the Headquarters Agreements with the two Organisations would apply to this order.
Action to be taken:	1971 Fund Administrative Council Information to be noted.

1 ***Vistabella***

1.1 Summary of the incident

Ship	*Vistabella*
Date of incident	07.03.1991
Place of incident	Guadeloupe, France
Cause of incident	Sinking
Quantity of oil spilled	Unknown
Flag State of ship	Trinidad and Tobago
Gross tonnage	1 090 GRT
Shipowner's insurer	Maritime General Insurance Company Limited
CLC limit	€359 000
Compensation	€1.3 million paid by the 1971 Fund
Legal proceedings	The 1971 Fund brought recourse action against the shipowner's insurer in Guadeloupe. The Court of Appeal rendered a judgement in favour of the 1971 Fund for €1 289 483 plus interest and costs. The 1971 Fund brought summary legal proceedings against the insurer in Trinidad and Tobago to enforce the judgement. The shipowner's insurers opposed the enforcement. In March 2008, the Court delivered a judgement in the 1971 Fund's favour. The shipowner's insurer appealed. In July 2012, the Court of Appeal decided in favour of the insurer. In March 2013, the 1971 Fund was granted leave to appeal to the Privy Council[<3>]. The Privy Council set a date for a hearing in June 2014.

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

1.3 Legal proceedings in Trinidad and Tobago

1.3.1 The 1971 Fund commenced summary proceedings against the insurer in Trinidad and Tobago to enforce the judgement of the Court of Appeal in Guadeloupe. However, the insurer opposed the execution of the judgement.

1.3.2 In March 2008, the Court delivered a judgement in the 1971 Fund's favour. The insurer appealed against this judgement in the Court of Appeal in Trinidad and Tobago, arguing that the enforcement of foreign judgements was contrary to public policy as the applicable French law was repugnant to the law of Trinidad and Tobago on various grounds.

1.3.3 In a judgement rendered in July 2012, the Court of Appeal dismissed the majority of the grounds of appeal but found that one ground required further consideration, ie the application of French law was in breach of the legislative choice of law and jurisdiction as set out in the Insurance Act of Trinidad

[<3>] The Privy Council is the court of final appeal for the United Kingdom Overseas Territories and Crown Dependencies and for some Commonwealth countries.

and Tobago. It was held that it was contrary to public policy to apply a law other than the law of Trinidad and Tobago to a policy of insurance issued in Trinidad and Tobago or through a person or an office in Trinidad and Tobago.

1.3.4 The 1971 Fund made an application for leave to appeal against the judgement of the Court of Appeal of Trinidad and Tobago before the Privy Council and it was granted. The hearing of the Privy Council will take place in June 2014.

1.4 Recent developments

Following the instructions given to the Director for the purpose of the winding up of the 1971 Fund, the Director has instructed the 1971 Fund's lawyers to discuss a possible out-of-court settlement with the insurer.

2 ***Aegean Sea***

2.1 Summary of the incident

Ship	*Aegean Sea*
Date of incident	03.12.1992
Place of incident	La Coruña, Spain
Cause of incident	Grounding
Quantity of oil spilled	73 500 tonnes of crude oil
Flag State of ship	Greece
Gross tonnage	57 801 GRT
P&I insurer	United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (UK Club)
CLC limit	€6.7 million
CLC + Fund limit	€57.2 million
Compensation	An agreement was concluded between the Spanish State, the 1971 Fund, the shipowner and the UK Club whereby the total amount due from the owner of the *Aegean Sea*, the UK Club and the 1971 Fund to the victims of the incident amounted to Pts 9 000 million or €54 million. Under the agreement, the Spanish State undertook to compensate all the victims who obtained a final judgement by a Spanish court in their favour which condemned the shipowner, the UK Club or the 1971 Fund to pay compensation as a result of the incident.

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

2.3 Civil proceedings

2.3.1 Only one claim by a fish pond owner totalling €799 921 is still pending in the civil proceedings. The Court of First Instance issued a judgement in December 2005 ordering the Spanish Government and the 1971 Fund to pay €363 746 to the claimant. The Spanish Government and the 1971 Fund appealed against the judgement. The Court of Appeal returned the file to the Court of First Instance ordering that the proceedings be re-started in order to correct an error made by the Court of First Instance.

2.3.2 The Court of First Instance gave time to the claimant to plead the continuation of the proceedings as declared by the Court of Appeal. However, the claimant decided not to continue the claim against the pilot. The Court of First Instance ordered that the proceedings continue only against the Fund, on the basis of technical defence called lack of *litis consortium*, ie the pilot was not a defendant in the proceedings and therefore the vicarious liability of the State could not come into effect.

2.3.3 In a judgement delivered in July 2012 the Court of First Instance decided to award the claimant the amount awarded in its prior decision in 2005, ie €363 746, but since the claimant had not included the pilot/Spanish Government in the proceedings, the 1971 Fund would only be liable in respect of 50% of the awarded amount, ie €181 873.

2.3.4 The 1971 Fund lodged an appeal against the judgement before the Court of Appeal.

2.4 Recent developments

2.4.1 The Court of Appeal delivered a judgement in October 2013, which was corrected in November 2013 due to a minor error, awarding the claimant a total of €243 000, which included principal, interest and costs. Under the agreement concluded between the Spanish State and the 1971 Fund, the State undertook to pay any judgement rendered against the Fund in respect of this incident.

2.4.2 The Director has contacted the Spanish Ambassador in London who has taken an active role in ensuring that the payment by the Spanish Government is made as soon as possible.

2.4.3 In April 2014, the Director was informed that the Spanish Government would pay the judgement within three weeks, ie before the May 2014 session of the 1971 Fund Administrative Council.

3 ***Iliad***

3.1 Summary of the incident

Ship	*Iliad*
Date of incident	09.10.1993
Place of incident	Pylos, Greece
Cause of incident	Grounding
Quantity of oil spilled	200 tonnes of Syrian light crude oil
Flag State of ship	Greece
Gross tonnage	33 837 GRT
P&I insurer	North of England Protection and Indemnity Association Limited
CLC limit	€4.4 million
Compensation	Five hundred and twenty-seven claims totalling €11 million were filed in the limitation proceedings. However, the Court-appointed liquidator assessed the claims at €2 217 755. The largest claim is that of a fish farm, totalling €3 million but the liquidator assessed the claim at €296 000. All claims are time-barred against the 1971 Fund except for a claim from the shipowner and his insurer in respect of reimbursement for any compensation payments in excess of the shipowner's limitation amount and for indemnification under Article 5.1 of the 1971 Fund Convention. Although the owner of a fish farm had initially interrupted the time bar period by taking legal action against the 1971 Fund, this action appears to have been abandoned. It could therefore be considered that this claim is now time-barred against the 1971 Fund.

