



INTERNATIONAL
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1992 Fund Executive Committee	92EC62	
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1971 Fund Administrative Council	71AC33	●

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

NISSOS AMORGOS

Note by the Secretariat

Objective of document:

To inform the 1971 Fund Administrative Council of the latest developments in respect of the legal action commenced by the Gard P&I Club against the 1971 Fund and the granting of a freezing injunction in favour of the Gard P&I Club against the 1971 Fund.

Summary of the incident so far:

In March 2014, the Gard P&I Club brought a legal action at the High Court in London against the 1971 Fund. In its action, the Gard Club maintained that the Club and the Fund had entered into a binding agreement, partly orally, partly in writing and partly by conduct, pursuant to which the 1971 Fund was required to abide by a final reconciliation pursuant to the said agreement so that the total amount to be paid by the Club in accordance with the judgement rendered by the Venezuelan Criminal Court of First instance did not exceed the limit under the 1969 Civil Liability Convention (1969 CLC). The Gard Club also maintained that the 1971 Fund was liable to indemnify it against the Venezuelan judgement under Article V of the 1969 CLC. The 1971 Fund has submitted an application to the High Court in England seeking a declaration that the High Court does not have jurisdiction on this matter.

The Gard Club has also initiated a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas. In its action the Club requested the Court to decide that the 1971 Fund was liable to pay to the Bolivarian Republic of Venezuela the amount awarded by the Supreme Court or, in the case that the Bolivarian Republic of Venezuela were to be paid by the Gard Club, that the 1971 Fund should reimburse the Club any amount which exceeds the shipowner's limitation of liability up to the Fund's limit.

The 1971 Fund, as instructed by the Administrative Council in October 2013, has discontinued its defence before the Venezuelan courts. The legal action in Venezuela has not been served on the 1971 Fund. In accordance with the instructions of the Administrative Council in May 2014, the Director will not attend the Maritime Court in Caracas to answer the Gard Club's action. As at 8 September 2014, the Director is not aware of any further developments in respect of this legal action.

In May 2014, the High Court in London decided that the Gard P&I Club was entitled to the freezing order relief it had requested against the 1971 Fund in support of its claim in England. However, the Court also decided not to grant the freezing injunction in support of the proceedings brought in the Bolivarian Republic of Venezuela.

Recent developments:	In June 2014, the 1971 Fund appealed the decision to grant the freezing injunction. In August 2014, the Director met with representatives of Gard Club and the International Group for a ‘without prejudice’ meeting ^{<1>} to discuss possible settlement of the incident.
Action to be taken:	<u>1971 Fund Administrative Council</u> Information to be noted.

1 Summary of the incident

Ship	<i>Nissos Amorgos</i>
Date of incident	28.02.1997
Place of incident	Maracaibo, Bolivarian Republic of Venezuela
Cause of incident	Grounding
Quantity of oil spilled	3 600 tonnes of crude oil
Flag State of ship	Greece
Gross tonnage	50 563 GRT
P&I insurer	Assuranceföreningen Gard (Gard Club)
CLC limit	5 244 492 SDR (Bs3 473 million or BsF 3.5 million) ^{<2><3>} (US\$7.3 million)
CLC + Fund limit	60 million SDR (Bs39 738 million or US\$83 221 800)
Compensation	Claims have been settled for Bs288 476 394 (£42 000) and US\$24 397 612 (£15 million). All the settled claims have been paid.
Legal proceedings	In May 2013, the Supreme Court dismissed the appeal by the master, shipowner and Gard Club, denying the shipowner the right to limit his liability, and ordered them to pay the Venezuelan State US\$60 million. In March 2014, the Gard Club brought a legal action against the 1971 Fund in the High Court in London. The Gard Club also brought a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas, Bolivarian Republic of Venezuela. In May 2014, the High Court in London decided that the Gard P&I Club was entitled to the freezing order relief it had requested against the 1971 Fund in support of its claim in England. However, the Court also decided not to grant the freezing injunction in support of the proceedings brought in the Bolivarian Republic of Venezuela. In June 2014, the 1971 Fund appealed the decision to grant the freezing injunction. Three claims remain in court, two by the Bolivarian Republic of Venezuela for US\$60 million, which are duplicated and time-barred, and one by three fish processors for US\$30 million.

^{<1>} A ‘without prejudice’ meeting is designed to enable parties to discuss settlement of a dispute upon the understanding that nothing disclosed during that meeting may be used in the litigation between the parties.

^{<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).

^{<3>} The decision on the limitation fund by the Cabimas Criminal Court in 1997 was reversed by the Maracaibo Criminal Court in February 2010 and the reversal was upheld by the Maracaibo Court of Appeal in March 2011 and later the Supreme Court in May 2013.

2 Background information

The background information to this incident is summarised above and provided in more detail at Annex I. The background information in respect of the granting of a 'freezing injunction' by the Gard P&I Club (Gard Club) against the 1971 Fund is provided at Annex II.

3 Decisions taken by the 1971 Fund Administrative Council at its May 2014 session

3.1 Following the discussion of the *Nissos Amorgos* incident at its May 2014 session, the 1971 Fund Administrative Council decided:

- (a) that since the 1971 Fund had immunity and because the claim was unfounded and had no legal basis, the 1971 Fund should contest vigorously the action brought by the Gard Club before the High Court in London against the 1971 Fund; and
- (b) that the Director should not attend the Maritime Court in Caracas to answer the Gard Club's action.

3.2 The 1971 Fund Administrative Council also instructed the Director to approach the Gard Club to try to reach an amicable settlement by the date of the October 2014 session of the Administrative Council, within the limit of the amount presently available to the 1971 Fund, but that the 1971 Fund should not, under any circumstances, take any action that would result in the 1971 Fund waiving its right to immunity from jurisdiction before the UK courts.

3.3 Judgement by the High Court in London on the freezing injunction application

Additionally, following the announcement of the grant of the freezing injunction on 7 May 2014, the 1971 Fund Administrative Council instructed the Director to:

- (a) appeal the decision to grant the freezing injunction; and
- (b) contact the Foreign & Commonwealth Office (FCO) of the United Kingdom to discuss the implications on the 1992 Fund and the Supplementary Fund of the judgement in which a discrepancy between the Order and the Headquarters Agreement between the UK Government and the 1971 Fund led to the freezing injunction upon the 1971 Fund.

4 Developments since May 2014

4.1 In accordance with the instructions given to the Director by the 1971 Fund Administrative Council, the Director has worked closely with the 1971 Fund's lawyers in relation to the issues currently before the English High Court.

