



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

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1992 Fund Assembly	92A17	•
1992 Fund Executive Committee	92EC56	
Supplementary Fund Assembly	SA8	
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ROLE OF MEMBER STATES

Note by the Secretariat

Summary:	<p>At its fourth meeting held in April 2012, the sixth intersessional Working Group discussed fourteen proposals relating to the role Member States could play following an oil spill incident. The advantages and disadvantages of each proposal were discussed by the Working Group with a final recommendation that some minor amendments be made to the proposals before presenting them to the 1992 Fund Assembly in October 2012 for approval. The Working Group also supported a recommendation to the 1992 Fund Assembly that it consider publishing the approved measures as a guidance note to Member States (document IOPC/OCT12/4/2 – Report of the fourth meeting of the sixth intersessional Working Group).</p> <p>This document contains the revised proposals for consideration by the 1992 Fund Assembly.</p>
Action to be taken:	<p><u>1992 Fund Assembly</u></p> <ul style="list-style-type: none">(a) Consider the proposals as set out in sections 2 to 15; and(b) Consider and give such instructions as might be required on the publishing of a guidance document on the role of Member States.

1 Introduction

- 1.1 The fourth meeting of the sixth intersessional Working Group held in April 2012 included a review of fourteen proposed measures that Member States could take in the event of a spill as detailed in document [IOPC/APR12/10/3](#) submitted by the Secretariat. The Working Group discussed the measures and recommended that, having incorporated some minor amendments, the Secretariat should submit the amended proposals for consideration by the 1992 Fund Assembly at its next session. A number of Member States supported a recommendation to the 1992 Fund Assembly that it consider publishing the approved measures as a guidance note to Member States.
- 1.2 The Working Group noted that Member States would be free to decide which and if any of the following proposals (or other measures) they wished to utilise as there was no obligation under the 1992 Civil Liability and Fund Conventions for Member States to apply any such measures. Given that the impact upon claimants in each Member State may depend on which proposals were adopted, Member States may wish to consult with the shipowner's P&I Club and/or the Director of the IOPC Funds prior to applying any of the following proposed measures.
- 1.3 This document contains the revised proposed measures for consideration by the 1992 Fund Assembly.

2 Standing last in the queue

- 2.1 In the *Sea Empress*, *Erika* and *Hebei Spirit* incidents, the affected governments stood last in the queue for settlement of claims for government costs. That is to say that these governments did not pursue their claims until non-government claims had been satisfied and if there were then no monies remaining, they would forgo compensation. In the case of the *Sea Empress*, the UK Government was eventually able to recover all its assessed costs. In the case of the *Erika*, the French Government recovered all its costs but TOTAL, the cargo owner and charterer of the ship who also volunteered to stand last in the queue, was unable to recover any of its costs having stood behind the French Government in the queue for compensation. In the Republic of Korea, the Korean Government is following this measure in respect of the *Hebei Spirit* incident and is standing last in the queue behind other claimants and allowing assessment efforts to be focussed on non-government claimants.
- 2.2 The purpose of standing last in the queue is to avoid or reduce pro-rated payments to non-governmental claimants. However, for this to work, government claims must form a significant proportion of all claims against the IOPC Funds so as to leave sufficient monies for other claimants and, as far as possible, avoid pro-rating. The effect is a *de facto* acceptance that in cases where the Fund's limit is likely to be exceeded, claims are not treated equally and that government claims will be sacrificed for the benefit of non-government claimants. The relevance of this approach to large numbers of small claims is that if small claims are pro-rated, the amount of money that can be paid, in absolute terms, risks becoming so small so as not to provide any significant compensation in relation to damages suffered.

3 Subrogation of claims settled by the State

- 3.1 In the *Prestige* incident the insurers of the vessel followed the provisions of the 1992 Civil Liability Convention (1992 CLC) and deposited the ship's limitation fund with the Corcubi3n Court in Spain. Since this discharged the shipowner's liability, no further payments were due from the shipowner or his insurer and this had the potential effect of excluding any payments of compensation to claimants until the limitation fund could be distributed. In order to avoid this situation, the Spanish Government settled claims against the shipowner and the 1992 Fund and is reclaiming these subrogated claims from the limitation fund in court and the 1992 Fund.
- 3.2 While this approach provides a potential solution to the rapid settlement of claims, a government risks being unable to recover the compensation it paid to claimants if the assessment of those claims were to follow different criteria to those applied by the 1992 Fund. Nevertheless, this approach might be appropriate for small claims if it avoided subjecting victims of an oil spill to undue financial hardship.

