INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item:4	IOPC/APR15/**4/4/1**	
Original: ENGLISH	1 April 2015	
1992 Fund Assembly	**92AES19**	●
1992 Fund Executive Committee	**92EC64**	
1992 Fund Working Group 7	**92WG7/4**	

FUNDING OF INTERIM PAYMENTS

Submitted by the International Group of P&I Associations

Summary:	The International Group of P&I Associations previously informed the Director that it had put on hold the discussions on clarifying the basis on which interim payments were made, due to the discussions taking place on the *Nissos Amorgos* and the winding up of the 1971 Fund. In light of the decision taken by the 1971 Fund Administrative Council to wind up the 1971 Fund by the end of 2014, the International Group has revisited the issue of the funding of interim payments and invites the 1992 Fund Assembly to take note of the information contained in this document.
Action to be taken:	1992 Fund Assembly Information to be noted.

1 Introduction

1.1 When the International Group of P&I Associations (IG) first approached the IOPC Funds' Secretariat in 2008 with a view to clarifying the basis on which interim payments were made in respect of claims where the CLC limit was exceeded and which were funded by both the P&I Club and the Fund, it was not envisaged that this would be a particularly difficult or controversial exercise, the main purpose being to record established practice.

1.2 Although initial progress in discussions was slow, the study prepared in February 2012 by Måns Jacobsson and Richard Shaw on joint instructions from the 1992 Fund and the International Group assisted in providing clarification on one key point, namely acknowledgement in paragraph 11.5 of that study that 'the International Group's contention that when a P&I Club makes interim payments, it does so partly on its own behalf and partly on behalf of the 1992 Fund...would be compatible with the 1992 Fund Convention' (see Annex to document IOPC/APR12/10/1).

1.3 It appeared that the IG and the Fund had finally found common ground and in 2013 the IG and the IOPC Funds' Secretariat were close to agreeing a set of principles. Paragraph 4.3.7 of document IOPC/OCT13/11/1 records that:

'In relation to the outstanding issue of interim payments, the Director stated that this was a difficult issue and that in principle he had reached a form of understanding, pending final agreement with the International Group, that whenever interim payments were made in the future, these interim payments would be made on behalf of both the shipowner/insurer and the 1992 Fund.'

1.4 The discussion on these principles was however never concluded and was overtaken by another event, namely the move by the IOPC Funds to wind up the 1971 Fund by the end of 2014.

2 Current situation

2.1 The decision to wind up the 1971 Fund and the conduct of the *Nissos Amorgos* case have raised a number of fundamental issues for the P&I Clubs which were not considered to be significant when the discussion on interim payments started in 2008. The main concerns are as follows.

2.2 Compensation not available although Fund limit not reached

2.2.1 During the discussions on interim payments, it was accepted by both the IG and the 1992 Fund that the main concern was to deal with a need to arrange speedy compensation in a situation where total claims exceeded the amounts available under CLC and the Fund Convention. It was considered that as long as claims did not exceed the Fund limit, correct apportionment would be dealt with as a matter of routine between the Club and the Fund, reflecting the interim payment practices which became established, as described in the study prepared by Måns Jacobsson and Richard Shaw. However, in the *Nissos Amorgos* case, the 1971 Fund has been wound up with payments having been made by the 1971 Fund of approximately USD 18.3 million, approximately USD 58 million short of the 1971 Fund limit whilst the shipowner faces claims far in excess of the 1969 CLC limit. As a result, Clubs now also have concerns about cases where total claims fall within the 1992 Fund limit and not just where that limit is exceeded.

2.2.2 Clubs have previously proceeded in the expectation that, if interim payments had been made up to the CLC limit, the Fund would take over responsibility for payment of claims established by a judgment or agreed settlement, subject to those payments not exceeding the Fund limit. Since the 1971 Fund has successfully maintained that there was no legally binding obligation or agreement to this effect, it follows that Clubs will have to take a fresh approach when considering whether and how to make interim payments. Since it is not possible to rely in future on previous expectations, other ways now have to be found of making the system work as intended.

2.3 Agreements and Immunity

The concept of an agreement between the IOPC Funds and the Clubs to supplement the Conventions dates back to the first Memorandum of Understanding (MOU) entered into in 1980 and revised in 1996 and 2006. However, reliance by the 1971 Fund on immunity in the *Nissos Amorgos* case brought against it by the Gard Club calls into question the value of an agreement on this issue. The Clubs are now in the position that they will not be able to enforce any agreement in the future without the risk that the Fund will seek to rely again on its immunity. The International Group therefore has concerns about relying on the MOU or any similar future agreement unless there is a valid waiver of immunity by the 1992 Fund in relation to any such agreement.