4.2 In June 2014, the 1971 Fund filed its appeal against the grant of the freezing injunction in favour of the Gard Club.

4.3 The 1971 Fund also continues to pursue its application to challenge the English court's jurisdiction in respect of the substantive proceedings commenced by the Gard Club.

4.4 The Gard Club filed a cross-appeal against the Judge's refusal to grant a freezing injunction in support of its claim against the 1971 Fund in Venezuela.

4.5 In June 2014, the 1971 Fund contacted the FCO to discuss the matter of the freezing injunction granted against the 1971 Fund.

4.6 In August 2014, the Director met with the Gard Club and the International Group of P&I Associations (International Group) to discuss, on a 'without prejudice' basis, the possibility of settling the claim.

4.7 The 1971 Fund's appeal against the grant of the freezing injunction in favour of the Gard Club

4.7.1 In respect of the 1971 Fund's appeal against the freezing injunction, the issue before the Court of Appeal is primarily whether section 6(1) of the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979, (the 'Order') which gives effect to the Headquarters Agreement under UK law, grants the 1971 Fund immunity from the English court's jurisdiction to make freezing injunctions generally.

4.7.2 It is expected that the Court of Appeal will hear the 1971 Fund's appeal in 2015, ie after the October 2014 session of the 1971 Fund Administrative Council.

4.8 The 1971 Fund's challenge to the English Court's jurisdiction

4.8.1 At the hearing of the Gard Club's application for a freezing order in May 2014, the Judge found that the Gard Club had a good arguable case that its claim in England based on the alleged claims handling agreement with the Fund fell within the exception from immunity in section 6(1) of the Order, on the grounds that the alleged funding arrangement amounted to a 'loan' or at least a 'transaction for the provision of finance'.

4.8.2 The 1971 Fund has appealed this finding on the grounds that the principal issue of whether there was, in fact, a contract falling within section 6(1) of the Order, ie by way of 'loan' or 'transaction for the provision of finance' which fell within one of the exceptions from immunity listed in the Order, must be determined on the balance of probabilities. This same issue is due to be determined at the Fund's application challenging the jurisdiction of the High Court. This will in turn necessitate the Court determining the terms of the alleged contract, and the scope of the exceptions to the 1971 Fund's immunity on their true construction.

4.8.3 In respect of these issues, the Gard Club has submitted to the High Court, a substantial amount of documentation in support of its claim including witness statements from representatives of the Gard Club, another P&I Club involved in previous incidents, the Chairman of the International Group of P&I Associations and the lawyer engaged by the Gard Club.

4.8.4 Following examination of the witness statements, the 1971 Fund's lawyers are of the view that, despite the volume of the documents submitted, they do not support the Gard Club's fundamental assertion that there was, in fact, a contract in the alleged terms, or indeed any contract falling within section 6(1) of the Order, ie by way of 'loan' or 'transaction for the provision of finance', which falls within one of the exceptions from the Fund's immunity.

4.8.5 The 1971 Fund has submitted a statement from one of its lawyers attaching an attendance note of a meeting he had with Mr Måns Jacobsson, who was Director of the 1971 Fund in 1997 when the alleged binding agreement was made. The attendance note makes it clear that Mr Jacobsson does not agree with the allegations made by the Gard Club.

4.8.6 The hearing on the 1971 Fund's application is scheduled in the week commencing 6 October 2014 and it is likely to last four days. It is possible that judgement may be rendered just before the session of the 1971 Fund Administrative Council. The Director intends to submit an additional document to the Administrative Council reporting on the judgement rendered by the High Court if the judgement is delivered in time for the October 2014 meeting.

4.9 Meeting with the FCO

4.9.1 In June 2014, as instructed by the Administrative Council at its May 2014 session, the Director contacted the FCO to discuss the matter of the freezing injunction granted against the 1971 Fund. Subsequently, during a meeting in July 2014 with the FCO and the Department for Transport of the United Kingdom, the FCO reiterated its understanding that the Order in Council had fully given effect to the Headquarters Agreement and indicated its intention to intervene in the 1971 Fund's appeal against the freezing order. However, the FCO stated that it required Ministerial approval to do so. On

2 September 2014, the FCO made an application to the Court of Appeal for permission to intervene in the 1971 Fund's appeal against the freezing order.

4.9.2 It is expected that further meetings with the FCO and the Department for Transport will take place, during which the Director will continue to discuss the implications of the present legal proceedings on the 1992 Fund and the Supplementary Fund, and the discrepancy between the Order and the Headquarters Agreement between the UK Government and the 1971 Fund, which led to the freezing injunction upon the 1971 Fund.

4.10 Meeting with the Gard Club and the International Group

4.10.1 In May 2014, the 1971 Fund Administrative Council instructed the Director to approach the Gard Club to try to reach an amicable settlement by the date of the October 2014 session of the Administrative Council. Accordingly, the Director duly requested a 'without prejudice' meeting with the Gard Club and the International Group.

4.10.2 In August 2014, the Director, Legal Counsel, Head of Claims Department and a Claims Manager met with representatives of the Gard Club and the International Group to discuss, on a 'without prejudice' basis, the possibility of resolving the dispute between the parties in the form of a global settlement.

4.10.3 The Director emphasised that if a global settlement was an approach that might be of interest to the Gard Club, then this was a matter that he could present to the 1971 Fund Administrative Council in October 2014, with a request for a decision from the Administrative Council.

4.11 Meeting with the Government of the Bolivarian Republic of Venezuela, the International Group and the Gard Club, hosted by the United Kingdom Government

4.11.1 In July 2014, the Director received a letter from the Permanent Representative of the United Kingdom to the International Maritime Organization (IMO), writing both in that capacity, and as a representative of the host government to the IOPC Funds, offering to facilitate a 'without prejudice' meeting between the 1971 Fund, the Permanent Representative of the Bolivarian Republic of Venezuela to the IMO and the Gard Club in association with the International Group of P&I Associations.

4.11.2 The letter indicated that the purpose of the meeting was:

“... to allow interested parties to engage in meaningful discussions in order to assure all interested parties that the 1971 Fund has taken all reasonable steps to meet any obligation it may have under Article 44(1) of the 1971 Fund Convention and to explore possible means of resolving any outstanding issues ahead of the meeting of the governing bodies of the International Oil Pollution Compensation Fund and the pending High Court case within the UK judicial system.”