4 Cooperation agreements between Member States and P&I Clubs

- 4.1 The Government of the Republic of Korea and the P&I insurer of *Hebei Spirit*, Assurancef3reningen Skuld (Gjensidig) (Skuld Club), made two cooperation agreements. It is the second of these agreements which may provide a model for future incidents where there are both large numbers of small claims and a risk that the 1992 Fund limit will be exceeded in a country that has not yet ratified the Supplementary Fund. This second agreement provides the Skuld Club with assurance that the Club would not pay in excess of the ship's limitation amount. This arrangement allows the Skuld Club to pay assessed amounts up to the ship's CLC limit without further delay. A model cooperation agreement which might be used as the basis for agreement between a Member State and the P&I Club would be provided in the guidance note to Member States to be published by the Secretariat.
- 4.2 Such an arrangement could be useful in future incidents in settling large numbers of small claims because the P&I Clubs have the facility to pay claims relatively quickly. However, it should be noted that the agreement relies on claims having been assessed before payment can be made. In previous sessions of the Working Group, the time taken to complete assessments and, in the case of small claims, to establish their validity against a sufficient level of proof, has been a major component in the discussion.

5 Reimbursement of overpayment of interim payments

One possible solution is that in addition to, or as part of, a cooperation agreement as described above, a Member State and a shipowner's P&I Club might consider an agreement under which the government guaranteed repayment of any overpaid interim payments made by the P&I Club. The concept, raised by the Republic of Korea and the International Tanker Owners Pollution Federation Ltd (ITOPF) in the second meeting of the Working Group (documents [IOPC/MAR11/8/7](#) and [IOPC/MAR11/8/8](#)), might be considered in the development of a cooperation agreement. In order that small claims could be dealt with and paid quickly, a rapid and generalised assessment could be undertaken and interim payments made to relieve financial suffering, as already provided for under the 1992 Fund Convention. Under such an agreement, if, in the light of further more comprehensive investigation, it was found that such payments were overly generous or that claims were not proven, the Government concerned would reimburse the shipowner's P&I Club. If, however, after a full investigation, further payments were due, final settlement of each claim could be made but within the longer time frame of a comprehensive investigation.

6 Memorandum of Understanding (MoU) with domestic insurance bodies

- 6.1 A proposal was put forward by some Member States that wished to work with their national insurance industries, and potentially use the resources and personnel of the domestic insurance industries to assist the 1992 Fund following an incident. The Secretariat prepared two MoUs (Annexes I and II to this document) for consideration by the Working Group at its fourth meeting in April 2012. The intention behind the documents is that if a Member State can agree, in general terms, that the resources of the domestic insurance industry could, if required, be made available to the 1992 Fund, the specific details of the arrangements agreed between the 1992 Fund and the insurer/loss adjusting company could form the basis of a separate MoU.
- 6.2 Accordingly, the first MoU attached at Annex I provides a framework for agreement between the Member State and the insurance industry, whereas Annex II provides a draft MoU proposing cooperation between the 1992 Fund and a specific insurer/loss adjusting company.
- 6.3 There is no conflict between an MoU as outlined above and the longstanding MoU between the 1992 Fund and the International Group of P&I Clubs. The proposed MoUs with domestic insurance companies are simply intended to facilitate the mobilisation of additional experts to meet the common concern expressed following many incidents, namely the lack of available experts.