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

3.3 Limitation proceedings

3.3.1 In March 1994 the shipowner's P&I insurer established a limitation fund amounting to Drs 1 497 million or €4.4 million with the Court in Nafplion by the deposit of a bank guarantee. Five hundred and twenty-seven claims were lodged in the limitation proceedings, totalling €10.8 million.

3.3.2 The liquidator submitted his report to the Court in March 2006. In his report, the liquidator assessed the 527 claims at €2 217 755, which is below the limitation amount applicable to the shipowner. However, 446 of these claimants, including the shipowner and his insurer, filed objections to the report.

3.3.3 The 1971 Fund also filed interventions to the Court in relation to the report in which the Fund dealt with the criteria for the admissibility of claims for compensation under the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention. The Fund, in its interventions, reserved its rights deriving under Article 6 of the 1971 Fund Convention to argue that most claims were time-barred *vis-à-vis* the Fund.

3.3.4 In October 2007, the Court in Nafplion decided that it did not have jurisdiction in respect of the limitation proceedings and referred the case to the Court of Kalamata as the court closest to the area where the incident took place.

3.3.5 In April 2010 the Court of Kalamata decided that the Court of Nafplion had jurisdiction in respect of the limitation proceedings and that therefore these proceedings should be referred back to that Court.

3.3.6 In July 2013 the shipowner and his insurer informed the 1971 Fund that all the claimants had been duly summoned to the limitation proceedings. At a hearing at the Court of Nafplion in November 2013 the 1971 Fund supported the shipowner and his insurer's objections and disputed the claims in their entirety.

3.4 Legal actions against the 1971 Fund

3.4.1 The shipowner and his insurer took legal action against the 1971 Fund in order to prevent from becoming time-barred their rights to reimbursement from the 1971 Fund for any compensation payments in excess of the shipowner's limitation amount and their rights to indemnification under Article 5.1 of the 1971 Fund Convention. A hearing of these proceedings is scheduled for December 2014.

3.4.2 The owner of a fish farm had initially interrupted the time bar period by taking legal action against the 1971 Fund. However, the 1971 Fund's Greek lawyer has informed the Director that this action appears to have been abandoned and that the claimant has decided to continue its action solely against the shipowner and his insurer in the limitation proceedings. As a consequence, it could be considered that this claim is now time-barred against the 1971 Fund.

3.5 Time bar issues

3.5.1 Article 6.1 of the 1971 Fund Convention provides as follows:

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

3.5.2 The 1971 Fund was an intervening party in the limitation proceedings and therefore it could be considered that the 1971 Fund was notified of the actions against the shipowner under Article 7.6 of the 1971 Fund Convention. The first requisite in Article 6.1 was therefore filled, ie the 1971 Fund was notified, within three years of when the damage occurred, of the actions against the shipowner in the limitation fund. However, none of the claimants in the limitation proceedings, except for the shipowner and the owner of the fish farm, initiated an action against the 1971 Fund within six years of when the incident occurred and therefore all claims other than that of the shipowner and the owner of the fish farm could be considered time-barred under the second requisite of Article 6.1 of the 1971 Fund Convention.

3.5.3 Since the owner of the fish farm appears now to have abandoned his action against the 1971 Fund, all claims except that of the shipowner and his insurer could be considered to be time-barred against the 1971 Fund.

3.6 Recent developments

3.6.1 At a hearing at the Court of Nafplion in November 2013, the 1971 Fund supported the shipowner and the North of England P&I Club's objections disputing the claims in their entirety.

3.6.2 Although most claims are time-barred *vis-à-vis* the 1971 Fund and it is very likely that the Court will accept the amount as calculated by the liquidator (an amount which falls well below the limit of liability under the 1969 CLC), following the instructions given by the Administrative Council in October 2013, the Director approached the North of England P&I Club in March 2014 to discuss a possible out-of-court settlement and made an offer of €250 000 in exchange for the Club's undertaking to release and hold harmless the 1971 Fund from any future claim in respect of this incident.

3.6.3 The proposal is currently being considered by the Club. If the Club were to agree to the offer, the Director intends to request the Administrative Council to authorise him to conclude a settlement with the Club.

3.6.4 So far the Club has not responded to the offer.

4 ***Plate Princess***

4.1 Summary of the incident

Ship	*Plate Princess*
Date of incident	27.05.1997
Place of incident	Puerto Miranda, Lake Maracaibo, Bolivarian Republic of 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	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 £300 000)
CLC + Fund limit	60 million SDR (BsF 403 473 005 or £42 million)
Compensation	No compensation paid
Standing last in the queue	N/A
Legal proceedings	Two claims as follows: *Claim by the Puerto Miranda Union* Plaintiff: Fishermen's Union. Defendants: Shipowner and master of the *Plate Princess.* The 1971 Fund, though not a defendant in the proceedings, participated as an interested third party. Judgement by the Maritime Court of First Instance ordered the defendants and the 1971 Fund to pay compensation to be quantified by court experts. Appeals on liability to the Court of Appeal, the Supreme Court and the Constitutional Section of the Supreme Court were rejected. The Maritime Court of First Instance decided the following:

	Quantified compensation, excluding costs	BsF 769 892 085	£80.7 million
	Shipowner's liability (3.6 million SDR)	BsF 2 844 983	£300 000
	Compensation limit under the Conventions (60 million SDR)	BsF 403 473 005	£42 million
	Payable by 1971 Fund (Compensation limit under the Conventions minus shipowner's liability)	BsF 400 628 022	£41.7 million
	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 Court. Leave was denied. The decision to deny leave to appeal was appealed by the 1971 Fund to the Supreme Court. The appeal was rejected. The 1971 Fund appealed to the Supreme Court (Constitutional Section) against the decision of the Supreme Court on the quantum of the loss. The appeal was rejected. No further forms of appeal are available to the 1971 Fund. *Claim by FETRAPESCA* Plaintiff: Fishermen's Union. Defendants: Shipowner and master of the *Plate Princess.* The 1971 Fund, though not a defendant in the proceedings, participated as an interested third party. Judgement by the Maritime Court of First Instance ordered the shipowner, master and the 1971 Fund to pay compensation to be quantified by a court expert. The 1971 Fund has filed an appeal against 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.		