4.11.3 The Director has accepted the invitation to meet the other parties, with the meeting proposed to take place in the week of 8 September 2014. As at 8 September 2014, the meeting had not yet taken place.

5 Possible future developments

5.1 As noted above, the hearing on the 1971 Fund's application challenging the English Court's jurisdiction is scheduled to begin in the week commencing 6 October 2014, and is likely to last four days. It is possible that judgement may be rendered just before the meeting of the 1971 Fund Administrative Council.

5.2 If the 1971 Fund's application is successful, the 1971 Fund's lawyers advise that the freezing injunction would automatically lapse unless the Gard Club appealed the jurisdiction decision and successfully applied to the court to maintain the freezing injunction in place, pending the hearing of that appeal.

- 5.3 The position regarding any appeal of the judgement on the challenge to jurisdiction is complicated by the fact that the ability of the unsuccessful party to appeal depends on permission being granted either by the Judge hearing the application, or the Court of Appeal, if the former refuses permission.
- 5.4 Conversely, if the Gard Club was successful in resisting the 1971 Fund's application on jurisdiction, then the freezing injunction would likely continue, at least until the date of judgement of the hearing of the 1971 Fund's appeal against the grant of the freezing injunction.
- 5.5 In all likelihood, the 1971 Fund's lawyers have stated that whichever party is unsuccessful in the jurisdiction challenge will appeal.
- 5.6 Following the decision of the Judge regarding the 1971 Fund's challenge to the jurisdiction, a number of outcomes are possible:

(a) *The 1971 Fund is successful in its application to challenge jurisdiction, and the freezing injunction lapses.*

This is the scenario described at paragraph 4.2 above.

(b) *The 1971 Fund is successful in its application to challenge jurisdiction, but the Gard Club appeals the judgement.*

The 1971 Fund's lawyers advise that there is a possibility that even if the 1971 Fund is successful in its challenge to jurisdiction, the Court may still order the continuation of the freezing injunction pending any appeal by the Gard Club on the challenge to jurisdiction.

(c) *The 1971 Fund is successful in its application to challenge jurisdiction, but the court orders the freezing injunction to remain, and the 1971 Fund's appeal on the freezing injunction is heard before the Gard Club's appeal on the challenge to the jurisdiction.*

- 5.7 Due to the vagaries of the dates of the Court hearings, there is a possibility that the 1971 Fund's appeal against the grant of the freezing injunction, which is due to commence in 2015 ie after the October 2014 session of the 1971 Fund Administrative Council, could be heard before any appeal by the Gard Club on the challenge to jurisdiction.
- 5.8 Under those circumstances, if the 1971 Fund's appeal against the grant of the freezing injunction was heard before any appeal by the Gard Club on the challenge to jurisdiction, and the 1971 Fund was successful in its appeal, then the freezing injunction would also lapse, notwithstanding that the Gard Club's appeal on the challenge to jurisdiction remained outstanding.
- 5.9 The Director is of the view, based on advice from the 1971 Fund's lawyers, that although there can be no certainty, notwithstanding that the Fund may be successful on the jurisdiction challenge, there is a significant risk that the court may order the freezing injunction to continue pending the hearing of any appeal by the Gard Club.

6 Director's considerations

- 6.1 The Director regrets that the Gard Club and 1971 Fund have been left in the position of having to resort to litigation in the English High Court, in respect of a claim which the 1971 Fund Administrative Council decided in July 2003 was inadmissible as it did not relate to pollution damage falling within the scope of the 1969 CLC and the 1971 Fund Convention.
- 6.2 In this regard, the Director recalls that in October 2005, the 1971 Fund Administrative Council endorsed the Director's view that the claims by the Bolivarian Republic of Venezuela were time-barred *vis-à-vis* the 1971 Fund since no legal action had been brought under Article 6.1 of the 1971 Fund Convention against the 1971 Fund within the six year period, which expired in February 2003.

- 6.3 The Director also recalls that in October 2013, the 1971 Fund Administrative Council decided that the 1971 Fund should not reimburse the Club for any payments made as a consequence of the Supreme Court judgement in respect of the claim by the Bolivarian Republic of Venezuela.
- 6.4 The implications and effect of a continuation of the freezing injunction
- 6.4.1 The Director notes that as described in document [IOPC/MAY14/3/10/2](#), the freezing injunction granted by the High Court in London will prevent the 1971 Fund from removing from England or disposing of its assets; however, it does not have any effect in practice on the normal course of its activities since the 1971 Fund is not prevented from making compensation payments, including making out of court settlements of claims, paying expenses, and the cost of the Fund's legal representation.
- 6.4.2 However, since it is expected that the Court of Appeal will hear the Fund's appeal against the freezing injunction after the October 2014 session of the 1971 Fund Administrative Council, and it is very likely that the freezing order will remain in force at the time of the October 2014 session of the Administrative Council, the Council will have to decide in October 2014 how the remaining assets of the 1971 Fund should be handled.
- 6.4.3 The Director has been advised by the 1971 Fund's lawyers that since litigation before the English courts is in progress, it is important that the discussion by the Administrative Council on the matter take place in a closed session.

7 Action to be taken

1971 Fund Administrative Council

The 1971 Fund Administrative Council is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

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ANNEX I

BACKGROUND INFORMATION – NISSOS AMORGOS

1 Incident

On 28 February 1997, the Greek tanker *Nissos Amorgos* (50 563 GRT), carrying approximately 75 000 tonnes of Venezuelan crude oil, ran aground whilst passing through the Maracaibo Channel in the Gulf of Venezuela. Venezuelan authorities have maintained that the actual grounding occurred outside the Channel itself. An estimated 3 600 tonnes of crude oil were spilled. The incident has given rise to legal proceedings in a Criminal Court in Cabimas, civil courts in Caracas and Maracaibo, the Criminal Court of Appeal in Maracaibo and the Supreme Court.

2 Applicability of the Conventions

At the time of the incident the Bolivarian Republic of Venezuela was Party to the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention. In June 1997, the Cabimas Criminal Court held that the shipowner's liability was limited to Bs3 473 million and that the 1971 Fund's limit of liability was 60 million SDR (Bs39 738 million or US\$83 million). The shipowner provided to the Court a bank guarantee in the sum of Bs3 473 million. In 1997 the Court accepted the guarantee as establishing a limitation fund under Article V of the 1969 CLC. This decision was subsequently rendered null and void by the Maracaibo Criminal Court of First Instance in a judgement of February 2010. That judgement was subsequently upheld by the Maracaibo Criminal Court of Appeal in March 2011.

