SPECIAL SESSION TO COMMEMORATE THE 1971 FUND

17 APRIL 2015

OPENING REMARKS BY MR JOSÉ MAURA

Good morning and welcome to this special session to commemorate the International Oil Pollution Compensation Fund 1971.

First, I would like to thank the Secretary-General for hosting the meeting this morning and all former 1971 Fund Member States for taking your last decision in respect of the organization by approving the final accounts of the Fund. It was an important decision that allows us to close the door on the 1971 Fund for good.

Before doing so, however, and given that this is the very last time that a meeting of all the former Contracting States to the 1971 Fund Convention is convened, I saw this as a fitting opportunity to look back at the history of the Fund and the achievements of this organization over the years and I have invited some dear friends and colleagues of the organization to share their experience with us today.

To my left I would like to welcome, Dr Rosalie Balkin, Foprmer Assistant Secretary-General and Head of the Legal Affairs and External Relations Division at IMO. Dr Balkin worked closely with myself and my predecessors, providing invaluable legal guidance to us and the Secretariat over many years until she retired in 2013. She has travelled from Australia especially to be here with us today and will be speaking about the international regime from the perspective of IMO.

Next to Dr Balkin, I am delighted to welcome Dr Reinhard Ganten, the very first Director of the 1971 Fund, and the man responsible for setting up the organization and establishing the internal practices of the Fund, many of which we still follow today. Dr Ganten will be describing how he went about establishing the organization and the very origins of the regime itself.

To Dr Ganten's left, is someone who many of you will recognize and some indeed know very well and I am delighted to welcome him back to this podium. Mr Mans Jacobsson, Director of the IOPC Fund for 22 years, will be speaking about a subject in which he played a leading role, namely the development of IOPC Funds' policy.

Dr Karen Purnell, seated next to Mans, is Managing Director of ITOPF and a dear friend of the Fund. Having attended in person or overseen a large quantity of incidents involving the IOPC Funds over the years, Dr Purnell will be talking about the early days of working alongside the IOPC Funds from the experts' perspective.

Mr Alfred Popp QC, currently Director of the Ship-Source Oil Pollution Fund, but also delegate to IOPC Fund meetings over many, many years, will be offering the delegate's perspective on the IOPC Fund.

Finally Captain David Bruce, the last Chairman of the 1971 Fund Administrative Council will be closing this session.

I would like to thank all our speakers for taking time out of their busy schedules to travel here today and share their experience of the 1971 Fund with us. Timing is limited to the next hour only, with the session due to finish at 1pm.

You have on your desks invitations to a lunchtime reception which takes place immediately after the session in the delegates' lounge and I hope that all of you will be able to stay and join us for that reception.

In addition, you will find a copy of a small commemorative brochure which the Secretariat has produced specifically for this session. Further copies are available in the foyer and can be downloaded from the website from this afternoon.

Without any further ado, and conscious of the tight schedule, it gives me great pleasure to hand over to Dr Balkin.

THE INTERNATIONAL LIABILITY AND COMPENSATION REGIME FROM AN IMO PERSPECTIVE BY DR ROSALIE BALKIN

Good morning.

It is a great (and somewhat unexpected) pleasure for me to be here at this Special Commemorative Event and for that I thank the Director, José Maura, for his kind invitation to address this august gathering. I am particularly glad to have been asked to speak about the International Liability and Compensation Regime from an IMO Perspective, as it has given me the opportunity to say a little about two great international organizations that are so close to my heart.

Much has been said, by the Secretary-General and the Japanese delegation this morning and at so many seminars and events over the years convened here and elsewhere, about the extraordinary role played by the treaties and their protocols that collectively comprise the international liability and compensation regime for oil pollution damage, in settling claims for environmental damage and in assisting in clean-up operations.

From an IMO perspective, it is probably a truism to say that the issue of liability and compensation goes hand in hand with that of ship safety and environmental protection. They are flip sides of the same coin, each a necessary component of the whole.

This stems from the unfortunate but unavoidable fact that, while IMO has endeavoured over the years, through myriad conventions, codes, guidelines and the like, to put in place, in the main successfully, an international regime designed to increase ship safety and environmental protection of the world's seas and oceans, it remains the case that, for a variety of reasons, accidents still do occur; and when they do, an established and workable system of liability and compensation is necessary in order not only to compensate victims of pollution incidents but also to restore the marine environment, to the extent that money can do so.

The realization by IMO of the need for an international liability and compensation regime, at least in so far as oil pollution was concerned, was made apparent barely a decade after the Organization commenced operations, with the dramatic grounding in 1967 of the *Torrey Canyon* off Seven Stones Reef and the spill of her cargo of 117,000 tonnes of crude oil, which threatened enormous ecological damage to the English coast.

Given the link between ship safety, the marine environment and compensation, it is no coincidence that the circumstances surrounding the grounding of the *Torrey Canyon* should have led not only to the adoption by IMO of the Civil Liability/Fund regime but also to the development at that time of the Intervention Convention, which empowered coastal States, at a time when the Law of the Sea Convention did not yet exist, to intervene to secure and to remove a vessel in distress threatening serious pollution to their waters and shores.

Foremost among the issues raised by the *Torrey Canyon* disaster were the almost insurmountable difficulties experienced by States, absent a viable international regime, in obtaining compensation for damage caused by oil pollution incidents occurring beyond national jurisdiction.

At that point in time, in order to succeed in obtaining compensation for any accidental damage, most national legal systems would have required accident victims to go through a series of legal hoops, fought out in the national courts. Apart from having to prove that the incident in question actually led to the harm or injury complained of, that is to say, the causal link, the victim would also have had to identify the person responsible for the accident and then to prove that the harm or damage was caused through the fault or neglect of that person.

These are difficult enough requirements to satisfy with regard to incidents that might occur on land within national boundaries. Add to this the difficulties inherent in obtaining such proof where the incident took place out on the high seas, where those persons responsible for causing the damage might not be readily identifiable, let alone attempting to force them to appear in a national court and you have some idea of what claimants were up against.

Responding to a call by the United Kingdom Government, the then IMCO Council established an *ad hoc* body which was later to evolve into IMO's Legal Committee. Assisted by a study prepared by the Rt Hon Lord Devlin, a prominent member of the Queen's Privy Council, in his capacity as Chairman of a CMI Sub-Committee established to consider the problems arising from the *Torrey Canyon* incident, this ad hoc body proceeded to draft what was to become the 1969 Civil Liability Convention, followed closely by the 1971 Fund Convention.