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

4.3 Legal proceedings

4.3.1 In 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 of the *Plate Princess*. In October 2005, ie eight years after the incident took place, the 1971 Fund was formally notified as an interested third party of both claims. In May 2006, the 1971 Fund Administrative Council decided that both claims were time-barred in respect of the 1971 Fund.

Claim by FETRAPESCA

4.3.2 In September 2012 the 1971 Fund was formally notified of the judgement relating to the claim by FETRAPESCA which had been rendered by the Maritime Court of First Instance in February 2009. In October 2012 the 1971 Fund filed an appeal against the February 2009 judgement.

Claim by Puerto Miranda Union

4.3.3 In March 2011 the Maritime Court of First Instance issued a judgement relating to the claim by Puerto Miranda Union in which it ordered the 1971 Fund to pay BsF 400 628 022 plus costs. Successive appeals by the master, shipowner and the 1971 Fund were rejected by the courts. In August 2012 the Constitutional Section of the Supreme Court confirmed that this judgement was now final.

Decisions taken by the 1971 Fund Administrative Council at its October 2012 session

4.3.4 In October 2012, the 1971 Fund Administrative Council decided to maintain its previous decisions instructing the Director not to make any payment in respect of this incident and to oppose the enforcement of the judgement.

Enforcement of the judgement

4.3.5 In December 2012, the Banco Venezolano de Credito filed a cheque at Court for BsF 2 844 983 corresponding to the amount of the guarantee issued to cover the limitation fund.

4.3.6 The Puerto Miranda Union's lawyers also filed pleadings at Court requesting an embargo over the Fund's assets, specifically over the contributions owed to the 1992 Fund by Petróleos de Venezuela SA (PDVSA), Venezuela's State-owned oil company. The 1971 Fund filed pleadings to oppose the measures requested by the Puerto Miranda Union on the basis that the *Plate Princess* incident related solely to the 1971 Fund, not the 1992 Fund, and that any amounts owed by PDVSA were in respect of monies owed to the 1992 Fund, not the 1971 Fund.

4.3.7 In January 2013, the Maritime Court of First Instance rejected the 1971 Fund's arguments on the basis that the 1971 Fund, as an international compensation body, should respond in relation to compensation matters and that the 1992 Fund was an interested party in relation to the eventual decision regarding any contributions due from PDVSA.

4.3.8 In February 2013, the Puerto Miranda Union requested a clarification of the judgement of the Maritime Court of First Instance arguing that the previous judgement, which imposed liability on the 1971 Fund, should refer to the 1992 Fund because Venezuela was now a member of the 1992 Fund only. The 1971 Fund filed pleadings in opposition highlighting that it was only the 1971 Fund, and not the 1992 Fund, that was involved in the *Plate Princess* incident.

4.3.9 The Maritime Court of First Instance accepted the request filed by the Puerto Miranda Union for an embargo over the Fund's assets, and ordered the embargo of contributions owed by PDVSA to the Fund up to a limit of BsF 412 646 863 (approximately 60 million SDR), which corresponded to the amount awarded against the 1971 Fund, ie BsF 400 628 022 plus execution costs. The Court did not specify whether it referred to the 1971 Fund or the 1992 Fund or both.

4.3.10 The Maritime Court of First Instance also issued an order of embargo of any assets the Fund might have in Venezuela, up to a limit of BsF 921 444 450, ie double the amount awarded against the 1971 Fund plus 30%. In the order, the Court referred expressly to the ratification by Venezuela not only of the 1971 Fund Convention but also of the 1992 Protocol. The 1971 Fund appealed against this order.

4.4 Recent developments

4.4.1 In accordance with the instructions given to the Director by the 1971 Fund Administrative Council in October 2013, the 1971 Fund has discontinued all legal representation and defence in legal proceedings in Venezuela.

4.4.2 In February 2014, the Maritime Court of First Instance in Caracas issued a request to the courts in the United Kingdom for their assistance in serving the judgements rendered by the Venezuelan Courts in respect of the claim by the Puerto Miranda Union on the IOPC Funds. The request includes the order of embargo against assets belonging to the IOPC Funds. The request does not specify whether it refers to the 1971 Fund or the 1992 Fund or both. The order has not been served upon the 1971 Fund.

4.4.3 The Director has informed the UK Government (Foreign and Commonwealth Office (FCO) and Department for Transport) of the arrest order and has requested the lawyers acting for the FCO to advise whether the Privileges and Immunities available to the 1971 Fund and the 1992 Fund in the Headquarters Agreements with the two Organisations would apply to this order.

5 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

BACKGROUND INFORMATION – VISTABELLA

1 Incident

While being towed, the sea-going barge *Vistabella* (1 090 GRT), registered in Trinidad and Tobago, sank to a depth of over 600 metres, 15 miles south-east of Nevis. An unknown quantity of heavy fuel oil cargo was spilled as a result of the incident and the quantity that remained in the barge is not known. Strong winds and currents led the oil to spread and, as a result, a number of locations in the Caribbean were impacted, including Guadeloupe (France) and the British Virgin Islands (United Kingdom).

2 Applicability of the Conventions

At the time of the incident France and the United Kingdom were Parties to both the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention and had extended the application to include the affected islands. The *Vistabella* was not entered in any P&I Club but was covered by third party liability insurance with a Trinidad insurance company. The insurer argued that the insurance did not cover this incident. The limitation amount applicable to the ship was estimated at FFr2 354 000 or €359 000. No limitation fund was established. It was considered unlikely that the shipowner would be able to meet his obligations under the 1969 CLC without effective insurance cover. The shipowner and his insurer did not respond to invitations to cooperate in the claims settlement process.

3 Claims for compensation

The 1971 Fund paid compensation amounting to some FFr8.2 million (€1.3 million) to the French Government in respect of clean-up operations. Compensation was paid to private claimants of the British Virgin Islands and to the UK Government for a total of £14 250.

4 Civil proceedings

4.1 Guadeloupe

4.1.1 The French Government brought legal action against the owner of the *Vistabella* and his insurer in the Court of First Instance in Basse-Terre (Guadeloupe) claiming compensation for clean-up operations carried out by the French Navy. The 1971 Fund intervened in the proceedings and acquired by subrogation the French Government's claim. The French Government subsequently withdrew from the proceedings.

4.1.2 In a judgement rendered in 1996 the Court of First Instance accepted that, on the basis of subrogation, the 1971 Fund had a right of action against the shipowner and a right of direct action against his insurer and awarded the Fund the right to recover the total amount which it had paid for damage caused in the French territories. The insurer appealed against the judgement.

