



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 4	IOPC/APR16/4/5	
Original: ENGLISH	17 March 2016	
1992 Fund Assembly	92AES20	•
1992 Fund Executive Committee	92EC66	
Supplementary Fund Assembly	SA12	•

INTERIM PAYMENTS

PROGRESS REPORT

Note by the Chairman of the Consultation Group on interim payments

Summary:	<p>At its October 2015 session, the 1992 Fund Administrative Council noted that agreement had yet to be reached between the IOPC Funds and the International Group of P&I Associations (International Group) on the issue of interim payments.</p> <p>In order to make progress on this matter, the Administrative Council decided to establish a Consultation Group to work with the Director and the International Group on this complex and difficult issue.</p> <p>The Consultation Group has met twice since it was set up and its progress report is contained in this document.</p>
Action to be taken:	<p><u>1992 Fund Assembly and Supplementary Fund Assembly</u></p> <p>(a) Take note of the information contained in this document; and</p> <p>(b) decide whether the Consultation Group should continue its work with its remaining four members.</p>

1 Introduction/Background information

- 1.1 At its October 2015 session, the 1992 Fund Administrative Council recalled that, in July 2011, the 1992 Fund 6th intersessional Working Group had established a Consultation Group of a small number of Member States, the Comité Maritime International (CMI), the International Group of P&I Associations (International Group) and the Secretariat to further consider the complex legal and technical issues of subrogation rights and interim payments.
- 1.2 The Administrative Council further recalled that the Consultation Group had met in July and October 2011 to discuss how to proceed and, as a result of the discussions, the Director and the International Group had decided to jointly commission a study to address, *inter alia*, the following issues:
- (a) the practice that had been followed by the P&I Clubs and the IOPC Funds in making interim payments under the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention, and previously under the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention;
 - (b) the problems faced by P&I Clubs when making interim payments; and
 - (c) the possible solutions to the problems identified in (b) above.

- 1.3 The Administrative Council also recalled that the Secretariat and the International Group had engaged the services of Mr Måns Jacobsson (a former Director of the IOPC Funds) and the late Mr Richard Shaw of CMI to carry out the study.
- 1.4 The Administrative Council also recalled that the International Group and the Director had held a number of constructive and useful meetings since October 2013 on the issue of interim payments with the aim of finding a solution which would be agreeable to both the International Group and the IOPC Funds. Options discussed had included a possible amendment to the 2006 Memorandum of Understanding (MoU) between the International Group and the Funds^{<1>} and the adoption of an Assembly Resolution.
- 1.5 The Administrative Council further recalled, however, that as the subject was complex and difficult, no form of wording suitable to both parties had yet been found and the parties were continuing to discuss the issues.
- 1.6 In order to make progress on this matter, in October 2015, the 1992 Fund Administrative Council decided to establish a Consultation Group to work with the Director and the International Group on the issue of interim payments with the following mandate:
- (a) To examine the issues which need to be resolved in respect of interim payments.
 - (b) To discuss the text of a new Memorandum of Understanding (MoU) between the International Group and the 1992 Fund and Supplementary Fund which would contain the terms and conditions under which interim payments would be made in future.
 - (c) To make recommendations to the governing bodies at their October 2016 sessions.
- 1.7 The Administrative Council decided upon the following composition of the Consultation Group:
- Germany, Mr Volker Schöfisch
 - Greece, Lt Commander Antonios Doumanis
 - Italy, Minister Plenipotentiary Antonio Bandini
 - Japan, Mr Jotaro Horiuchi
 - Nigeria, Captain Ibraheem Olugbade
- 1.8 The Administrative Council also decided that the Consultation Group may wish to consult with the Chairman of the 1992 Fund Assembly and the Chairman of the Supplementary Fund Assembly and with legal and other experts as required.

2 Work of the Consultation Group

First meeting

- 2.1 The first meeting of the Consultation Group took place on 21 October 2015. Mr Volker Schöfisch was unanimously elected Chairman of the Group. The Chairmen of the 1992 Fund and Supplementary Fund Assemblies and two legal advisers, Dr Rosalie Balkin and Mr Alfred Popp, were invited to join the meeting as observers. After initial discussions, representatives of the International Group were invited to join the meeting. The Consultation Group noted that the two key stumbling blocks for the International Group were immunity of jurisdiction and the definition of ‘established claims’ and that there was the need for both parties to find a middle ground so as to avoid another situation such as that of the *Nissos Amorgos*^{<2>}.

<1> Memorandum of Understanding between the International Group and the 1992 Fund and Supplementary Fund signed on 19 April 2006.

<2> For details of this incident, please visit <http://www.iopcfunds.org/incidents/incident-map/#94-1997-60-February>.