The adoption of these conventions has completely changed the legal landscape so that, today, we are now in the fortunate situation where, should an oil spill from a tanker occur, whether in a port, offshore or on the high seas, most of those adversely affected by the consequences can look forward to obtaining full and fair compensation for their losses within a reasonable period of time, and without the expense and trouble and attendant uncertainty of outcome associated with having to pursue their claims through the national court systems.

The 1992 Civil Liability Convention currently has 133 States Parties representing over 96 % of world tonnage, while the 1992 Fund is not too far behind, with 114 Member States representing over 94 % of world tonnage. These are very satisfying statistics, from both an IMO and Funds point of view, although the aim must still remain to convince those States not yet participating in the system, particularly those with vulnerable coastlines and coastal or fishing industries, of the value of such participation.

The adoption of the Civil Liability and Fund Conventions, in turn, also led directly to the creation of the first IOPC Fund and the start of the symbiotic relationship between the IOPC Funds and IMO that, I am happy to say, endures to this day.

While it is undoubtedly true that the CLC/Fund regime, in its original 1969/1971 format as well as in its 1992 metamorphosis, is still to be regarded as one of the Legal Committee's high points of achievement, the very success of the regime also inspired the IMO membership, though the Legal Committee, to endeavour to replicate its success in other maritime areas.

The vital features of the oil pollution liability and compensation regime so essential to its success have been reproduced, to a greater or lesser extent, in the Hazardous and Noxious Substances Convention, the Bunkers Convention, the Nairobi Wreck Removal Convention as well as the 2002 Protocol to the Passenger Accident Liability Convention, all of which, apart from the HNS Convention, have now entered into force.

In the process, the principles of channelling of liability, limitation of liability, strict or no-fault liability and compulsory insurance have become by-words not only within IMO and the Funds, but to all in the maritime world whose area of expertise happens to lie in the field of liability and compensation.

This is not to say that the other liability and compensation regimes developed by IMO have simply been carbon copies of the Civil Liability/Fund Conventions. Each has been carefully tailored to meet the particular needs of the mischief sought to be addressed. In the case of the Bunkers Convention, for example, which establishes a system of liability and compensation for pollution damage caused specifically by the spill of bunker fuel oils from ships other than tankers, it was decided that a single tier liability and compensation regime was all that was needed, at least for the time being. Accordingly, it has been modelled solely on the Civil Liability Convention.

Among its novel features is that, while liability is still channelled to the "shipowner," that term has been more widely defined than in the CLC, so that liability may be channelled not only to one responsible party but rather to a particular group of individuals, including bareboat charterers, managers and operators of vessels.

This extension takes account of the view that modern-day shipping involves complex contractual relationships in which the shipowner is often far removed from the operation of the ship and might not therefore be the most suitable person to be held responsible.

The current status of the Bunkers Convention—which entered into force in 2008 and which now has 78 States Parties representing over 91 % of world tonnage—is noteworthy, belying as it does the initial lack of interest shown by IMO Member States in developing a liability and compensation regime of this nature. Indeed it was in no small measure due to the lead delegation (Australia's) persistence that the negotiations were pursued in the Legal Committee. Nonetheless, with the progression of time and changes in perception of the potential value of such a treaty, this compensation regime now forms another beneficial link in the chain of liability and compensation regimes developed under IMO's aegis.

The perceived benefits of a workable system of liability and compensation may also be demonstrated by the development and adoption of the Nairobi Wreck Removal Convention which, as we heard this morning, entered into force just a few days ago on the fourteenth of this month.

When the issue of wreck removal was first discussed in the Legal Committee, the main priority of States appeared to be the creation of an international legal system which would empower them to remove wrecks located beyond their territorial seas which posed a danger to international navigation or to their marine or coastal environments. But matters soon progressed to the point where the main emphasis and question became who would pay for such removal and on what basis.

Once again, the familiar features underlying the CLC/Fund regime were employed to resolve this issue. The costs of locating, marking and removing dangerous wrecks have been made the responsibility of shipowners, with a concomitant obligation placed on them to take out insurance or other financial security, and States have been given the right of direct action against insurers.

In similar vein, the 1974 liability and compensation regime relating to the carriage of passengers and their luggage by sea has been substantially revised by IMO through the adoption of the 2002 Athens Protocol. Among other changes, the principle of compulsory insurance, this time for carriers, has been introduced and the fault-based liability system for shipping-related incidents has been replaced by one based on strict liability.

That leaves the embattled HNS Convention which, of all the liability and compensation regimes subsequently developed by IMO, most closely approximates the CLC/Fund regime but which, with hindsight, was perhaps too ambitious in its objective of combining both compensation tiers into a single treaty instrument.

Although few doubt the benefits of a universal scheme which will provide compensation in the event of harm or injury caused by the myriad of hazardous and noxious substances regularly carried by sea, and despite all the modifications introduced by the 2010 HNS Protocol, the HNS Convention is still perceived as a complex instrument and has yet to enter into force.

Significantly, both IMO and the IOPC Funds have worked together tirelessly with the single aim of facilitating the implementation of the Convention. And it is no mere coincidence that the plan is for the HNS Fund, once the Convention is operative, to be administered by the IOPC Funds secretariat.

This brings me back to the point I made earlier about the symbiotic relationship between the IOPC Funds and IMO. The close cooperation that exists between the two Organizations, at the secretariat, governing body and committee levels, has undoubtedly redounded to the benefit of Member States of both Organizations.

Time and time again, as problems have surfaced and novel and sometimes controversial scenarios have emerged in relation to the implementation of the CLC/Fund regime, as alluded to by the Japanese delegation this morning, they have been dealt with promptly and responsibly by one or the other or both Organizations acting in concert.

The adoption, at a diplomatic conference convened by IMO in 2003 at the request of the Fund secretariat of the 2003 Supplementary Fund Protocol serves as just one example.

The Protocol was developed at first instance by a Working Group established by the 1992 IOPC Fund Assembly in the wake of the *Erika* incident and a European proposal to introduce a regional fund to provide compensation over and above that generated by the 1992 Civil Liability/Fund Conventions. It was thereafter considered by the IOPC Funds Assembly and subsequently by the Legal Committee.