4.1.3 The Court of Appeal rendered its judgement in March 1998. The Court held that the 1969 CLC applied to the incident and that the Convention applied to the direct action by the 1971 Fund against the insurer, even though in this particular case the shipowner had not been obliged to take out insurance since the ship was carrying less than 2 000 tonnes of oil in bulk as cargo. The case was referred back to the Court of First Instance.

4.1.4 In a judgement rendered in March 2000, the Court of First Instance ordered the insurer to pay FFr8.2 million or €1.3 million to the 1971 Fund plus interest. The insurer appealed against the judgement.

4.1.5 The Court of Appeal rendered its judgement in February 2004 in which it confirmed the judgement of the Court of First Instance of March 2000. As at October 2013 the insurer had not appealed to the Court of Cassation.

4.2 Trinidad and Tobago

4.2.1 In 2006, in consultation with the 1971 Fund's lawyers in Trinidad and Tobago, the 1971 Fund commenced summary proceedings against the insurer in Trinidad and Tobago to enforce the judgement of the Court of Appeal in Guadeloupe.

4.2.2 The 1971 Fund submitted an application for a summary execution of the judgement to the High Court in Trinidad and Tobago. The insurer filed defence pleadings opposing the execution of the judgement on the grounds that it was issued in application of the 1969 CLC to which Trinidad and Tobago was not a Party.

4.2.3 The 1971 Fund submitted a reply arguing that it was not requesting the Court to apply the 1969 CLC, but that it was seeking to enforce a foreign judgement under common law.

4.2.4 In March 2008, the Court delivered a judgement in the 1971 Fund's favour. The insurer appealed against this judgement in the Court of Appeal in Trinidad and Tobago, arguing that the enforcement of foreign judgements was contrary to public policy as the applicable French law was repugnant to the law of Trinidad and Tobago on four grounds, namely:

(a) it allowed for a direct action against the insurer and deprived the insurer of defences that would ordinarily be open to it under its contract of insurance with its insured;
(b) it imposed strict liability on the insurer without the possibility of mounting an effective defence;
(c) it overrode the contractual limitation on liability of TT$3 000 000 (€380 000) which was expressed in the contract of insurance with its insured; and
(d) the application of French law was in breach of the legislative choice of law and jurisdiction as set out in the Insurance Act of Trinidad and Tobago and so violated the public policy as determined by Parliament.

4.2.5 In a judgement rendered in July 2012, the Court of Appeal dismissed the first three grounds of appeal but found that the fourth ground required further consideration. Noting that the Insurance Act of Trinidad and Tobago stated that 'Every policy issued in Trinidad and Tobago through a person or an office in Trinidad and Tobago shall, notwithstanding any agreement to the contrary, be governed by the laws of Trinidad and Tobago and shall be subject to the jurisdiction of the Courts of Trinidad and Tobago', the Judge held that this was an example of an overriding statute which laid down a mandatory rule as to the applicable law of the policy or contract of insurance and the relevant jurisdiction and this was to be regarded as laying down or crystallising a rule of public policy.

4.2.6 Noting further that insurance companies fulfilled an important role in the national financial and economic systems, the Judge stated that the State had an obvious interest in protecting and regulating those systems and that the Insurance Act of Trinidad and Tobago was designed to serve that interest. The Judge therefore held that it was contrary to public policy to apply to a policy of insurance issued in Trinidad and Tobago or through a person or an office in Trinidad and Tobago, a law other than the law of Trinidad and Tobago.

4.2.7 The 1971 Fund had argued that it was not sufficient to rely on one statutory provision to claim that foreign judgements were contrary to public policy when a direct action by an injured party against an insurer was a recognised concept under the domestic legislation of Trinidad and Tobago. Additionally, the 1971 Fund had argued that Trinidad and Tobago had acceded to the 1992 Protocols to the 1969 CLC and 1971 Fund Convention which reflected a broad international consensus as to the appropriate manner in which to respond to the problems of oil spills which, by acceding to the Conventions, Trinidad and Tobago had chosen to support.

4.2.8 Noting that it was true that an example could be found in the Trinidad and Tobago domestic law which provided a direct action against the insurer and which limited the contractual defences it could raise, the Judge however concluded that it would be contrary to the rule of public policy found within the Insurance Act of Trinidad and Tobago to enforce a judgement pursuant to French law in which the French courts had assumed jurisdiction and applied French law.

4.2.9 Furthermore, the Judge noted that the 1992 Protocols to the Conventions had been acceded to several years after the insurance policy was issued and the sinking of the *Vistabella* which had given rise to the claim against the insurer. Moreover, the Judge noted that the Conventions had not been enacted into domestic law and the policy as laid down by the Insurance Act of Trinidad and Tobago therefore remained unchanged.

4.2.10 In these circumstances, the Judge therefore refused enforcement of the judgement of the Court of Appeal in Guadeloupe. In its judgement the Court argued that the Insurance Act of Trinidad and Tobago set out a rule of public policy that provided that a contract of insurance issued in that jurisdiction should be governed by the law of Trinidad and Tobago and be subject to the jurisdiction of the Courts of Trinidad and Tobago. The Court therefore concluded that to enforce a judgement under French law in which the French courts had assumed jurisdiction and applied French law would be contrary to public policy.

4.3 United Kingdom

The 1971 Fund was granted leave to appeal the judgement to the Privy Council. The 1971 Fund's lawyers filed a formal Notice of Appeal to the Privy Council in May 2013 and negotiated an agreed Statement of Facts and Issues with the insurer's lawyers. The 1971 Fund has applied for the first available date for a hearing before the Privy Council in England, which has been set for June 2014.

5 Recent developments

At its October 2013 session the 1971 Fund Administrative Council, with a view to deciding to dissolve the 1971 Fund at its October 2014 session, instructed the Director to resolve this outstanding case and to report to the Administrative Council at its next session.

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ANNEX II

BACKGROUND INFORMATION – AEGEAN SEA

1 Incident

During heavy weather, the *Aegean Sea* (57 801 GRT) ran aground while approaching La Coruña harbour in the north-west of Spain. The ship, which was carrying approximately 80 000 tonnes of crude oil, broke in two and burnt fiercely for about 24 hours. The forward section sank some 50 metres from the coast. The stern section remained largely intact.

2 Impact

The quantity of oil spilled was not known, since most of the cargo was either dispersed in the sea or consumed by the fire on board the vessel, but it was estimated at some 73 500 tonnes. Several stretches of coastline east and north-east of La Coruña were contaminated, as well as the sheltered Ria de Ferrol.

3 Response operations

The oil remaining in the aft section of the *Aegean Sea* was removed by salvors working from the shore. Extensive clean-up operations were carried out at sea and on shore.