3 Claims for compensation

3.1 Settled and paid claims

3.1.1 In April 1997, the Gard Club and the 1971 Fund set up a claims-handling office in Maracaibo. Between 1997 and 2002, claims received by the office were settled for a total of Bs288.5 million plus US\$24 397 612 and these amounts were paid to the claimants.

3.1.2 The table below summarises the settled claims, which have all been paid in full.

Claimant	Category of claim	Settled and paid amount (Bs)	Settled and paid amount (US\$)
Petroleos de Venezuela SA (PDVSA)	Clean up		8 364 223
Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM)	Preventive measures	70 675 468	
Shrimp fishermen and processors	Loss of income		16 033 389
Others	Property damage and loss of income	217 800 926	
Total		288 476 394	24 397 612

3.2 Outstanding claims

3.2.1 Three claims for compensation totalling US\$150.5 million, summarised in the table below, are pending before the courts in Venezuela.

Claimant	Category of claim	Claimed amount (US\$)	Court	Fund's position
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Criminal section)	Time-barred and not admissible
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Political administrative section)	Time-barred and not admissible
Three fish processors	Loss of income	30 000 000	Supreme Court (Political administrative section)	No loss proven
Total		150 500 792		

3.2.2 Detailed information regarding the three pending claims is given in the criminal and civil proceedings sections below.

4 **Criminal proceedings**

- 4.1 Criminal proceedings were brought against the master of the *Nissos Amorgos*. In his pleadings to the Criminal Court in Cabimas the master maintained that the damage was substantially caused by deficiencies in Lake Maracaibo's navigation channel, amounting to negligence imputable to the Bolivarian Republic of Venezuela.
- 4.2 In a judgement rendered in May 2000, the Criminal Court dismissed the arguments made by the master and held him liable for the damage arising as a result of the incident and sentenced him to one year and four months in prison. The master appealed against the judgement before the Criminal Court of Appeal in Maracaibo.
- 4.3 In September 2000 the Criminal Court of Appeal decided not to consider the appeal but ordered the Criminal Court in Cabimas to send the file to the Supreme Court due to the fact that the Supreme Court was considering a request for 'avocamiento'^{<4>}.
- 4.4 In August 2004 the Supreme Court decided to remit the file on the criminal action against the master to the Criminal Court of Appeal in Maracaibo.
- 4.5 In a judgement rendered in February 2005, the Criminal Court of Appeal in Maracaibo held that it had been proved that the master had incurred criminal liability due to negligence causing pollution damage to the environment. The Court decided, however, that, in accordance with Venezuelan procedural law, since more than four and a half years had passed since the date of the criminal act, the criminal action against the master was time-barred. In its judgement the Court stated that this decision was without prejudice to the civil liabilities which could arise from the criminal act dealt with in the judgement. In October 2006 the public prosecutor requested the Supreme Court (Constitutional section) to revise the judgement of the Criminal Court of Appeal on the grounds that the Court had not decided in respect of the claim for compensation submitted by the public prosecutor on behalf of the Bolivarian Republic of Venezuela.

^{<4>} Under Venezuelan law, in exceptional circumstances, the Supreme Court may assume jurisdiction, 'avocamiento', and decide on the merits of a case. Such exceptional circumstances are defined as those which directly affect the 'public interest and social order' or where it is necessary to re-establish order in the judicial process because of the great importance of the case. If the request for 'avocamiento' is granted, the Supreme Court would act as a court of first instance and its judgement would be final.

- 4.6 In a judgement rendered in March 2007 the Supreme Court (Constitutional section) decided to annul the judgement of the Court of Appeal and send back the criminal file to the Court of Appeal where a different section would render a new judgement. In its judgement, the Supreme Court stated that the judgement of the Court of Appeal was unconstitutional since it had not decided on the claim for compensation submitted by the Bolivarian Republic of Venezuela that had been presented to obtain compensation for the Venezuelan State for the damage caused.
- 4.7 A different section of the Criminal Court of Appeal issued a new judgement in February 2008, confirming that the criminal action against the master was time-barred but preserving the civil action arising from the criminal act.
- 4.8 The developments concerning the civil action in the criminal proceedings, submitted by the Bolivarian Republic of Venezuela are detailed in the section on civil liability below.
- 4.9 Claim by the Bolivarian Republic of Venezuela in the criminal proceedings
- 4.9.1 The Bolivarian Republic of Venezuela presented a claim for environmental damage for US\$60 250 396 against the master, the shipowner and the Gard Club in the Criminal Court in Cabimas.
- 4.9.2 The claim was based on a report on the economic consequences of the pollution, written by a Venezuelan university, in which the amount of damage had been calculated by the use of theoretical models. Compensation was claimed for:
- damage to the communities of clams living in the inter-tidal zone affected by the spill (US\$37 301 942);
 - the cost of restoring the quality of the water in the vicinity of the affected coasts (US\$5 000 000);
 - the cost of replacing sand removed from the beach during the clean-up operations (US\$1 000 000); and
 - damage to the beach at a tourist resort (US\$16 948 454).
- 4.9.3 The 1971 Fund was notified of the criminal action and submitted pleadings in the proceedings. The progress of this action is detailed below.
- 4.9.4 In March 1999 the 1971 Fund, the shipowner and the Gard Club presented to the Court a report prepared by their experts on the various items of the claim by the Bolivarian Republic of Venezuela which concluded that the claim had no merit.
- 4.9.5 At the request of the shipowner, the Gard Club and the 1971 Fund, the Criminal Court appointed a panel of three experts to advise the Court on the technical merits of the claim presented by the Bolivarian Republic of Venezuela. In its report presented in July 1999, the panel unanimously agreed with the findings of the 1971 Fund's experts that the claim had no merit.

Judgement by the Criminal Court of Appeal in February 2008

- 4.9.6 In the February 2008 judgement the Criminal Court of Appeal decided to send the file to a Criminal Court of First Instance, where the claim submitted by the Bolivarian Republic of Venezuela would be decided.

Master's plea of lack of jurisdiction

- 4.9.7 The master submitted pleadings to the Criminal Court of First Instance in Maracaibo in which he argued that the Court did not have jurisdiction and that the case should be transferred to the Maritime Court in Caracas.