The Protocol not only substantially increased the amount of available compensation but, just as importantly for IMO and the IOPC Funds, its adoption pre-empted the emergence of a regional fund and laid to rest concerns that sub-standard and less reliable tankers would inevitably gravitate to non-European waters, increasing the risk of accidents in those waters.

To conclude, therefore, the benefits of the international liability and compensation regime from an IMO perspective cannot be too highly rated. While the main focus for IMO must always be on maintaining and improving ship safety and environmental standards of protection, compensation for individual and State victims where harm does occur is an essential component of building a better marine environment and more harmonious international relations.

Time is short, so I will simply conclude by saying “All power to the regime in all its manifold applications!”

THE 1971 FUND CONVENTION: THE ORIGINS OF THE REGIME: SETTING UP OF THE ORGANIZATION BY DR REINHARD GANTEN

Mr. Secretary-General, distinguished participants at this special ceremony,

At this unique occasion I am very tempted to revel in good memories rather than to talk about substance. But since I suppose that my personal memories are not of such great interest to you I'll rather concentrate on the substance of setting up the regime of the 1971 Fund Convention.

Allow to me to begin with a quotation:

"Friends, colleagues, countrymen of the world community, lend me your ears.
I come to bury the 1971 IOPC Fund, not to praise it!"

We all know these words of the famous speech of Marc Anthony in Shakespeare's drama "Julius Caesar", only slightly adapted by me. And we know that, contrary to his own words, Marc Antony's speech actually was a glorification of Caesar.

I am honoured to start my talk on the origins of the 1971 IOPC Fund with this quotation since, what we started in 1978, or rather in 1969 and 1971 when the Conventions were adopted, has become an amazing success story.

The setting up of the Organization started, after my election as Director of the Fund in November 1978, on Monday, 4 December 1978. On entering the room IMO provisionally provided for us in its Piccadilly premises, I saw to my great delight a secretary waiting for me and for work to be done. Vivien Morrison was on loan from IMO and her appointment was the best the Fund could experience. We started with very basic tasks such as buying stationery, creating a filing system, in particular establishing a list of persons to be contacted, setting priorities for future work, and sending out invoices to the contributors so that we had the financial means to start operations.

My sincere thanks to you, Vivien, for your help, your creativity and your leniency towards my lack of experience in doing business in England.

At this stage I also express my sincere thanks to IMO and all its staff of those days. They all did their very best to help the IOPC Fund to get off the ground, beginning with the Secretary General, Mr. Srivastava, the Heads of all Divisions, and other staff. Without this help and in many cases the personal friendship it would not have been possible to set up the Fund Administration so quickly and so efficiently. There is one person who was, from the very beginning up to the end of my function as Director, at the center of this help. I am speaking of Dr. Tom Mensah, former Assistant Secretary General and Head of the IMO Legal Affairs and External Relations Division, who unfortunately is unable to be here today.

My sincere thanks to IMO, in those days IMCO, Mr. Secretary-General, for the help it provided for the IOPC Fund.

The IOPC Fund is not a Member of the UN Family and is, therefore, not bound by the UN Rules. So from the start the Fund had to develop its own Internal Regulations, Staff and Financial Regulations and other procedures. In addition, a Headquarters Agreement with the Host Government had to be negotiated. I was very fortunate that Tom Busha introduced to me David Sagar, an Australian lawyer who had worked for the Commonwealth Secretariat in London and who was not only familiar with Rules and Regulations of this nature, but also with the drafting of such texts. It was a great help and relief to me that I could rely on his

expertise in this field. I thank you, David, him for this help and for your assistance as trustworthy advisor in those difficult first months of my work for the Fund.

The main issue of our work in these first months, however, was the establishment of rules and procedures dealing with the Fund's sole purpose, the settlement of claims. How should the IOPC Fund administration organize itself? Contrary to the concern of a Netherlands delegate during the discussions on the draft 1971 Convention about our having a 12-story administrative building, we opted for a very small office. In addition to the Director we had only two professional staff, one lawyer and the late Samson Nte, our Finance and Personnel Officer, plus the necessary secretarial support. For professional advice we relied on the expertise of local experts, including lawyers, employed from time to time at the place of the incident. To a large extent we cooperated with the expert staff of the Tanker Owners Pollution Federation Limited (ITOPF). Their base was in London so we were able to keep in constant very close contact with them about the peculiarities of the Fund Convention and on the needs and techniques of a most effective, efficient and economic fight in dealing with oil pollution. This cooperation helped us keep Fund staff to a minimum.

The IOPC Fund, like the ship-owner under the Civil Liability Convention, has to pay compensation for "pollution damage". The CLC defines "pollution damage" as "loss or damage … caused by contamination". This means, that there was practically no legal definition helpful in claim-settlement procedures. It was one of my major challenges as the CEO of the Fund to arrive at definitions that were acceptable to all parties involved. These parties were the claimants, on the one hand, and on the other hand the oil industry who had to pay the bill. But very much interested in this issue were also the Governments of Member States ("Does the Director allow claims that would not be allowed under our Legal System?") and of States considering access to the Convention ("What sort of claims are covered under the Fund Convention?"). Of course, the cleaning of beaches, damage to fishing grounds, loss of income for hotel-owners with their business on beach-tourism – all these are clear-cut cases. But where do we draw the line? What about loss of tax revenue of communes adjacent to polluted beaches where the pollution led to a considerable drop in tourism and, as a consequence, in tax revenue? What about damage to cars having collided during clean-up operations? These are all actual cases that we had to deal with.

I am very pleased to state, that during my directorship there was not a single case in which court proceedings were brought against the Fund because of disagreement on the question of whether or not a claim was covered by the term "pollution damage". Occasionally, of course, we had to be a bit pragmatic. Pollution damage was covered, at the time, only if an actual spill of oil had occurred. In the Tarpenbek case of 1979 the UK Coast Guard was extremely efficient in preventing oil escaping from the tanker capsized off the UK coast. In their report to the public they proudly claimed that "not a single drop of oil" had escaped the tanker. My initial response to the Coast Guard was that consequently they had no claim against the Fund. This response, which they did not like very much, had to be retracted when we discovered, after a very close look at the cleaning records, that in fact some oil had escaped.