7 Grouping claims/claimants

- 7.1 This proposal was put forward by a number of Member States. Grouping claimants into categories allows a large number of similar claims to be assessed as one body of claims against the same criteria with the outcome that grouped claims can be dealt with more quickly than if they were presented individually. Member States may therefore wish to consider facilitating the grouping of claimants or working together with the P&I Club and the Secretariat to identify categories of claim which could be treated in this way.
- 7.2 The IOPC Funds have extensive experience of dealing with claims presented by groups of claimants, in particular, fishery associations which may have many hundreds or even thousands of members. A chairman and his staff normally discuss settlement of claims on behalf of the membership on the basis of a power of attorney or an authorisation provided to the chairman by each member. This has the great advantage that the association is responsible for the equitable distribution of the compensation awarded. The chairman and his staff will be aware of which members are no longer, or only slightly, active and which members are the most industrious and will be in a position to allocate compensation accordingly. In the case of the hand gatherers in the *Hebei Spirit* incident, some belonged to fishery associations, many did not. In any event, the individual loans and subrogated rights to the Korean Government meant that it was not possible to group these claimants, resulting in the enormous effort to assess each claim.

8 National expert list

- 8.1 At the second meeting of the sixth intersessional Working Group, one delegation submitted a document proposing, amongst other things, that Member States consider the preparation of a list of national experts (document [IOPC/MAR11/8/6](#) submitted by France). One of the functions proposed for such experts was to assist claimants in the compilation of claims. Such assistance by well-qualified experts would be very useful, not just in the context of small claims but more generally, in advising claimants of the types of claim admissible under the 1992 Fund Convention and the material necessary to support a claim.
- 8.2 The provision of a list of national experts available to the Secretariat could be of benefit in terms of increasing the number of assessments that could be conducted following an incident, which may lead to a reduced overall time of assessment. The IOPC Funds routinely draw upon the expertise of both national and international experts to assist in the assessment of claims and both are selected on the basis of their competence and experience in the field in which claims are being assessed.

9 Expert mediation panel

- 9.1 With regard to the proposal to have an expert mediation panel to decide on disputes between the claimant and the IOPC Funds, as was noted by the International Group of P&I Clubs at the July 2011 meeting of the Working Group, P&I Clubs, in common with the Funds, always focus on trying to agree settlements without recourse to court actions (document [IOPC/JUL11/7/6](#)).
- 9.2 Nevertheless, in claims where there is no disagreement on admissibility but disputes arise regarding interpretation of supporting evidence and the resulting level of compensation offered, setting up an expert mediation panel could be useful to avoid protracted and expensive lawsuits.
- 9.3 A standing list of experts from Member States could be drawn up by the Secretariat based on information provided by Member States for this purpose. At the request of one or several Member States which are affected by an incident, these experts could, if the concerned parties (claimant, P&I Club and IOPC Funds) agree, be called upon to look into possible compromise solutions which could then be proposed to the parties. The costs of these experts would be covered by the IOPC Funds.

10 Pro forma Memorandum of Understanding between Member State, IOPC Funds and P&I Club

At the first meeting of the Working Group a proposal was made to consider a standardised MoU, adjusted to accommodate the circumstances of the incident between the victim Member State, the Secretariat (representing the Funds' governing bodies) and the shipowner's P&I Club. An approach to such an arrangement was in place during the *Hebei Spirit* incident with regular coordination meetings between the three parties although without the benefit of a pre-agreed MoU. The intention of such an MoU would be to cover, for example, the strategic management of the claims handling process, coordination meetings and ensuring every assistance was offered to national and international experts working on the assessment of claims. A *pro forma* MoU which might be used as the basis for agreement between a Member State, the IOPC Funds and the P&I Club would be provided in the guidance note to Member States to be published by the Secretariat.

11 Access to statistical data

- 11.1 In the event of an incident, the P&I Club involved and the 1992 Fund jointly engage both national and international experts to advise them on the assessed level of losses in the sectors affected. Member States can assist these experts by enabling access to requested information sources whether they be, for example, offices of national statistics, tax authorities, fishery associations or regional tourist offices or to data held by any other public body.

- 11.2 Another potential area in which Member States may be able to assist the P&I Club and the IOPC Funds' experts would be to facilitate contact with claimants and reassure them that by providing information and cooperating with the experts, claims can be dealt with more quickly.