4 Applicability of the Conventions

The maximum amount of compensation payable in respect of the *Aegean Sea* incident under the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention is 60 million SDR. When converted into pesetas using the rate applied for the conversion of the shipowner's limitation, the maximum amount of compensation payable is Pts 9 513 473 400 or €57.2 million.

5 Claims for compensation

Claims totalling Pts 48 187 million or €289.6 million were submitted before the criminal and civil courts. A large number of claims were settled out of court but many claimants pursued their claims in court.

6 Criminal proceedings

In a judgement rendered in 1997 the Criminal Court of Appeal in La Coruña held that the master of the *Aegean Sea* and the pilot were directly liable for the incident and that they were jointly and severally liable, each on a 50% basis, to compensate victims of the incident. It was also held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the Courts held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.

7 Civil proceedings

7.1 One claim by a fish pond owner, totalling €799 921, is still pending in the civil proceedings. The Court of First Instance issued a judgement in December 2005 ordering the Spanish Government and the 1971 Fund to pay €363 746 to the claimant. The Spanish Government and the 1971 Fund appealed against the judgement. The Court of Appeal returned the file to the Court of First Instance ordering that the proceedings be re-started also against the pilot, in order to correct an error by the Court of First Instance.

7.2 The Court of First Instance gave time to the claimant to pursue their claim against the pilot as decided by the Court of Appeal. However, the claimant decided not to continue the claim against the pilot. The Court of First Instance ordered that the proceedings continue only against the Fund, on the basis of technical defence called lack of *litis consortium*, ie the pilot was not a defendant in the proceedings and therefore the vicarious liability of the State could not come into effect.

7.3 In a judgement delivered in July 2012 the Court of First Instance decided to award the claimant the amount awarded in its prior decision in 2005, ie €363 746, but since the claimant had not included the pilot/Spanish Government in the proceedings, the 1971 Fund would only be liable in respect of 50% of the awarded amount, ie €181 873.

7.4 In accordance with the agreement with the Spanish Government, the 1971 Fund notified the Spanish Government of the above judgement and lodged an appeal.

7.5 In January 2013, at a meeting with the Director, the Spanish Government agreed that the Government would not object if the 1971 Fund tried to settle the claim with the remaining claimant. An initial discussion with the remaining claimant took place, however no agreement was possible.

7.6 In May 2013, the Court of Appeal (Audiencia Provincial) decided to hear the declarations of the experts acting on behalf of the parties. According to this decision the experts appeared before the Court in October 2013.

7.7 In a judgement delivered in October 2013, and corrected in November 2013, the Court of Appeal reduced the amount awarded to the claimant to €163 439 plus interest, of which the 1971 Fund would be liable for 50% plus interest and costs. It is not known whether the remaining claimant will appeal the judgement to the Supreme Court.

7.8 The Spanish State will, under the agreement with the 1971 Fund, pay any amounts awarded by the courts.

8 Global settlement

8.1 In June 2001, the 1971 Fund Administrative Council authorised the Director to conclude, on behalf of the 1971 Fund, an agreement with the Spanish State, the shipowner and the UK Club on a global solution to all outstanding issues in the *Aegean Sea* case.

8.2 On 30 October 2002 an agreement was concluded between the Spanish Government, the 1971 Fund, the shipowner and the UK Club whereby the total amount due to the victims from the owner of the *Aegean Sea*, the UK Club and the 1971 Fund as a result of the distribution of liabilities determined by the Court of Appeal in La Coruña amounted to Pts 9 000 million or €54 million. As a consequence of the agreement, the Spanish State undertook to compensate all the victims who might obtain a final judgement in their favour by a Spanish court, which condemned the shipowner, the UK Club or the 1971 Fund to pay compensation as a result of the incident. The 1971 Fund, in turn, also undertook to notify the Spanish State of any proceedings to which the Spanish State was not a party and not to accept the claims brought in the proceedings.

8.3 On 1 November 2002, pursuant to the agreement, the 1971 Fund paid €38 386 172 corresponding to Pts 6 386 921 613 to the Spanish Government.

9 Considerations

At its October 2013 session the 1971 Fund Administrative Council, with a view to deciding to dissolve the 1971 Fund at its October 2014 session, instructed the Director to continue his discussions with the Spanish Government in order to resolve this outstanding case and to report to the Administrative Council at its next session.

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ANNEX III

BACKGROUND INFORMATION – ILIAD

1 Incident

On 9 October 1993, the Greek tanker *Iliad* (32 511 GRT) grounded on rocks close to Sfaktiria Island after leaving the port of Pylos (Greece), resulting in a spill of some 287 tonnes of Syrian light crude oil.

2 Response operations

The Greek national contingency plan was activated and the spill was cleaned up relatively rapidly.

3 Applicability of the Conventions

3.1 At the time of the incident Greece was Party to the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention.

3.2 The *Iliad* was insured with the Newcastle P&I Club, which is now merged with the North of England P&I Club.

4 Claims for compensation

4.1 Claims for costs incurred in respect of clean up and preventive measures submitted by the Ministry of Merchant Marine, a clean-up contractor and the shipowner were settled and paid by the shipowner's insurer for a total of €1 105 344.

4.2 The majority of the claimants whose claims are still pending did not prove that they had suffered pollution damage due to the incident.

4.3 The table below summarises the claims situation as at October 2013.

Claims submitted in the Limitation Court	**Claimed amount (€)**	**Amount assessed by the Court appointed liquidator (€)**	**Paid by shipowner's insurer (€)**
Clean-up claims (settled)	1 105 502	1 105 344	1 105 344
Other claims (pending) – objections filed to the liquidator's report by claimants	8 739 527	1 030 541	0
Other claims (pending) – no objections filed to the liquidator's report by claimants	979 162	81 870	0
Total	**10 824 191**	**2 217 755**	**1 105 344**

5 Limitation proceedings

5.1 In March 1994, the shipowner's liability insurer established a limitation fund amounting to Drs 1 496 533 000 or €4 391 880 with the Court in Nafplion through the deposit of a bank guarantee. The Court decided that claims should be lodged by 20 January 1995. By that date, 527 claims had been presented in the limitation proceedings, totalling €10.8 million.

5.2 The Court appointed a liquidator to examine the claims in the limitation proceedings. The liquidator submitted his report to the Court in March 2006. In his report, the liquidator assessed the 527 claims at €2 217 755.34. A subrogated claim by the shipowner's insurer for €1.1 million in respect of amounts paid by it for claims related to clean up was accepted in full by the Court-appointed liquidator. The largest claim is that of a fish farm, totalling €3 million. However, the Court-appointed liquidator assessed the claim at €296 000.