The first incident the IOPC Fund became liable for was the "*Antonio Gramsci*" case, occurring only a fortnight after the Fund had become liable to pay compensation. But since the oil spilt by this tanker was covered by the ice of the Baltic Sea the pollution became apparent only much later. We developed our claims settlement procedure on the basis of the *Miya Maru No. 8* case, a relatively minor incident which occurred in the Japanese Inland Sea in March 1979. In the discussions with the P&I Club covering the ship's liability we developed the scheme which has since been followed for many years, and partly up to now. In 1980 we concluded a Memorandum of Understanding with the P&I Clubs laying down the agreed principles of cooperation. In short, this Memorandum states that the Clubs have primary responsibility for handling the clean-up measures and claims against the owner. But if, because of the amount of the claims, the involvement of the IOPC Fund is likely to occur, they have to coordinate with the Fund. One of the reasons why this scheme worked so well was that there existed a very close relationship, even in many cases a

friendship, with many representatives of the Clubs, of ITOPF, OCIMF and CRISTAL. For me personally this pleasant relationship was a reassurance of the work done and certainly a personal enrichment.

The efficiency gained by our claims settlement procedure allowed the Fund to settle claims within very short periods. Payments to claimants arising out of the *Tanio* incident of March 1980, the largest incident I had to deal with, were made within less than four years after the incident. My report on this settlement in one of the specialist journals had the heading: "IOPC Fund starts with World Record!", and in fact it was. One of the reasons for this quick and, in nearly all cases, amicable settlement of claims was our decision to spend many days in France and have personal meetings with the claimants, check their documents at the site and decide immediately on the justification of a claim. Thank you Hilary, for your help and support in this. Another reason for the quick settlement was that for the first time we made use of electronic data procession to arrange the claims in systematic order and to detect erroneous doubling of claims.

The IOPC Fund is financed by oil companies receiving oil in Contracting States. Fortunately we experienced very few problems in collecting the money needed; some minor contributors tended to be late with their reports and with their payment, or did not pay at all, but this did not affect the Fund's financial stability. However, the complexity of the contribution system required constant communication with the contributors and many explanations in writing, by telephone or even personal visits – there were no emails in those days. We always kept the contributors well informed about major incidents and foreseeable demands for major contributions so that they were able to take the necessary steps in their internal budgets. I am sure that this information policy helped us to ensure that the IOPC Fund was always capable of meeting its financial obligations.

Last but not least I want to mention one very important aspect of my duties in the first years. When the Fund Convention entered into force on 16 October 1978 there were only 14 Member States. For an organization of this kind, based on the system of mutuality, it is essential that it is supported by many members. I understood therefore that it was my duty to spread the information on this "entity" as much as possible throughout the world. I wrote many articles, gave lectures and visited many States; I saw Member States to explain the system and Non-Member States to convince them to join. By the end of my six-year-term the membership had more than doubled, from 14 to 34 States. Today the Fund has 114 Members.

Thus, with my reflection on my initial quotation from Shakespeare, we can justly applaud what has since been achieved, achieved on the basis of the 1969 Civil Liability Convention, the 1971 Fund Convention and the new Conventions adopted thereafter. I have tried to explain how we laid the foundation stone for the Fund Administration in the first years since 1978. But the success story would not have been possible without the three Directors of the Fund succeeding me, especially my friend Mans Jacobsson being the Director for 22 years, and all our staff, advisors, consultants and colleagues all over the world. A special tribute, however, has to be paid to our Member States. They always acted in a very constructive way, conscious of their responsibility for the success of the organization. The Chairman of the Assembly during my directorship, the late Joergen Bredholt, and the various chairmen of the Executive Committee contributed an important part to this success story; I am very grateful to them.

The new IOPC Fund, being a child of the 1971 Fund, can be proud of its now deceased father.

DEVELOPING IOPC FUNDS' POLICY BY MR MÅNS JACOBSSON

I have been invited to deal with the development of the IPOC Funds' policy. In order to be able to address this issue, I believe that it is necessary to take as starting point the purpose for which the Funds were established, namely to provide compensation for oil pollution damage resulting from tanker oil spills. The definition in the Civil Liability and Fund Conventions of pollution damage is therefore of paramount importance. That definition is, however, not very helpful for the decision making, since it states simply that pollution damage is damage by contamination. Also other definitions in the Conventions are not very precise, and there are hardly any provisions dealing with the handling of compensation claims.

It has been suggested that this lack of detailed provisions constitutes a weakness of the international compensation regime. In my view, however, it has proved very fortunate that the drafters of the Conventions did not lay down precise definitions and detailed procedural provisions, since this has enabled the Funds, through their governing bodies composed of representatives of the governments of the States Parties, to develop the regime in the light of experience.

The 1971 Fund bodies had during the period up to 1984 taken important decisions on the interpretation of the definition of pollution damage and on the procedures for claims handling, in particular in relation to the *Antonio Gramsci* incident which affected my own country Sweden, the *Tanio* incident in France and several incidents in Japan. When I took over the post over Director on 1 January 1985, I was well aware of the decisions on matters of principle that had already been taken, since I had attended practically all meetings of the governing bodies and chaired several Intersessional Working Groups, and I expected to be able to base my work on these decisions. But I soon became aware that things were not that simple.

Already in March 1985, i.e. less than three months after my having taken up the post of Director, the 1971 Fund was confronted with the *Patmos* incident in Italy which gave rise to a number of tricky issues, for instance the conversion of gold francs into Italian lire, the admissibility of claims for environmental damage and the relationship between salvage and preventive measures. A few years later a series of major incidents resulted in a multitude of claims which gave rise to important questions of principle, the *Rio Orinoco* in Canada, the *Agip Abruzzo* and the *Haven* in Italy, the *Aegean Sea* in Spain and the *Braer* off the Shetland islands in the United Kingdom.

Up to that time the Executive Committee had addressed important questions of principle as and when they arose. I believe that this was the right approach in the early days. Against the background of these incidents the 1971 Fund Assembly decided, however, that it was time to take a more systematic approach to the Fund's policy in respect of the admissibility of claims. In 1993 – after the *Aegean Sea* and *Braer* incidents – the Assembly therefore set up an Intersessional Working Group with the mandate to establish the general criteria for the admissibility of claims within the scope of the 1969 and 1971 Conventions and the recently adopted 1992 Protocols to these Conventions, in particular as regards pure economic loss and environmental damage.