- 4.9.8 In March 2009 the Criminal Court of First Instance issued a decision rejecting the plea of lack of jurisdiction. This decision was notified to the master, but not to the shipowner and his insurer or the 1971 Fund.
- 4.9.9 The 1971 Fund submitted pleadings arguing that, by not notifying the 1971 Fund of the decision, the Court had denied the Fund a proper defence. In its pleadings the Fund also submitted its conclusions, as follows:
- The claims by the Bolivarian Republic of Venezuela were time-barred in respect of the 1971 Fund;
 - All admissible claims for pollution damage had already been compensated by the Club and the Fund; and
 - The claim by the Bolivarian Republic of Venezuela was not admissible under the 1969 CLC and 1971 Fund Convention and the alleged damage was not proved.

Judgement by the Criminal Court of First Instance in Maracaibo in February 2010

- 4.9.10 In February 2010, the Maracaibo Criminal Court of First Instance held that the master, the shipowner and the Gard Club had incurred a civil liability derived from the criminal action and ordered them to pay to the Venezuelan State BsF 29 220 620 (US\$60 million) plus indexation, interests and costs. In its judgement the Court denied the shipowner the right to limit his liability, stating that the Criminal Court of Cabimas had been wrong in its decision delivered in 1997 since, at that time, it was not certain that a criminal offence had been committed and the damage had not been quantified.
- 4.9.11 In its judgement, the Maracaibo Criminal Court of First Instance also stated that the 1971 Fund had a responsibility, as provided in Articles 2 and 4 of the 1971 Fund Convention, to intervene in those cases in which the compensation available under the 1969 CLC was insufficient. It was also ordered in the judgement that the 1971 Fund be notified.
- 4.9.12 The master, the shipowner and the Gard Club and the 1971 Fund appealed against the judgement.

Judgement by the Maracaibo Criminal Court of Appeal in March 2011

- 4.9.13 In March 2011, the Maracaibo Criminal Court of Appeal upheld the judgement of the Maracaibo Criminal Court of First Instance and dismissed the appeals by the master, the shipowner, the Gard Club and the submission by the 1971 Fund. In its judgement the Maracaibo Criminal Court of Appeal dealt mainly with the issues set out below.
- 4.9.14 The master, shipowner and the Gard Club appealed to the Supreme Court requesting again that the Court recognise the shipowner's right to limit his liability

Shipowner's limitation of liability

- 4.9.15 In its appeal, the master, shipowner and the Gard Club had requested that the Court recognise the shipowner's right to limit its liability, as set out in Article V, paragraph 1 of the 1969 CLC.
- 4.9.16 In its judgement, the Maracaibo Criminal Court of Appeal upheld the judgement of the Maracaibo Criminal Court of First Instance, stating that the Criminal Court of Cabimas was not a suitable forum for admitting a liability limitation fund since, at that time, it was not certain that a criminal offence had been committed and the damage had not been quantified. The judgement rejected the shipowner's request to limit its liability but decided that it would be for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund.

Time bar

- 4.9.17 In its appeal, the 1971 Fund pointed out that, under Article 6.1 of the 1971 Fund Convention, rights to compensation became time-barred unless an action had been brought under Article 4, or a notification made pursuant to Article 7.6, within three years of the date when the damage occurred but that in no case should an action be brought after six years from the date of the incident. The 1971 Fund further pointed out that no action had been brought against the 1971 Fund within six years and that the claim by the Bolivarian Republic of Venezuela was, therefore, time-barred.
- 4.9.18 The Maracaibo Criminal Court of Appeal dismissed this argument on the grounds that the 1971 Fund had been given notice within three years of the date when the damage occurred. The Court also pointed out that the lawyers of the 1971 Fund had attended hearings of the Criminal Court of Cabimas in 1997 and that it had been in a position to effectively intervene throughout the entire proceedings.

Implementation of the Conventions

- 4.9.19 The 1971 Fund appealed the judgement of the Maracaibo Criminal Court of First Instance on the grounds that those persons and organisations (private individuals, companies and State organisations) who had suffered a loss as a result of the pollution had been compensated for their losses by the Gard Club and the 1971 Fund. The Venezuelan State itself did not have an admissible claim since it had not suffered any loss and was not, therefore, entitled to compensation as claimed and as awarded by the Criminal Court of First Instance in Maracaibo. The 1971 Fund also appealed on the grounds that the amounts of compensation paid to victims had not been taken into consideration.
- 4.9.20 In its judgement, the Maracaibo Criminal Court of Appeal pointed out that the Maracaibo Criminal Court of First Instance had differentiated between 'direct' and 'indirect' victims, as established by the Environmental Criminal Law of Venezuela (*Ley Penal del Ambiente*), which provided that the Venezuelan State was the direct victim whereas those natural or corporate persons affected by the pollution were indirect victims. The Court stated that the Venezuelan State, as a direct victim, should be compensated for the environmental damage caused without making any pronouncement with respect to the indirect victims, since their claims had already been satisfied.

Award of compensation to Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM)

- 4.9.21 In 1998, ICLAM, a Venezuelan State organisation responsible for monitoring and environmental control of Lake Maracaibo, submitted a claim in court for the cost incurred in carrying out a programme of water, sediment and marine animal life inspection, sampling and testing following the spill. The claim was assessed by the Gard Club and 1971 Fund at Bs70 675 467 and that amount was paid by the 1971 Fund. Following payment of the claim, ICLAM withdrew their claim from court and in 2005 the court confirmed ('homologación') the withdrawal.
- 4.9.22 Notwithstanding the payment made to ICLAM by the 1971 Fund and the subsequent withdrawal of its claim from the Court, the Maracaibo Criminal Court condemned the master, shipowner and Gard Club to pay Bs57.7 million. The 1971 Fund appealed on the grounds that ICLAM had already been compensated.
- 4.9.23 The Maracaibo Criminal Court of Appeal rejected this appeal stating that a certain amount of money should be paid for the systematic monitoring of the affected area as, even though it was for the same purpose (as the payments made by the 1971 Fund), it was not for the same item, since one sum was paid in a transaction made in civil proceedings and the other for estimated court costs relating to the reparation of damages arising from the committing of a criminal offence.

The calculation of losses

- 4.9.24 The 1971 Fund appealed on the grounds that the method of calculation of losses was not applicable under the 1969 CLC and 1971 Fund Convention in that, even if changes in the ecology of the area had occurred, it had not been demonstrated that these were due to the spill and that an abstract mathematical formula had been used in the calculation of the amount claimed and awarded.