5.3 Four hundred and forty-six claimants, including the shipowner and his insurer and the owner of the fish farm mentioned above, filed objections to the report and the assessed amounts.

5.4 The 1971 Fund also filed pleadings to the Court, referring to the criteria for the admissibility of claims for compensation under the 1969 CLC and the 1971 Fund Convention. The Fund, in its pleadings, argued that all claims except those submitted by the shipowner, his insurer and the owner of the fish farm were time-barred *vis-à-vis* the 1971 Fund.

5.5 The shipowner and his insurer had taken legal action against the 1971 Fund in order to prevent their rights to reimbursement from the Fund for any compensation payments in excess of the shipowner's limitation amount, and their rights to indemnification under Article 5.1 of the 1971 Fund Convention, from becoming time-barred. The hearing of these proceedings is scheduled for December 2014.

5.6 The owner of the fish farm had initially interrupted the time bar period by taking legal action against the 1971 Fund. However, this action has now been abandoned and the claimant has decided to continue his action solely against the shipowner and his insurer in the limitation proceedings. As a consequence, it can be considered that this claim is now time-barred against the 1971 Fund.

5.7 Jurisdictional issues

5.7.1 In October 2007, the Court in Nafplion decided that it did not have jurisdiction in respect of the proceedings and referred the case to the Court of Kalamata as the court closest to the area where the incident took place. A number of claimants appealed against the decision. The 1971 Fund, following advice received from its Greek lawyer, joined in the appeal.

5.7.2 In April 2010, the Court of Kalamata decided that the Court of Nafplion had jurisdiction in respect of the limitation proceedings and that therefore these proceedings should be referred back to that Court.

5.8 Recent developments in the limitation proceedings

The shipowner and his insurer have filed objections in the limitation proceedings against the lodged claims. In July 2013 the shipowner and his insurer informed the 1971 Fund that all the claimants had been duly summoned to the limitation proceedings. At a hearing at the Court of Nafplion in November 2013 the proceedings were adjourned to December 2013. The 1971 Fund filed an intervention supporting the shipowner and his insurer's objections and disputing the claims in their entirety.

6 Considerations

6.1 In the Director's view, all claims filed in the limitation proceedings against the 1971 Fund are time-barred, except for the claim from the shipowner and his insurer in respect of reimbursement for any compensation payments in excess of the shipowner's limitation amount and for indemnification under Article 5.1 of the 1971 Fund Convention.

6.2 Taking into account the total claimed amount approved by the liquidator (€2 217 755.34) and applicable interest, it seems unlikely that the final adjudicated amount will exceed the limitation sum of €4.4 million. Moreover, all claims other than the claim by the shipowner and his insurer may well be found to be time-barred by the Court. However, although the likelihood of the 1971 Fund having to pay compensation appears to be slim, 446 claimants have filed objections against the liquidator's report and as at October 2013 the total claimed amount of €10.8 million had not been assessed by the Court. The 1971 Fund will therefore continue monitoring the legal proceedings.

7 Recent developments

At its October 2013 session the 1971 Fund Administrative Council, with a view to deciding to dissolve the 1971 Fund at its October 2014 session, instructed the Director to continue his discussions with the North of England P&I Club, with the assistance of the International Group of P&I Associations, and to resolve this outstanding case and to report to the Administrative Council at its next session.

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ANNEX IV

BACKGROUND INFORMATION – PLATE PRINCESS

1 Incident

1.1 On 27 May 1997, the *Plate Princess* spilled some 3.2 tonnes of crude oil, contained within 8 000 tonnes of ballast water, whilst loading cargo at an oil terminal in Puerto Miranda (Venezuela). A report from a Maraven/Lagoven helicopter over-flight 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 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 ITOPF expert was informed that oil was observed drifting towards the north-west, 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 the 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 Limitation proceedings

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

6.2 In 1997, a bank guarantee for this amount was provided 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 his 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.

7 Civil proceedings

7.1 Claims by FETRAPESCA

7.1.1 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 at October 2013, there had been no developments on this claim.

7.1.2 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.

7.1.3 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. No information was provided with the notification as to the nature or extent of the losses alleged.

7.1.4 In view of the notification 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 text of the Conventions and decided that the claim by FETRAPESCA was time-barred in respect of the 1971 Fund.

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

7.1.6 In July 2008, the shipowner and the master of the *Plate Princess* requested the Maritime Court of Caracas to declare that the claim by FETRAPESCA had lapsed (*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 had not lapsed. 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.

First Instance judgement in respect of claim by FETRAPESCA

7.1.7 In February 2009, the Maritime Court of First Instance 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.

7.1.8 In October 2011 FETRAPESCA requested the withdrawal of its claim from the Maritime Court of First Instance (first request to withdraw the claim). The Court however rejected FETRAPESCA's request.

7.1.9 In September 2012, the 1971 Fund was formally notified for the first time of the judgement. The judgement comprised two documents. The first document contained the decision imposing liability on the shipowner and master and requested the 1971 Fund to be notified of this decision. It also stated

that the quantum of compensation would be assessed by court experts to be appointed at a later date. The second document, which also formed part of the judgement, contained a decision which condemned the 1971 Fund to pay compensation to the claimants in excess of the shipowner's liability.

7.1.10 In October 2012, the 1971 Fund filed an appeal against the February 2009 judgement.

7.1.11 Also in October 2012, FETRAPESCA filed an application to withdraw its claim (second request to withdraw the claim). This application again was refused by the Court.

7.2 Claim by the Puerto Miranda Union

7.2.1 In June 1997, the Puerto Miranda Union presented a claim in the Civil Court of Caracas against the shipowner and the master of the *Plate Princess* for an estimated amount of US$20 million.

7.2.2 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 by Puerto Miranda Union. No information was provided with the notification as to the nature or extent of the losses alleged.

7.2.3 As with the claim by FETRAPESCA, the 1971 Fund Administrative Council decided in May 2006 that the claim by the Puerto Miranda Union was time-barred in respect of the 1971 Fund, according to the 1971 Fund Convention, since the Puerto Miranda Union had not taken legal action against the 1971 Fund nor had it notified the Fund within the time period provided in the Convention of its legal action against the shipowner.

7.2.4 In December 2006, the claim was transferred to the Maritime Court of First Instance, also in Caracas.

Amendment of Puerto Miranda Union claim

7.2.5 In April 2008 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.

7.2.6 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.

7.2.7 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.

7.2.8 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 that the claim was time-barred in respect of the 1971 Fund.