After a very thorough analysis of the issues involved, the Working Group submitted its report to the Assembly for consideration at its October 1994 session. The Working Group expressed the view that the adoption of criteria for the admissibility of claims would contribute to consistency in the Fund's decisions and would also allow claimants to foresee with a certain degree of certainty whether a particular claim would be admissible. It was at the same time emphasized that it was essential that the criteria would allow the Fund certain flexibility, enabling it to take into account new situations and new types of claim. The Assembly endorsed by consensus the Working Group's conclusions that were then reflected in a new expanded edition of the 1971 Fund's Claims Manual published in June 1995.

It should be mentioned that at its first session after the entry into force of the 1992 Fund Convention, the 1992 Fund Assembly decided that the Report of the Intersessional Working Group should form the basis of the 1992 Fund policy, in order to ensure consistency between the decisions of the two organizations.

One of the most important results of the Working Group's study was the development of criteria for the admissibility of claims for pure economic loss, i.e. losses suffered by somebody who has not also sustained damage to his property or another recognized legal right. This was not a new question, because pure economic loss claims had been dealt with by the 1971 Fund already in the *Tanio* case in the early 1980ies. It is a difficult issue, because the approach to such claims varies between jurisdictions. In countries whose legal systems are based on common law claims for pure economic loss are in principle not admissible, whereas in many countries belonging to the continental legal system pure economic loss is not considered as a separate type of damage and is therefore dealt with according to the same principles as any other damage. It was thus necessary for the Working Group to find a solution acceptable to all Fund Member States The Working Group concluded that in order for such a claim to be admissible, there should be a sufficiently close link of causation between the contamination and the loss or damage, and some factors were set out that should be taken into account in the consideration of whether this requirement was fulfilled.

A very important concept in the Conventions is that of preventive measures, i.e. reasonable measures to prevent or minimize pollution damage. It had been generally accepted from the early days of the 1971 Fund that clean-up operations at sea and on shore fell within this concept, provided the operations were objectively reasonable. It was recognized that the drafters of the 1969 and 1971 Conventions had had in mind measures to prevent or minimize physical damage and had not contemplated that measures taken to prevent pure economic loss fell within that concept. Nevertheless, it was decided that since the definition of preventive measures did not make any distinction between various interests to be protected, also measures to prevent or minimize pure economic loss fell, in principle, within the concept of preventive measures.

An important issue which had arisen in the context of the *Patmos* and *Rio Orinoco* incidents was the relationship between salvage and preventive measures. The policy finally adopted was that if operations which are technically salvage have the primary purpose to prevent or minimize pollution, the operations fall within the definition of preventive measures, whereas if they have another purpose, e.g. to save the ship and cargo, they do not, the so called primary purpose test. If the operations are undertaken both for preventing pollution and for saving the ship and cargo, but it is not possible to establish with any certainty the primary purpose, the costs are apportioned between pollution prevention and salvage, the dual purpose test. A further important policy decision was that compensation for preventive measures associated with salvage should not be assessed on the basis of the criteria applied for determining salvage awards, but the compensation should be limited to costs including a reasonable element of profit.

The Working Group had also addressed the issue of claims for environmental damage. With the exception of one dissenting delegation, there was general consensus that the policy adopted by the 1971 Fund already in 1980 which had been codified in the 1992 Protocols should be maintained, namely that compensation should be limited to actual economic losses and actual costs for reinstatement of the marine environment and that damage to the ecosystem as such was not admissible for compensation.

Another difficult issue was how to apply the criterion of reasonableness in the definition of preventive measures to operations carried out or ordered by a government or other public authority. There was general agreement in the Working Group that the reasonableness of the operations should be determined on the basis of objective technical criteria. This position has thereafter been reiterated by the governing bodies many times, e.g. in relation to the Spanish Government's claim for the costs of removing the oil from the wreck of the *Prestige*.

After 1994 the 1971 Fund, and from 1996 also the 1992 Fund, have dealt with tens of thousands of claims relating to in particular pure economic loss. As a result the Funds have developed and refined the criteria adopted by the Intersessional Working Group for the admissibility of compensation claims, for example in respect of so called second degree claims in the tourism sector, costs of reinstatement of the marine environment and costs of environmental studies. It is interesting to note, however, that the criteria adopted in 1994, i.e. more than 20 years ago, and the principles underlying these criteria, still form the basis of Fund policy.

An important policy decision by the 1971 Fund Assembly was that the Fund should take legal action against other parties who had caused or contributed to pollution damage for the purpose of recovering the amounts paid by the Fund in compensation. The 1971 Fund took recourse actions in a number of cases, which led to out-of-court settlements resulting in the recovery of significant amounts. The most important 1971 Fund case in this regard was the *Sea Empress* incident which occurred in 1996 in the entrance to Milford Haven in Wales where the Fund recovered £20 million from the Milford Haven Port Authority.

In order to facilitate prompt payment of compensation, the 1971 Fund and the P&I Clubs developed, with only very limited support in the text of the Conventions, a procedure for interim payments which I believe has worked very well in most cases. In recent years the P&I Clubs have however expressed concern that the procedure as applied exposed the Clubs to certain risks of overpayment. So far no solution has been found that meets this concern. I understand that this issue is to be discussed by the 1992 Fund Assembly next week.

In this context I would like to emphasize the importance of the excellent co-operation that has existed over the years between the P&I Clubs and the Funds. Certain events associated with the *Nissos Amorgos* case and the liquidation of the 1971 Fund have, however, caused tensions as regards this longstanding relationship. I trust that the Funds and the Clubs will be able to re-establish this important relationship, in order to ensure the efficient operation of the international compensation regime.

When the 1971 Fund Convention entered into force, there were 14 States parties. Today, as we know, the 1992 Fund has 114 Member States and the Supplementary Fund 31 Member States. I believe that the continuous increase in the number of Fund Member States shows that States have in general considered this regime, which is certainly by no means perfect, has been working reasonable well in most cases.

It is in fact an extraordinary achievement that such a large number of States with different legal traditions and on different levels of economic development have been able to agree on the criteria for admissibility of compensation claims. I believe that one reason for this is that the Funds have always endeavoured, and with very few exceptions succeeded, to take decisions by consensus. It is also remarkable that, on the basis of these criteria, the Funds have been able to reach out-of-court settlements in respect of the overwhelming majority of the compensation claims. Although national courts have sometimes not accepted the Funds' interpretation of the Conventions or the Funds' application of these criteria in individual cases – we have to admit this – national courts have largely accepted the position taken by the Funds as regards the admissibility of compensation claims.