- 2.2 The Consultation Group agreed to study in detail all the documents that the Group had before it before its next meeting. It further noted that the Chairman would prepare a short paper based on all the documents to hand and circulate it to the Consultation Group, Chairmen of the governing bodies, legal advisers and the International Group for comments before the next meeting of the Consultation Group on 12 February 2016.
- 2.3 In the meantime, the Chairman met with the Director and Dr Rosalie Balkin on 27 November 2015 in order to understand the complex legal documents that had been submitted by the Secretariat and the International Group (draft amendments to the existing International Group/IOPC Funds' MoU and a new draft Appendix from each party). He subsequently met with representatives of the International Group and with the Director on 11 January 2016.

Second meeting

- 2.4 The Consultation Group held its second meeting on 12 February 2016. The Chairmen of the 1992 Fund and Supplementary Fund Assemblies, Mr Alfred Popp (legal adviser) and representatives of the International Group also participated in the meeting.
- 2.5 The Consultation Group recalled that the existing MoU between the International Group and the 1992 Fund and Supplementary Fund which had been signed on 19 April 2006 provided, *inter alia*, details of cooperation on claims-handling procedures, including the need for the establishment of a joint Claims Handling Office, and the use and sharing of costs of joint experts and surveyors employed to assess claims under the Conventions. The Consultation Group agreed that the 2006 MoU should be maintained.
- 2.6 The Consultation Group considered a legal opinion by Dr Rosalie Balkin on the interpretation of Article 7.6 of the 1992 Fund Convention. It was noted that the nature of the 1992 Fund's obligation under Article 7.6 was a limited one, specifically not to dispute the facts and findings contained in any judgment rendered by a competent court and that therefore the 1992 Fund was entitled to rely on any defences (including the defences prescribed in Article X of the 1992 Civil Liability Convention) unless such defences were addressed in the judgment of proceedings against the shipowner or insurer.
- 2.7 The Consultation Group also considered the proposed approach of the International Group as set out in the proposed draft amendments to the existing MoU and new Appendix that had been submitted to the Consultation Group for consideration. It was noted that the International Group fundamentally disagreed with the approach that a decision on interim payments should be made by Member States on a case-by-case basis.
- 2.8 The Consultation Group did, however, consider an alternative approach proposed by the International Group, namely the use of case-specific agreements between the 1992 Fund and an International Group Club in the event of a future case that would set out the desire of both parties that the practice of making interim payments should be maintained, and specifying clearly the obligations on the Club and the IOPC Funds (a 'template').
- 2.9 Noting the divergent views that existed, the Consultation Group agreed with the proposal of case specific agreements in future cases and agreed to produce a draft template which would contain a set of terms, conditions and obligations that the parties could agree on a case-by-case basis. If interim payments were to be made by an International Group P&I Club, which met the conditions set out in such an agreement, they would be recognised by the Funds. This agreement could also involve the Member State affected by the oil spill, as described in section 3 of the IOPC Funds' publication, 'Guidance for Member States – Measures to facilitate the claims handling process'. The template would also contain a clause which provides that any disputes between the parties would be subject to the jurisdiction of the English High Court of Justice. This jurisdiction clause would amount to a waiver of immunity by the 1992 Fund and Supplementary Fund in a particular case. The International Group has made it clear that individual Group Clubs will be unable to agree any future case-specific agreements without the inclusion of such a clause.

Future meetings

- 2.10 The Consultation Group will be holding its third meeting on 28 April 2016 and will report back to the governing bodies at their October 2016 sessions.

3 Composition of the Consultation Group

- 3.1 At its second meeting in February 2016, the Consultation Group noted that Captain Olugbade had had to step down as a member of the Consultation Group as he had returned to his capital and would not be in a position to attend this or future meetings of the Consultation Group. The Consultation Group thanked Captain Olugbade for his contribution to the work of the Group.
- 3.2 The Consultation Group is of the view that, given the difficult nature of the subject matter, the appointment of a fifth member of the Consultation Group at this stage would be likely to delay the work of the Consultation Group and that the Group should continue its work with its remaining four members.

4 Chairman's considerations

- 4.1 The Chairman is pleased to report that the Consultation Group has made good progress with this complicated subject and that this has been possible through positive cooperation with the International Group and with advice from the Chairmen of the governing bodies and the Group's legal experts.
- 4.2 The Chairman also notes that the discussions will continue and that it is anticipated that the Consultation Group will provide the governing bodies with a recommendation at their October 2016 sessions.

5 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund are invited to:

- (a) take note of the information contained in this document; and
 - (b) decide whether the Consultation Group should continue its work with its remaining four members.
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