12 Standard reference prices

- 12.1 This proposal is for Member States to prepare and maintain an up-to-date database of the prices of commodities at risk of oil pollution damage or alternatively a database of the sources of such information. This would allow one component of the value of losses suffered to be determined without the need for protracted research and associated delays in assessment of claims.
- 12.2 The idea could be further developed to include pre-determining the cost of government spill response assets. The example was given of the Maritime and Port Authority of Singapore which, in coordination with ITOPF, had developed and documented reasonable rates for vessels and specialist equipment in advance of any incident in Singapore waters. In this case, agreement had been reached between the Government of Singapore and ITOPF, one of the experts used by the P&I Clubs and Funds. It may, however, in future be more appropriate that the agreement is reached directly with those responsible for compensation.
- 12.3 Where a database or pre-determined rates have not been established in advance of an incident, Member States may still assist by making such information readily available at the time of the incident.
- 12.4 It was noted that the Secretariat was exploring the possibility of reaching a similar agreement for the use of European Maritime Safety Agency (EMSA) vessels in response to an incident in European waters.
- 12.5 The Working Group also noted that, under the auspices of EMSA, some European Member States had formed a working group to examine how best to assist each other in dealing with maritime claims. The Secretariat, the International Group of P&I Clubs and ITOPF had met with this group in February 2012 to discuss the guidelines produced by the group on claims presentation and the Claims Manual approved by the 1992 Fund Assembly.

13 Coordination between Member State delegates attending IOPC Funds' meetings and response agencies

A point made by the Director in his submission to the second meeting of the sixth intersessional Working Group (document [IOPC/MAR11/8/1](#)) was that the government departments most familiar with the workings of the international regime and representing Member States at meetings of the Funds' governing bodies were very often not the same ministries or agencies directly involved with the response to an incident. The latter might be best referred to as 'practitioners' involved in the day-to-day issues of spill response and subsequent preparation of claims and in most cases were employed by departments or agencies not present at IOPC Funds' meetings. In order to promote a wider understanding of the claims settlement process, Member States might therefore wish to encourage fostering a close working relationship between those attending IOPC Funds' meetings and those government organisations responsible for submitting claims for spill response costs.

14 Use of social security systems

- 14.1 It was noted by the International Group of P&I Clubs, that the shipowner's P&I Club was generally the first party to make interim payments following an incident. However, even these payments must fulfil the criteria under the Civil Liability and Fund Conventions. It was also noted that the criteria for payment under the Conventions did not necessarily equate to payments which may be made under a comprehensive social security system.

- 14.2 In this regard, notwithstanding the potential difficulties which may be faced in attempting to consider payments made under the social security system as qualifiable under the Civil Liability and Fund Conventions' criteria, the social security system of a Member State could still form a very useful source of information to the 1992 Fund's experts.
- 14.3 Member States may see the merit of more readily allowing access to certain pertinent information, which could for instance, allow the 1992 Fund's experts to ascertain at an early stage, whether a claimant was involved in one specific industry type, eg fisheries or tourism. Such information may indicate whether the claimant could potentially have a claim which was admissible in principle, and may also assist in the grouping of claims.

15 Publication of guidance on the role of Member States

It was noted that the number of measures which Member States may wish to consider may increase in the future dependant on further experience. However, concern was expressed that the ideas explored by the sixth intersessional Working Group risked being lost once the reports of these meetings were finalised. The Working Group therefore supported a proposal to recommend to the 1992 Fund Assembly that the Secretariat be instructed to publish a guidance document setting out the various actions and approaches that Member States could take to assist claimants in resolving their claims as quickly as possible. Such guidance or manual might also offer a step-by-step guide to Member States facing an incident in which the 1992 Fund may become involved covering the initial actions, contacts to be made and sources of further information.

16 Future experience and additional measures

In order to take advantage of experience gained in future incidents, Member States may wish to provide the Director with feedback, both positive and negative on the use of any of the measures mentioned above. In addition, Member States are encouraged to provide information on any new, modified or alternative measures employed in incidents not only where the IOPC Funds are involved but also where they are not. This information would be valuable to Member States when they are considering whether to apply or modify any of the measures to suit the specific circumstances of an incident in their country.

17 Action to be taken

1992 Fund Assembly

1992 Fund Assembly is invited:

- (a) to consider the measures set out in sections 2 to 15 above; and
- (b) to consider and give such instructions as might be required on the publishing of a guidance document on the role of Member States.