It is also encouraging to note that the regime administered by the Funds has been used as a model for other similar compensation systems. I refer in particular to the HNS Convention and the Bunkers Convention. When the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy was revised in 2004, some of the principles developed by the Funds for the admissibility of claims inspired similar solutions in respect of that Convention.

To conclude, I must admit that it is with some nostalgia that I face the demise of the 1971 Fund which constituted an innovation not only in the field of maritime law but also in respect of international co-operation in general. My nostalgia is perhaps not surprising, since I witnessed the birth, or rather the

conception, of the organization at the 1971 Diplomatic Conference and was heavily involved in its work, first as a Swedish delegate and then as Director for nearly 22 years. It is indeed the end of an era. In my view we are not here today to celebrate the liquidation of the 1971 Fund, but rather to be proud of the success of the 1971 Fund and its successor the 1992 Fund, and consequently of the international regime based on the Civil Liability and Fund Conventions.

I am convinced that the offspring of the 1971 Fund will continue to develop the IOPC Funds' policy as required, and this not only in fair winds but also when the sailing becomes rough, to the benefit of society and in particular to the benefit of innocent victims of tanker oil pollution.

WORKING WITH THE EXPERTS, THE EARLY DAYS BY DR KAREN PURNELL

Mr Chairman, Secretariat, Delegates, Observers, Ladies and Gentlemen, thank you for providing me with the opportunity to speak at this special session to commemorate the 1971 Fund Convention about 'Working with the Experts' – who are important cogs in the wheel to ensure the compensation mechanism runs smoothly.

The Torrey Canyon served to highlight the enormous financial losses that can arise and the importance of ensuring that victims of oil pollution damage are compensated quickly and fairly.

Both industry and governments saw the merit of putting in place an international, strict liability, regime of compensating victims of oil pollution damage – a regime that would reflect the global nature of shipping and provide for equitable sharing of responsibility between those who want the oil and those who ship it.

However, that regime would take several years to develop and, in fact, although the 1971 Fund Convention was adopted in December 1971, it did not come into force until October 1978, more than 10 years after the *Torrey Canyon* incident.

Recognising the importance of having a world-wide regime for dealing with oil pollution as quickly as possible, a unique 2-tier voluntary compensation plan was put into effect in the interim – this plan consisted of two Agreements, TOVALOP & CRISTAL, and they formed the basis of the CLC & Fund Conventions that are in force throughout most of the world today.

ITOPF was established in December 1968 originally to administer TOVALOP, the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution – the precursor to the CLC Convention. Hence, ITOPF's origin also lies with the *Torrey Canyon* incident.

As part of the early discussions on setting up the two voluntary Agreements, the industry called for ITOPF to develop a technical function to complement its administrative function, employing scientists with backgrounds in marine biology, fisheries and chemistry.

This expertise would be provided objectively and on a not-for-profit basis, to promote effective response to marine oil spills worldwide. Thereby making ITOPF unique in being the only organisation established purposely to advise and evaluate the impact of accidental oil spills from ships in the marine environment.

The scientific expertise assimilated in ITOPF during the early days was crucial to aid the discussions taking place on the establishment of the CLC and Fund Conventions. It was ITOPF's scientific expertise and practical knowledge of the fate and effects of oil in the marine environment that allowed interpretation of the term 'technically reasonable' and development of the criteria on how pollution damage should be quantified objectively that exist in the claims manual today.

This technical function has evolved over the years to become the main role of the organisation that you see today and the key reason why ITOPF is relied upon to this day by the P&I Clubs and the IOPC Funds to provide the same objective advice that has done since the early days.

By the time the 1971 Fund Convention came into force in October 1978, ITOPF had been in existence for almost 10 years and had already attended some 44 incidents involving TOVALOP member tankers in 25 different countries worldwide, including the *Metula* in the Magellan Straits, the *Jacob Maersk* off Portugal, the *Venoil/Venpet* collision off South Africa, the *Betelgeuse*, Ireland, and the *Amoco Cadiz* in France.

This picture is of ITOPF's Technical Manager – Mike Garnet and a fresh-faced new ITOPF technical adviser as he was at the time and erstwhile employee of the IOPC Fund, Joe Nichols, undertaking a survey of response techniques on the shoreline after the *Amoco Cadiz*.

In fact Joe also attended the very first incident falling under the newly ratified 1971 Fund Convention. This was the *Antonio Gramsci*, which grounded in Latvia on 27 February 1979 and lost about 5 000 tonnes of its crude oil cargo.

We went into our basement and dusted off the file and found some interesting facts:

ITOPF was mobilised to the site of the incident by the P&I Club as the tanker was entered in TOVALOP. ITOPF was also asked to assist the IOPC Fund in relation to claims made by Sweden (as Sweden was a member of the 1971 Fund at the time). Looking back, our role then was much the same as it is today, namely:

To observe the extent of oil pollution and give recommendations on the most appropriate response strategies, take samples of oil to establish the link to the incident, advise on the technical merit of the claims and costs arising, and to advise on effects of oil on birds and other wildlife.

Also of interest is the fact that several issues arose that are the same as those arising in many incidents today; such as more than one country involved (Latvia, Sweden & Finland) and the associated additional complexities that can arise from this; the extent of contamination – in this case ~4 000 individual islands off the coast of Sweden; and submission of environmental damage claims based on abstract models or formulae.

It was also interesting to note a meeting in Stockholm in August 1979 with a Mr Måns Jacobsson from the then Chancery of Justice – a small world then and now!

Of course, ITOPF is not the only experts working with the IOPC Funds and the P&I Clubs. The IOPC Funds and P&I Clubs may engage different experts and surveyors according to the specific needs of the incident.

I've taken the liberty of using a Member State's translation of the Claims Manual to illustrate the point that was made by supporters of the compensation regimes in the early days, namely that payment should be made for actions that are technically reasonable – and this is why the role of the expert is so important.

Of course, it is the Member States who decide what claims are admissible and the level of proof required to support claims for pollution damage but it is usually the experts who gather the information to enable the P&I Clubs and the IOPC Funds to approve the claims and make payment.