- 4.9.25 The Maracaibo Criminal Court of Appeal stated that this argument constituted a strategy to transfer the civil proceedings derived from a criminal offence to one of purely maritime scope ignoring the pre-eminence of criminal law and the civil proceedings which arose from the establishment of criminal liability as a result of the committing of a crime.
- 4.9.26 The Maracaibo Criminal Court of Appeal dismissed the appeal on the grounds that the 1971 Fund should have indicated at the right time its disagreement with the methodology employed by the experts in whose report the amount of the alleged loss had been calculated. It should, however, be noted that the report submitted by the Public Prosecutor had been contested at the time by the 1971 Fund when the Fund had presented its expert's report at the Criminal Court in Cabimas.

The failure to examine the evidence submitted by the 1971 Fund

- 4.9.27 The 1971 Fund additionally appealed on the grounds that the Maracaibo Criminal Court of First Instance had not examined the evidence submitted by the defendants and the 1971 Fund but had taken into account only the experts' report submitted by the Public Prosecutor in 1997.
- 4.9.28 The Maracaibo Criminal Court of Appeal dismissed the appeal on the grounds that the Maracaibo Criminal Court of First Instance had examined all the elements on the record and that the judgement was in keeping with the law.

Judgement by the Supreme Court (Criminal section) in May 2013

- 4.9.29 In May 2013 the Supreme Court (Criminal section) upheld the judgement of the Maracaibo Criminal Court of Appeal and the Maracaibo Criminal Court of First Instance, dismissing the appeals by the master, the shipowner, the Gard Club and the 1971 Fund. This judgement is now final.

5 Civil proceedings

5.1 Claim by the Republic of Venezuela in the civil proceedings

- 5.1.1 The Bolivarian Republic of Venezuela has also presented a claim against the shipowner, the master of the *Nissos Amorgos* and the Gard Club before the Civil Court of Caracas for an estimated amount of US\$20 million, later increased to US\$60 250 396. The 1971 Fund has not been notified of this civil action.
- 5.1.2 The two claims presented by the Bolivarian Republic of Venezuela were duplications since they were based on the same university report and relate to the same items of damage. The Procuraduria General de la Republica (Attorney General) admitted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001.

Considerations by the 1971 Fund Administrative Council on the claims by the Republic of Venezuela

- 5.1.3 At the 1971 Fund Administrative Council's eighth session held in June 2001, the Venezuelan delegation stated that the Bolivarian Republic of Venezuela had decided to withdraw its claim that had been presented in the Civil Court of Caracas and that the withdrawal would take place as soon as the necessary documents had been signed by the shipowner and his insurer. It was stated that the withdrawal of that claim had been decided for the purpose of contributing to the resolution of the *Nissos Amorgos* case and to assist the victims, especially the fishermen, who had suffered and were still suffering the economic consequences of the incident. As at October 2013, this claim had not been withdrawn.
- 5.1.4 In July 2003, the 1971 Fund Administrative Council recalled the position taken by the governing bodies of the 1971 and 1992 Funds as regards the admissibility of claims relating to damage to the environment. In particular it was recalled that the IOPC Funds had consistently taken the view that claims for compensation for damage to the marine environment calculated on the basis of theoretical models were not admissible, that compensation could be granted only if a claimant had suffered a quantifiable economic loss and that damages of a punitive nature were not admissible. The 1971 Fund

Administrative Council considered that the claims by the Bolivarian Republic of Venezuela did not relate to pollution damage falling within the scope of the 1969 CLC and the 1971 Fund Convention and that these claims should therefore be treated as not admissible.

5.1.5 The 1971 Fund Administrative Council noted that the two claims presented by the Bolivarian Republic of Venezuela were duplications and that the Procuraduria General de la Republica (Attorney General) had accepted that this duplication existed, as stated above.

5.1.6 At its October 2005 session the 1971 Fund Administrative Council endorsed the Director's view that the claims by the Bolivarian Republic of Venezuela were time-barred in respect of the 1971 Fund since Article 6.1 of the 1971 Fund Convention requires that, in order to prevent a claim from becoming time-barred in respect of the 1971 Fund, a legal action has to be brought against the Fund within six years of the date of the incident and no legal action had been brought against the 1971 Fund by the Bolivarian Republic of Venezuela within the six-year period, which expired in February 2003.

5.2 Claims by fish processors

5.2.1 Three fish processors presented claims totalling US\$30 million in the Supreme Court against the 1971 Fund and the Instituto Nacional de Canalizaciones. The claims were presented in the Supreme Court because one of the defendants is an agency of the Bolivarian Republic of Venezuela and, under Venezuelan law, claims against the Republic have to be presented before the Supreme Court.

5.2.2 In November 2002, the Supreme Court decided to consolidate all civil claims pending in relation to the *Nissos Amorgos* incident. Therefore the civil claim by the Bolivarian Republic of Venezuela is now in the Supreme Court (Political administrative section), together with the claims by the three fish processors. The Supreme Court will act as a Court of First Instance and its judgement will be final.

5.2.3 In August 2003 the 1971 Fund submitted pleadings to the Supreme Court arguing that, as the claimants had submitted and subsequently renounced claims in the Criminal Court in Cabimas and the Civil Court in Caracas against the master, the shipowner and the Gard Club for the same damage, they had implicitly renounced any claim against the 1971 Fund. The 1971 Fund also argued that not only had the claimants failed to demonstrate the extent of their loss, but the evidence they had submitted indicated that the cause of any loss was not related to the pollution. As at October 2013 there had been no developments in respect of these claims.

5.2.4 At its October 2013 session the 1971 Fund Administrative Council decided that since the loss of income had not been proven the 1971 Fund should not pay compensation in respect of this claim.

6 Other issues

6.1 Meetings with the Gard Club and the International Group of P&I Associations in 2013

6.1.1 A meeting took place with the Gard Club in Arendal, Norway in June 2013, between the Chief Legal Counsel and the Head of Claims from the Gard Club, Mr Alfred Popp, Chairman of the Consultation Group on the winding up of the 1971 Fund, Mr Gaute Sivertsen, Chairman of the 1992 Fund Assembly who had kindly facilitated the arrangement of the meeting, and the Director of the IOPC Funds on behalf of the 1971 Fund.

6.1.2 During the meeting it was mentioned that the Club would look to the Fund for reimbursement of any sum above the limitation amount. The Director stated, however, that the 1971 Fund could only pay compensation arising from a legal obligation and, in this case, the judgement by the Supreme Court of Venezuela had not ordered the 1971 Fund to pay compensation.

6.1.3 A further meeting with the International Group of P&I Associations, the Gard Club, the Chairman of the Consultation Group and the Director took place in September 2013. The parties did not reach an agreement, however, all parties considered that it was important to continue the discussions.