7.2.9 On 4 August 2008 copies of the documents (16 bundles in total) were received by the 1971 Fund. The 1971 Fund appointed experts to examine the claim and the supporting documents. On the basis of the report issued by its experts, the 1971 Fund submitted further pleadings in November 2008. In these pleadings the 1971 Fund argued that the documentation provided by the claimants did not demonstrate

that damage allegedly suffered by the fishermen had been caused by the spill from the *Plate Princess* and that the documentation provided in support of the claim was of doubtful accuracy and had in many instances been falsified. The 1971 Fund also requested that the report by its experts be accepted as evidence. The Court rejected the request on the grounds that the report had not been submitted within the time limit provided by Venezuelan law. The 1971 Fund appealed against this decision on the grounds that the time limit was not sufficient for the Court to provide copies of the documentation and for the Fund's experts to review them. The appeal was rejected.

Hearing in respect of the claim by the Puerto Miranda Union

7.2.10 In January 2009 the hearing in connection with the revised claim took place. At the hearing, verbal 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.

7.3 Court decisions on liability

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

7.3.1 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, to pay the damages suffered by the claimant, to be quantified by court experts. The Venezuelan Court, in its interpretation of the Conventions, assumes that the 1971 Fund, having been notified, is obliged automatically to pay compensation. The master, the shipowner and the 1971 Fund appealed against the judgement to the Maritime Court of Appeal.

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

7.3.2 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 [<1>].

Judgement by the Supreme Tribunal

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

Appeal to the Constitutional Section of the Supreme Tribunal

7.3.4 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 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>] For a summary 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 Incidents involving the IOPC Funds 2010, pages 66-67.

Judgement of the Constitutional Section of the Supreme Tribunal

7.3.5 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.

7.3.6 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*); and
- Other issues considered in the judgement

Time bar

7.3.7 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."

7.3.8 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*).

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

"… taking into consideration that spillage of oil in the sea is an undoubted factor in upsetting the ecological balance which totally changes the biodiversity of the various species which inhabit that environment, in the majority of cases causing irreparable damage to the ecosystem concerned, this Constitutional Section considers that legal proceedings instituted for the purpose of obtaining compensation or indemnification for the damage suffered on the occasion of such incidents, in essence involve judgements which concern aspects relating to the environment, which touches on a human right recognized in the Constitution.

In this respect, Article 95 (ex Article 19, paragraph 16 of the Act of 2004) of the Organic Law of the Supreme Court of Justice states, as one of the grounds for inadmissibility of the time bar, proceedings which involve environmental matters. In this respect, the provision in question states:

> Article 95. Proceedings shall not be declared time-barred in cases involving environmental matters; or in the cases of claims which are intended to punish offences against human rights, public assets or trafficking in narcotic drugs and psychotropic substances.

This being the case, and taking into consideration that the subject of the claim in these proceedings derives from an incident in which environmental matters are involved (spillage of oil in the sea) this Constitutional Section considers it unnecessary to analyse the claim for time bar argued by the requesting party, since in this type of proceedings, this form of time bar of the proceedings, as an anomalous mechanism for terminating the proceedings, is inadmissible."

The requirement for the courts to use 'logic and judgement' (sana critica)

7.3.10 The 1971 Fund 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.

7.3.11 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.

7.3.12 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 logic and judgement (*sana critica*) alluded to in maritime procedural law, but by the specific rules established in the Civil Procedure Code, which were applicable in preference to maritime procedural law.

Other issues considered in the judgement

7.3.13 The 1971 Fund 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.

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

7.4 Court decisions on quantum

Appointment of court experts

7.4.1 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.

Report by the court experts

7.4.2 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**

7.4.3 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.

7.4.4 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.

7.4.5 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.

Judgement of Maritime Court of First Instance on quantum

7.4.6 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 against this judgement to the Maritime Court of Appeal.

Judgement of Maritime Court of Appeal on quantum

7.4.7 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 had argued in its appeal 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 [<2>], plus costs.

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

Judgement of the Supreme Court on quantum

7.4.9 In 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.

7.4.10 In March 2012 the 1971 Fund appealed to the Constitutional Section of the Supreme Court against the judgement of the Supreme Court regarding the quantum of the loss.

Judgement of Constitutional Section of the Supreme Court on quantum

7.4.11 In August 2012 the Constitutional Section of the Supreme Court rejected the 1971 Fund's appeal against the judgement of the Supreme Court regarding the quantum of the loss. In its judgement, the Court decided that the awarded amount should be paid to each fisherman individually, according to the Court experts' assessment.

[<2>] The court experts calculated that the total amount available for compensation under the 1969 CLC and the 1971 Fund Convention (60 million SDR) was equivalent to BsF 403 473 004.80 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).

Enforcement of the Court of Appeal's judgement

7.4.12 In 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 Maritime Court of First Instance accepted the request of Puerto Miranda Union concerning the enforcement of the judgement and fixed a date for the shipowner and 1971 Fund to pay the amounts awarded by the Court of Appeal.

7.4.13 In April 2012 the 1971 Fund submitted pleadings to the Maritime Court of First Instance requesting the Court to stay the enforcement of the judgement. In the pleadings the Fund argued that, according to Article 4.5 of the 1971 Fund Convention, the amount of compensation corresponding to the 1971 Fund should be distributed to all recognised victims of the incident in accordance with the accepted amounts of the damage. Therefore, on the basis of the principle of equal distribution of the shipowner's limitation fund between all claimants contained in the 1969 CLC, no payments can be made until the claim by FETRAPESCA has reached a final stage in the proceedings.

7.4.14 In August 2012 the master submitted pleadings also requesting the Court to stay the enforcement of the judgement on the basis of the distribution of the shipowner's limitation fund between all claimants under the 1969 CLC.

7.4.15 In September 2012 the Maritime Court of First Instance rejected the request by the master and the 1971 Fund to stay the enforcement of the judgement.

7.4.16 Also in September 2012, Puerto Miranda Union requested the Constitutional Section of the Supreme Court to amend its judgement rendered in August 2012 and to issue a new decision ordering the defendants to make payment not to the fishermen themselves, but to the Puerto Miranda Union. The 1971 Fund opposed this request.

7.4.17 In December 2012, the Banco Venezolano de Credito filed a cheque at Court for BsF 2 844 983 corresponding to the amount of the guarantee issued to cover the limitation fund.