What is crucial is that all experts know the criteria used to assess what is/is not likely to be considered technically reasonable and are truly objective when giving advice.

This applies when giving advice on preventative measures where experts need a thorough, practical understanding of techniques that will minimise damage, those that could cause more damage, as well as when to terminate the clean-up, and whether the associated resources and costs are likely to be reasonable.

The network of correspondents and local experts that has been established over time by the P&I Clubs and the IOPC Funds provide invaluable support to international experts like ITOPF. Local correspondents and surveyors provide their knowledge of local practices, day-to-day support to the experts, and of course, language skills.

This local support is especially important when experts are seeking to understand the nature and extent of economic loss and seeking to advise on ways to mitigate economic hardship by addressing, for example, ways to tackle perception of damage to resources.

Being able to work co-operatively with national experts to assess the scope and duration of fishing bans is key and provides a practical example of a co-operative strategy between the Member State, the IOPC Funds and the P&I Clubs in dealing with the incident and allowing activities to return to normal as quickly as possible.

The interpretation and assessment of Environmental Damage has been the subject of most discussion and evolution since the drafting of the 71 Fund Convention.

As these claims can be extremely large and not always well documented, it is our view that satisfactory resolution of these claims is more likely if experts engaged by the P&I Clubs and IOPC Fund are able to work with local experts to conduct joint surveys. This was our advice in the early days and it remains our advice today.

In conclusion, ITOPF has worked as technical experts on oil spills from tankers for the IOPC Funds for almost 40 years and almost 50 years for the P&I Clubs. I am proud to be able to look back on these years and recall how we have worked alongside the other experts to assist the Funds, the P&I Clubs and the Member States; the input that we have had to the technical discussions, and the fact that we have sought to apply the claims criteria consistently and objectively for every one of the 700+ incidents that we have attended in every one of the 100+ countries that we've visited.

Yes, it is true that our advice and, indeed the advice of other experts, may not please everyone all of the time, but as long as all experts are objective and apply the criteria of the CLC and Fund Conventions consistently, then we've all played our role to ensure that the Conventions continue to stand the test of time.

THE ROLE OF MEMBER STATES: A DELEGATE'S PERSPECTIVE BY MR ALFRED POPP QC

When I was asked by José Maura to speak at this seminar to give the perspective of a delegate, I was somewhat confused and a little apprehensive as to what I could usefully say on that subject. In the end I decided that, after many years of participating in meetings of this IOPC Fund I would try to describe to you why I think the 1971 Fund and its successive organizations have been a roaring success. Apart from some minor difficulties towards the end I think that we can be proud of these organizations.

I would point to a number of factors which explain that success, and I would point out, as an aside, that in the early days there was a fair amount of scepticism as to whether such a scheme would work. That scepticism was particularly strong in respect of the Fund Convention, which perhaps explains why it took so long to bring them into force.

In the case of the 1971 Fund Convention, it took the Amoco Cadiz incident to achieve the required number of ratifications and accessions to bring the convention into force.

I think I can say without fear of contradiction that in setting up that fund, the organization and the policies and practices that were established under the auspices of the 1971 Fund Convention for the settlement and payment of established claims were very sound and have been the foundation for the success not only of the 1971 Fund, but also the successor funds, namely, the 1992 Fund and the Supplementary Fund.

There are perhaps five or six factors that speak to the success of these conventions.

I would argue that the conventions (CLC and FC) were, in a sense, what I would like to call "bare bones" conventions. By that I mean that they confined themselves to dealing with specific incidents and tried to solve only the problems raised by those incidents. Despite the temptation to engage in a more comprehensive scheme - and my own delegation was one of those that wished to do so – the drafters of those early conventions, and I refer here to the Civil Liability Convention, stuck to certain key elements.

Firstly, they needed to solve the issue of who had jurisdiction. The incident that gave rise to it was the sinking of the *Torrey Canyon*, which posed all sorts of international legal problems: the incident technically took place on the high seas and had caused damage in at least two coastal States. The convention solved that problem.

The next problem was to decide which party was liable: given the complex arrangements under which ships were and still are owned, managed and operated – registered and beneficial ownership, charter arrangements, management companies and operating companies - who do you go after for compensation? The convention solved that problem by introducing the very simple expedient of the registered owner.

Then there was the issue of basis of liability. Should it be negligence, with all the pitfalls associated with trying to prove your case against multiple parties? That was resolved by establishing a regime of strict liability, with the shipowner, subject to very limited defences, as liable for compensation.

Next, the very important issue of insurance was resolved. As we all know, marine insurance is basically a contract of indemnification. The idea is that the claimant, the victim of the responsible party, must pay claims and then go after the insurer for indemnification. This was not considered to be satisfactory at the time and so the notion of compulsory insurance was created, with direct access against the insurer. We accept that now as the norm, but it was a highly revolutionary concept at the time. I recall one of the P&I representatives saying that were forgetting that marine insurance was a contract of indemnity and that we were overturning fundamental principles.

Last but not least was the issue of damage, a subject that previous speakers here have already addressed. It was perhaps right that a very general definition was adopted, since there was a lot of ground to cover. Over

the years, especially when the Fund Convention came into force, I think it enabled the Fund to break new ground when it came to damages, so much so that in Canada we had our doubts, since the convention was far ahead of what was allowed in our domestic law.

So sound was the approach adopted that subsequently the CLC, in particular, has been copied in many other international instruments, some of which have been mentioned here.

The 1971 Fund Convention was a more complex situation, but even there I would argue that it was a "bare bones" convention, since it basically addressed the circumstances in which it would provide supplementary compensation. It provided the mechanism for raising the money and was essentially a call fund. The idea was not to have large sums invested somewhere but that money would be raised as the need arose. It also created the need for a secretariat, since, of course, the Fund had to be managed.

Neither of the conventions provides much detail, and instead the people charged with setting them up at the beginning had to break new ground.

That is why, to my mind, the conventions have been a success. They have led to the investigation, assessment and payment of claims on a relatively straightforward basis. Essential to that early work was, of course, the cooperation established from the outset with the P&I Clubs to engage in the settlement of claims, with technical advice from organizations such as ITOPF.