2.4 Claims not meeting IOPC Funds' criteria but upheld by competent Court

2.4.1 The IOPC Funds has developed its criteria on the admissibility of claims over many years in conjunction with the IG and others. The Clubs fully support these criteria and have contributed to their development. It has, however, always been clear that claims were ultimately determined by the courts of a State Party in the relevant jurisdiction. In the *Nissos Amorgos* case, it was clear that the 1971 Fund was bound by the final judgment of the Supreme Court (in accordance with Article 7.6 of the 1971 Fund Convention) but for a variety of reasons it nevertheless refused to pay. The particular issue which arose over the merits of the Bolivarian Republic of Venezuela's claim cannot repeat itself in future, as claims of this kind are excluded by the 1992 Conventions. However, the supremacy of the competent courts remains a matter of important principle, as Clubs and their Members will generally be unable to refuse to settle final judgments.

2.4.2 The position taken by the 1971 Fund in this regard in the *Nissos Amorgos* case gives the Clubs the concern that they alone are exposed to claims adjudged to be recoverable by the competent courts but determined by the Fund not to meet its own criteria.

2.5 Collection of contributions

It was also made clear during the discussions on the winding up of the 1971 Fund that supposed difficulties in collecting contributions was one reason why the winding up of the 1971 Fund by the end of 2014 was the favoured approach. This should not, however, affect the question of whether the Fund should in principle meet claims, even though it was clearly a factor taken into account by delegates. The Clubs also have to make recoveries from pooling partners and from over ninety reinsurers in much the same manner that the IOPC Funds collects contributions from contributors.

3 Looking ahead

3.1 The IG recognises that it must continue to maintain a working relationship with the IOPC Funds' Secretariat and the Clubs will continue to strongly support the compensation system established by the Conventions, which has served claimants well for more than 40 years. The way in which the Clubs and the 1992 Fund operate together will, however, in all likelihood need to be different going ahead.

3.2 It would not be correct to assume that the Clubs' concerns are solely attributable to the unique circumstances of the winding up of the 1971 Fund. As mentioned earlier, the Clubs and the 1992 Fund have recognised the need for clarification of the basis upon which interim funding might take place since 2008. However, points raised by the IOPC Funds' Director and some States in the discussions on the winding up of the 1971 Fund and in the defence of the *Nissos Amorgos* proceedings will continue to have consequences for Clubs and add to Clubs' concerns about the risk of overpayment if raised in future cases.

3.3 As States are fully aware, Clubs can fulfil their legal obligations under the 1992 CLC by establishing a limitation fund without making any interim payments. This option will always be open to Clubs. However, Clubs also have the alternative of making interim payments on a basis which is different from the common practice in previous cases.

3.4 As was mentioned by the IG in document IOPC/OCT09/10/1 submitted to the 1992 Fund Assembly meeting in October 2009, the possibility was considered as far back as 1999 (see document 71FUND/EXC.60/12/1, 92FUND/EXC.2/6/1) of apportioning interim payments between the Club and the IOPC Funds such that any interim payments funded by the Club would only cover the CLC portion of the total amount that each claimant would be entitled to under the CLC/Fund Convention system.

3.5 This would fundamentally change the approach taken to the payment of claims and be administratively inconvenient since it would lead to claimants receiving compensation from two different parties ie the insurer and the 1992 Fund, require the Fund to be involved in funding claims from the outset in all large cases, and potentially cause delay. It would necessitate the Club making an estimate of the final proportions of total claims ultimately payable under the 1992 CLC and the 1992 Fund Convention. It would also complicate the hitherto simple reconciliation process at the conclusion of a case.

3.6 As a result, and taking particular account of the approach taken by the IOPC Funds' Director and the States in the winding up of the 1971 Fund, the International Group is currently considering whether any concerns surrounding the funding of interim payments can more effectively be dealt with on a case-by-case basis rather than through a generic agreement with the 1992 Fund that would apply to all future 1992 CLC/1992 Fund cases. The *Hebei Spirit* incident in 2007 is the only major casualty involving an IG Club and the 1992 Fund since the current limits came into force in 2003.

3.7 The IG has previously referred to the Second Cooperation Agreement reached in that case as an illustration of a post-spill agreement reflecting the individual circumstances of the case. Accordingly, the IG is prepared to re-open the discussions with the IOPC Funds' Director on the possibility of a legally binding generic agreement which builds on the concept of the MOU. The IG also considers that case specific agreements may have a role to play.

4 Action to be taken

1992 Fund Assembly

The 1992 Fund Assembly is invited to take note of the information contained in this document