Embargo over Fund assets

7.4.18 In addition, the Puerto Miranda Union lawyers filed pleadings at Court requesting an embargo over the Fund's assets, specifically over the contributions owed to the 1992 Fund by Petróleos de Venezuela SA (PDVSA), Venezuela's State-owned oil company. The 1971 Fund filed pleadings to oppose the measures requested by the Puerto Miranda Union on the basis that the *Plate Princess* incident related solely to the 1971 Fund, not the 1992 Fund, and that any amounts owed by PDVSA were in respect of monies owed to the 1992 Fund, not the 1971 Fund.

7.4.19 In January 2013, the Maritime Court of First Instance rejected the 1971 Fund's arguments on the basis that the 1971 Fund, as an international compensation body should respond in relation to compensation matters and that the 1992 Fund was an interested party in relation to the eventual decision regarding any contribution from PDVSA.

7.4.20 In February 2013, the Puerto Miranda Union requested a clarification of the judgement of the Maritime Court of First Instance arguing that the previous judgement, which imposed liability on the 1971 Fund, should refer to the 1992 Fund because Venezuela was now a member of the 1992 Fund only. The 1971 Fund filed pleadings in opposition highlighting that it was only the 1971 Fund, and not the 1992 Fund, that was involved in the *Plate Princess* incident.

7.4.21 Later that month, the Maritime Court of First Instance accepted the request filed by the Puerto Miranda Union for an embargo over the Fund's assets, and ordered the embargo of contributions owed by PDVSA to the Fund up to a limit of BsF 412 646 863, which corresponded to the amount awarded against the 1971 Fund, ie BsF 400 628 022 plus execution costs. The Court did not specify whether it referred to the 1971 Fund or the 1992 Fund or both.

7.4.22 The Maritime Court of First Instance also issued an order of embargo of any assets the Fund might have in Venezuela, up to a limit of BsF 921 444 450 ie double the amount awarded against the 1971 Fund plus 30%. The Court referred expressly to the ratification by Venezuela not only of the 1971 Fund Convention but also of the 1992 Protocol. The 1971 Fund appealed against this order but as at October 2013, there have been no developments in respect of the appeal.

8 Considerations

8.1 Director's considerations

8.1.1 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 (document IOPC/OCT11/3/4). In the document, the Director informed the Administrative Council as set out below.

Time bar issue

8.1.2 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.

8.1.3 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.

8.1.4 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.

8.1.5 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. 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.

8.1.6 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.

The application by the courts of 'logic and judgement' (sana critica)

8.1.7 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.

The quantum of the assessment

8.1.8 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. Of this amount, BsF 726.3 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 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. 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.

Calculation of the amount to be paid by the 1971 Fund

8.1.9 The limit of liability of the shipowner and the total amount available for compensation under the Conventions had been calculated by the Maritime Court using SDR/Bolivar exchange rates applicable on dates differing by 14 years. Since the Bolivar had depreciated relative to the SDR by some 750% in the intervening period, the amounts ordered by the Court to be paid by the shipowner or his insurer and the 1971 Fund 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.

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

8.1.10 The Director is of the view that the 1971 Fund had not been given reasonable notice and a fair opportunity to present its case, as required under Article X of the 1969 CLC. He considered that this is 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.

8.2 Considerations by the 1971 Fund Administrative Council

March 2011

8.2.1 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 requesting the 1971 Fund Administrative Council to give the Director such instructions as it deemed appropriate. The Venezuelan delegation also 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.

8.2.2 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.

8.2.3 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.

October 2011

8.2.4 At its October 2011 session 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.

8.2.5 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.

April 2012

8.2.6 At its April 2012 session the 1971 Fund Administrative Council instructed the Director to conduct a further analysis on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 CLC and to 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).

October 2012

8.2.7 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 legal opinion was attached at Annex II to document IOPC/OCT12/3/4/1, which was presented to the 1971 Fund Administrative Council at its October 2012 session.

8.2.8 Dr Mensah had concluded that, in his view, the decision of the courts in Venezuela on the issue of time bar was patently incorrect as the rights of the claimants to compensation under Article 4 of the 1971 Fund Convention had been extinguished because no action had been bought under Article 4 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 CLC had been given to the 1971 Fund within that period, as required under Article 7, paragraph 6 of the 1971 Fund Convention.

8.2.9 Dr Mensah had also concluded that there was strong support for the contention that the judgement of the Venezuelan Court relating to the quantum of damages was based on evidence that was not genuine and which had been falsified for the purpose of obtaining compensation, and that accordingly the 1971 Fund had a very strong case for challenging the enforcement of the judgement in the courts of other contracting states based on the grounds that the judgement had been obtained by fraud. Dr Mensah concluded that before an English court, it would be open to the 1971 Fund to challenge the enforcement of the judgement both under the 1971 Fund Convention and also under English common law.

8.2.10 In respect of the issue of the due process of law, Dr Mensah concluded that the 1971 Fund was fully entitled to challenge the enforcement of the judgement of the Venezuelan Court by asserting that it had not been afforded a fair opportunity to present its case before the Venezuelan Court, both under Article 8 of the 1971 Fund Convention coupled with Article X of the 1969 CLC, and by reference to the English common law which also recognised the right of a party to contest the enforcement of the judgement of a foreign court on the grounds that it had not been given a reasonable opportunity to present its case.

8.2.11 In response to the third intervention of the delegation of Venezuela at the April 2012 session of the 1971 Fund Administrative Council, Dr Mensah had concluded that the intervention was not supported in fact or in law and that the claim that Venezuela 'automatically became a party to the 1992 Protocol' when the 1971 Fund Convention entered into force for Venezuela was factually incorrect. Venezuela did not become a Party to the 1992 Fund Convention until July 1999, and the claim of Venezuela that 1992 Fund Member States were under any liability in respect of incidents that occurred when the 1971 Fund Convention was in force, even when they were not members of the 1971 Fund, had no basis in law, and was in fact in direct conflict with the express provisions of the 1971 Fund Convention and the principles of the general international law of treaties.

October 2013 decision by the 1971 Fund Administrative Council

8.2.12 At its October 2013 session the 1971 Fund Administrative Council, with a view to deciding to wind up the 1971 Fund as soon as possible, decided that no loss had been proven with regard to the claim submitted by FETRAPESCA and instructed the Director to discontinue the defence of the 1971 Fund before the courts. It was noted in the Record of Decisions of that session that the Director had already received instructions from the 1971 Fund Administrative Council not to make any payment in respect of the *Plate Princess* incident and to oppose the enforcement of the judgement.

8.2.13 In accordance with the instruction received from the 1971 Fund Administrative Council, the 1971 Fund withdrew its defence from the legal proceedings brought by the Puerto Miranda Union and FETRAPESCA before the Venezuelan Courts.