It is interesting to reflect on how the conventions came about in terms of the mechanisms involved. I would argue that the CLC was essentially a work of cooperation between the CMI and the Legal Committee. The CMI, with all its vast experience of the private sector and in the settlement of claims, was charged with the initial task of producing a draft, which was subsequently approved by the newly created Legal Committee. In those days the convention had to be taken to Brussels for adoption – that situation changed very soon afterwards.

The Fund Convention came two years later. I wonder now whether that provided a good model for the HNS Convention, which combined the two elements in one instrument. It was initially adopted in 1996 and then amended by Protocol, ostensibly to simplify it, but it has still, in 2015, not come into force.

Recently, the Secretariat provided me with a copy of the list of participants at the first Assembly of the IOPC Fund in November 1978. I had requested that list because I wanted to be sure that I was correct in making the claim to have been present at that Assembly, and I was. Fourteen parties were present at that first meeting.

Running through that list brought back names and memories, names that for most of us have long been forgotten and yet they played an important part in setting the right course for the new the Fund.

I will mention just a few, beginning with Mr. Bredholt, Head of the Danish delegation, who served as the first Chairman of the Assembly and remained in that position for many years. I admired his ability to circulate in the room and resolve all difficulties with a smile, and to conduct the meetings with the greatest good humour – those first meetings were very cordial.

The German delegation included Dr. Ganten, whom I knew from the Legal Committee's discussions on amendments to the 1957 Limitation Convention which then became the 1976 Limitation Convention. He was subsequently appointed as the Fund's first Director.

Mr. Jacobsson was a member of the Swedish delegation, and he went on to become the next Director of the Fund, remaining in the post for 22 years.

Then there was Mr. Douay of the French delegation, a great character who played an important role both in the Legal Committee and in the early days of the Fund Assembly.

Last but not least there was Prof. Tanikawa, always occupying a rather modest position as advisor on the Japanese delegation but in fact exerting a huge and constructive influence on it.

I think it is fitting at this point to pay special tribute to the two Directors who operated the Fund in those early days.

I have mentioned both of them already, namely, Dr. Reinhard Ganten, the first Director and Mr. Mans Jacobsson who followed him.

They had to start from scratch without much guidance as to how such a fund should function and with nowhere to look for inspiration.

The sound practices and procedures that they established in those far off days are in many respects still in place today in the successor Funds.

A special mention must also be given to Mr. Bredholt, who guided the governing bodies at that crucial time.

Meetings of the governing bodies, held in the meeting rooms of the IMO in Piccadilly, were relaxed and reasonably informal affairs, but the Funds were effective.

To put it in a nutshell, the Fund was in the business of paying claims. In most instances, litigation was avoided, obviously not completely, since the new instruments did give rise to issues of interpretation.

That was a great tribute to the Directors, their secretariat and, of course, the delegates.

Various efforts were made to amend these conventions, first in 1984 and later in 1992 (to this day I do not think that I have understood the transitional provisions included in the amending instruments coming out of those conferences).

Sound principles were created in those early days, and even though we now see the disappearance of the 1971 Fund, it is my firm conviction and hope that those principles will continue to operate in the 1992 Fund and the Supplementary Fund.

CLOSING REMARKS FROM CAPTAIN DAVID BRUCE

Thank you to all who have spoken. We have heard of the work and achievements of the 1971 Fund over the years from a variety of perspectives and it now falls to me as the last Chairman of the 1971 Fund Administrative Council to bring this special commemorative session to a close.

As I look around the room I see many of my friends and colleagues with whom I have attended numerous IMO meetings in my capacity as representative of the Marshall Islands to IMO. The majority of those meetings have focussed on ways to improve maritime safety, on best practices and on better regulation of international maritime transportation. However, as time has passed and shipping practices have evolved we have relooked within IMO and tried to ensure that the relevant regulations have evolved at the same pace. But, no matter how closely we continue to monitor developments and revise best practice, the risk of incidents remains and unfortunately always will.

There will always be room for improvement and new unprecedented issues will undoubtedly arise. Generally, the IOPC Fund system has worked well for nearly 40 years and as a result has provided a sense of security to all of us within the IMO family to know that whilst we continue to lead in the battle to improve safety at sea, when incidents do inevitably occur, potential victims are protected under the Fund regime.

It was an honour to be Chairman of the 1971 Fund Administrative Council and it is an honour today to speak alongside such key figures in the life of the 1971 Fund. I remember when I was asked whether I would consider becoming Chairman, I considered that the Convention had ceased to be in force, the remaining incidents were well on their way to being closed, and that it would be an easy post to take on – little did I know at that time!

Yes, there could be no new incidents to deal with, but the old ones were far from straightforward and the winding up process itself turned out to be one of the biggest challenges in the Fund's history. It pushed us in the end to call for a vote and ultimately that vote was in favour of the dissolution. As a consequence, there is clearly work to be done and it is my sincere hope that the cooperation and trust between the P&I Clubs and the IOPC Funds can be rebuilt as it is fundamental to the smooth operation of the regime.

Putting those difficulties aside for now, we are, of course, marking the end of an era with the dissolution of the Fund. Looking back, £331 million in compensation was paid to victims as a result of the establishment of the 1971 Fund. This may not seem large by today's standards but it is significant. Looking forward, the original international liability and compensation regime of the 1969 CLC and 1971 Fund Convention has paved the way for the new wider covering regime in place today under the 1992 Conventions and has also inspired the basic framework for the HNS Convention. It is a good footing to start off from and we can certainly hope that the 1992 regime will continue to follow in its predecessor's successful footprints and that the HNS Convention will follow a similar course.

With this in mind, I would like to thank again our speakers, Dr Balkin, Dr Ganten, Mr Jacobsson, Dr Purnell and Mr Popp, for taking the time to travel here today and for their words, but also for their input into the work of the 1971 Fund. I would also like to thank the Secretary-General and the staff of IMO for hosting the meeting earlier this morning and for their unwavering support given to the 1971 Fund. Finally I would like to thank all former Member States, observer organizations, the four Directors of the organization and the Secretariat for their commitment, engagement and hard work in all the years that I chaired the Administrative Council and previously. We must also thank the interpreters who are so involved in enabling us to speak to each other.

We will now move to the final stage of commemorating this innovative organization and, on behalf of the Director, I would like to invite you to join us for a lunchtime reception in the delegates' lounge on the first floor.

Thank you.