7 Considerations

7.1 Considerations by the 1971 Fund Administrative Council in October 2013

Statement by the International Group of P&I Associations

- 7.1.1 At the October 2013 session of the 1971 Fund Administrative Council the International Group of P&I Associations (International Group) stated that the first consequence of the judgement of the Supreme Court was that steps were being taken to draw down on the limitation fund guarantee and that in its judgement, the Maracaibo Criminal Appeal Court had stated that the bank guarantee provided by the Club did not constitute a limitation fund but a simple security for the claim by the Venezuelan State, and that the judgement could therefore be enforced against it. In the view of the Gard Club the Court had wrongly appropriated a properly constituted limitation fund in favour of one party alone, to the exclusion of other parties with claims against it. The International Group stated that execution proceedings were in progress to satisfy the judgement and it appeared that account would not be taken of the Club having already paid claims up to the limitation amount, those claims having been paid by the Club according to the practice agreed between the Club and the Fund and that as a result, it was likely the Club would have to bear at least twice the limitation amount and would therefore be faced with having paid over the CLC limit through no fault of the Club. It was also stated that this was exactly one of the scenarios that this delegation had been explaining to States in the context of the interim payments debate in the 1992 Fund sixth intersessional Working Group.
- 7.1.2 The International Group also stated that in its view the ruling in Venezuela could have no bearing on the accounting position between the Club and the Fund since there had never been any dispute between the Club and the Fund that the shipowner is entitled to limit liability.
- 7.1.3 The International Group also stated that another possible consequence of the judgement of the Supreme Court was that the Court might look to the shipowner and the Club to satisfy the remainder of the judgement and that if this were to happen the Club would seek reimbursement from the Fund for the sum in excess of the shipowner's limitation amount. Reference was made to the fact that the judgement of the Venezuelan Criminal Court in 2010, upheld by both the Criminal Court of Appeal and the Supreme Court, had stated that the Fund was legally liable to pay.

Director's considerations

- 7.1.4 The Director sympathises with the situation in which the Gard Club finds itself. In 1997, the Criminal Court in Cabimas held that the shipowner's liability was limited to some US\$7.3 million. Now, fourteen years later, this decision has been overturned and the shipowner has been denied the right to limit his liability. In the Director's view, this decision by the Venezuelan Courts is wrong since there are no grounds to hold that the shipowner is not entitled to limit his liability.
- 7.1.5 The judgement by the Court of First Instance, confirmed by the Court of Appeal and Supreme Court, rejected the shipowner's request to limit his liability and stated that it would be for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund. However, the judgement by the Venezuelan Courts is not against the 1971 Fund.
- 7.1.6 The Director considers that it would be very difficult for the 1971 Fund to agree to pay compensation in excess of the shipowner's limitation amount since the judgement is not against the 1971 Fund. In the Director's view, the 1971 Fund can only pay compensation based on a legal obligation to do so and, in this case, a legal obligation does not exist.

1971 Fund Administrative Council decisions

- 7.1.7 The 1971 Fund Administrative Council, whilst expressing sympathy for the shipowner and the Club in this case, decided that the 1971 Fund should not reimburse the Club of any payments made as a consequence of the Supreme Court judgement (Criminal section) in respect of the claim by the Bolivarian Republic of Venezuela.

7.1.8 The 1971 Fund Administrative Council also decided:

- (a) with respect to the *Nissos Amorgos* incident, to continue discussions with the Gard Club relating to the accounting position in respect of joint costs and to report to the Administrative Council at its next session;
- (b) that the 1971 Fund had no legal obligation to reimburse the Gard Club any amounts paid as a consequence of the judgement by the Supreme Court of Venezuela, as already decided by the 1971 Fund Administrative Council in respect of the *Nissos Amorgos* incident;
- (c) that the claim submitted by the Bolivarian Republic of Venezuela before the Supreme Court (Political administrative section) in respect of the *Nissos Amorgos* incident was time-barred in respect of the 1971 Fund and not admissible for compensation, and instructed the Director not to pay any compensation or reimbursement in respect of this claim and to discontinue the defence of the 1971 Fund before the courts; and
- (d) that the claim submitted by three fish processors before the Supreme Court (Political administrative section) for loss of income in respect of the *Nissos Amorgos* incident had not been proven, and instructed the Director not to pay any compensation in respect of this claim and to discontinue the defence of the 1971 Fund before the courts.

8 Developments between October 2013 and May 2014

- 8.1 In accordance with the decisions taken by the 1971 Fund Administrative Council at the October 2013 session, the 1971 Fund discontinued its defence in the legal proceedings in relation with this case in Venezuela.
- 8.2 Following an examination of the accounting position in respect of joint costs incurred by the Gard Club and the 1971 Fund in respect of this case, the 1971 Fund made an offer of US\$344 090 to the Gard Club in payment of the 1971 Fund's contribution to the joint costs. The Gard Club did not accept the offer.
- 8.3 In March 2014 a meeting took place with the International Group of P&I Associations (International Group) and the Gard Club where the Director informed the International Group and the Gard Club of the steps being taken towards the winding up of the 1971 Fund. The *Nissos Amorgos* incident was also discussed during this meeting.
- 8.4 On 19 March 2014, the 1971 Fund was served with a legal action brought by the Gard Club against the 1971 Fund in the High Court in London. In the legal action it was argued that in 1997 the 1971 Fund had entered into an agreement with the Gard Club to reimburse the Club in respect of the Club's liability to the Bolivarian Republic of Venezuela under the judgement of the Venezuelan courts.
- 8.5 Moreover, on 21 March 2014, the 1971 Fund was served with an application by the Gard Club to the High Court in London for a 'freezing injunction' which, if granted, would prevent the 1971 Fund from removing assets up to an amount of US\$58 million.
- 8.6 The 1971 Fund disputed the jurisdiction of the English courts to hear these matters since, pursuant to the Headquarters Agreement between the UK and the 1971 Fund and the implementing UK Statutory Instrument, the 1971 Fund's property and assets are immune from any form of provisional judicial constraint. The Fund also enjoys immunity from jurisdiction and execution within the scope of its official activities.
- 8.7 The Gard Club also started a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas, Bolivarian Republic of Venezuela, requesting the Court to declare that the 1971 Fund should either pay the Bolivarian Republic of Venezuela the amount awarded in the judgement rendered by the Supreme Court of Venezuela or reimburse the Gard Club any amount it pays in excess of the shipowner's limit of liability and up to the 1971 Fund limit.

- 8.8 In the legal action the Venezuelan Court requested the Director to appear before the Maritime Court in Caracas to answer the Gard Club's action. This legal action has not been served on the 1971 Fund.
- 8.9 The Director, together with the 1971 Fund's legal advisers, met with the Legal Advisers of the United Kingdom Foreign & Commonwealth Office (FCO) on 24 April 2014 to inform them of the claim against the 1971 Fund in the High Court in London (see paragraph 6.3.1 of document [IOPC/MAY14/3/10](#)) and of the application for a 'freezing injunction'. The Director requested the assistance of the FCO to ensure that the High Court in London was aware that, under the Headquarters Agreement between the United Kingdom Government and the 1971 Fund, the 1971 Fund, within the scope of its official activities, has immunity from jurisdiction and execution and that its property and assets are immune from administrative or provisional judicial constraint.
- 8.10 In a letter to the Director dated 25 April 2014, the FCO stated the following:

I confirm that the United Kingdom is bound by the terms of the Headquarters Agreement of 27 July 1979 to afford to the 1971 International Oil Pollution Compensation Fund the privileges and immunities set out in the Agreement. The International Oil Pollution Compensation Fund (Privileges and Immunities) Order 1979 (SI 1979/912) was made to give effect to the Agreement. The language of the Order reflects the terms of the International Organisations Act 1968, which contains the relevant enabling power. Accordingly I confirm that the obligations of the United Kingdom under the Headquarters Agreement, including in particular Article 5 thereof, are given full effect in the Order.

- 8.11 The Director submitted a copy of the letter from the FCO to the High Court in London for its consideration.

9 Hearing of the application for a 'freezing injunction'

- 9.1 The hearing of the application for a 'freezing injunction' took place on 1 May 2014 before Mr Justice Hamblen in the High Court (Commercial Court) of London.
- 9.2 After a full day's hearing during which both parties' submissions were completed, Mr Justice Hamblen reserved judgement until 7 May 2014.

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ANNEX II

JUDGEMENT ON THE APPLICATION FOR A 'FREEZING INJUNCTION'

1. On 7 May 2014 the High Court in London decided that the Gard P&I Club was entitled to the freezing order relief it had requested against the 1971 Fund in support of its claim in England. The Court also decided not to grant an injunction in support of the proceedings brought in the Bolivarian Republic of Venezuela.
2. In the decision, the Court dealt first with the issue of whether the 1971 Fund had immunity from freezing injunctions in all circumstances.
3. Section 6 of the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979, (the 'Order') which gives effect to the Headquarters Agreement under UK law states:
 - (1) within the scope of its official activities the Fund shall have immunity from suit and legal process except:
 - (a) to the extent that it shall have waived such immunity in a particular case;
 - (b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;
 - (c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;
 - (d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;
 - (e) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
 - (f) in the event of the attachment or, in Scotland, arrestment, pursuant to the order of a court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member;
 - (g) in respect of the enforcement of an arbitration award made under Article 23 of the Agreement; and
 - (h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.
 - (2) Paragraph 1 of this Article shall not prevent the taking of such measures as may be permitted by law in relation to the property and assets of the Fund in so far as they may be temporarily necessary in connection with the prevention and investigation of accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.
4. The Court held that this provision does not have the effect of granting the Fund a general immunity from freezing injunctions.
5. The words 'suit and legal process' in section 6 of the Order clearly include freezing injunctions, and the Judge therefore found that the effect of the Order is that immunity from freezing injunctions only exists in respect of matters which do not fall within any of the exceptions listed in section 6(1) of the Order.

6. The Judge acknowledged that the immunity granted by the Order appears to be less extensive in this respect than under the Headquarters Agreement, which provides:
- (1) Within the scope of its official activities, the Fund shall have immunity from jurisdiction and execution except:
 - (a) to the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;
 - (b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;
 - (c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;
 - (d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;
 - (e) in respect of civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
 - (f) in the event of the attachment, pursuant to the final order of court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;
 - (g) in respect of the enforcement of an arbitration award made under Article 23 of this Agreement; and
 - (h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.
 - (2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except insofar as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.

7. The Judge considered the meaning and effect of section 6 of the Order to be clear and unambiguous. He therefore found that effect should be given to it without regard to the differing text of the Headquarters Agreement and indeed without regard to the Conventions, which might otherwise aid the construction of the Order. This was regardless of (in the Judge's words) "whether it means that the UK would be in breach of its obligations under the HQ Agreement".

8. The Court then considered whether the Gard Club had a 'good arguable case' that its claims fell within the exceptions from immunity in section 6(1) of the Order.

Claim by the Gard Club in England

9. The Judge found that the Gard Club had a good arguable case that its claim in England based on the alleged claims handling agreement with the Fund falls within the exception from immunity in section 6(1)(c) of the Order on the grounds that the alleged funding arrangements amount to a 'loan' or at least a 'transaction for the provision of finance'.

10. The Court then considered whether the Gard Club has satisfied the requirement for a 'good arguable case on the merits' of its substantive claim against the 1971 Fund.

11. Whilst noting that real issues are likely to arise on the facts, the Judge considered that the Gard Club could satisfy the good arguable case threshold in respect of its English claim based on the alleged claims handling agreement with the Fund.

Claim by the Gard Club in Venezuela

12. However, the Judge held that the Gard Club had failed to make out a good arguable case that the Venezuelan court proceedings brought by the Gard Club against the Fund fall within the exception to immunity at section 6(1)(b) of the Order for claims brought 'in accordance with the provisions of the [1971 Fund] Convention'. The Judge found that the claim in Venezuela is not a 1971 Fund Convention claim.
13. Although the issue did not arise in view of the Judge's finding on immunity relating to the Venezuelan proceedings, the Judge noted that the only evidence before the Court from the Gard's Venezuelan lawyer was that Gard had a good arguable case in Venezuela.

Effect of the freezing injunction

14. The effect of a freezing order made by the English High Court is that:
 - (a) The 1971 Fund, and any persons made aware of the order (including, for example, the 1971 Fund's bankers), may not remove from England or dispose of the Fund's assets up to the sum of US\$58 million (effectively, any of the 1971 Fund's assets).
 - (b) However, the 1971 Fund is not prevented from dealing with its assets in the ordinary course of its business, including making compensation payments under the 1971 Fund Convention and paying its ordinary expenses, or from spending reasonably on legal representation.
15. The text of the judgement, in English, is published in the IOPC Funds' website (www.iopcfunds.org).