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ANNEX I

PROVIDING ASSISTANCE FOR THE ASSESSMENT OF CLAIMS FOR COMPENSATION UNDER THE 1992 CIVIL LIABILITY AND FUND CONVENTIONS

Memorandum of Understanding between the Member State and the insurance industry

1. This Memorandum sets out an agreement between the Government of [.....] (“the Contracting State”) and its insurance industry (“the insurers”).
2. The Contracting State is a party to the International Convention on Civil Liability for Oil Pollution Damage 1992, (the “CLC”), and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the “Fund Convention”) [,and the International Oil Pollution Compensation Supplementary Fund 2003 (the “Supplementary Fund”)] (,together the “International Compensation Regime”).
3. The International Compensation Regime provides a mechanism for the provision of compensation for persons who suffer damage caused by oil pollution resulting from the escape or discharge of oil from ships (as defined in Article 1 of the CLC).
4. The International Compensation Regime is administered by the 1992 Fund Secretariat which is tasked with administering the 1992 Fund and the Supplementary Fund, and approving claims for compensation from claimants affected by the oil spill incident.
5. Often following a major oil spill incident, a large number of claims for compensation are filed with the 1992 Fund Secretariat. This places a large burden on the 1992 Fund Secretariat, which could potentially lead to delays in the assessment of claims process.
6. In order to ease this administrative burden, the Contracting State Government proposes to enter into this Memorandum of Understanding with the insurance industry within [Contracting State] in order to prepare for any incident which may impact upon its territory.
7. The Contracting State requests that the insurers make available their resources and personnel in order to assist the 1992 Fund Secretariat with the investigation and assessment of losses arising from an incident as defined in Article 1 of the CLC, if so requested by the 1992 Fund Secretariat.
8. The costs of the provision of such assistance by the insurers are to be paid for by the 1992 Fund [or the Supplementary Fund if the Contracting State is a Member of the Supplementary Fund].
9. The insurers do hereby acknowledge and recognise that the 1992 Fund Secretariat must apply the criteria (“the relevant criteria”) determined by the 1992 Fund Assembly, as specified in the December 2008 Edition of the IOPC Fund Claims Manual, (or whichever subsequent edition is applicable at the time of the incident), when assessing claims for compensation. Accordingly, the insurers agree to use and apply the relevant criteria under the direction of the 1992 Fund Secretariat, when retained by the 1992 Fund Secretariat to assist with assessing losses and claims for compensation arising from an incident.
10. The insurer also recognises and agrees that the final decision as to the level of compensation to be paid to claimants, rests with the 1992 Fund and therefore any assessments conducted by the insurers or any recommendations made, are of an advisory nature only and are subject to the 1992 Fund's and ship insurer's (P&I Club or otherwise) final approval.
11. In a major incident the time required for all claims to be presented, substantiated and assessed, and for more contentious claims to be finally resolved, may typically run to a period of some years. The Contracting State is convinced of the need for prompt payment of compensation.

Accordingly, the aim of retaining the insurers is to enable the swift assessment and payment of claims for compensation to be made. The insurers will therefore use their best endeavours to assist with the process of assessing large numbers of claims using the relevant criteria.

12. The rates for the insurer's services are to be agreed by the 1992 Fund Secretariat with the insurers prior to the insurers commencing work for the 1992 Fund or Supplementary Fund.
13. Any claims or disputes in relation to this Memorandum shall be governed by [Contracting State] law and be subject to the exclusive jurisdiction of the [Contracting State].

Dated []

For the insurer

For the Government of [Contracting State]

Signed

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ANNEX II

**ASSESSMENT OF CLAIMS FOR COMPENSATION
UNDER THE 1992 CIVIL LIABILITY AND FUND CONVENTIONS**

**Memorandum of Understanding between
the International Oil Pollution Compensation Fund 1992 and [loss adjuster]**

1. This Memorandum sets out an agreement between the International Oil Pollution Compensation Fund 1992 (“1992 Fund”) and [the loss adjusting company] (“the Company”) in relation to the procedures and practices to follow when the Company is retained by the 1992 Fund to assist with the investigation and assessment of losses arising from oil pollution damage following an incident as defined in Article 1 of the Civil Liability Convention 1992 (“CLC”).
2. The 1992 Fund and the Company acknowledge that the 1992 Fund must apply the criteria (“the relevant criteria”) determined by the 1992 Fund Assembly, as specified in the December 2008 Edition of the IOPC Fund Claims Manual, (or whichever subsequent edition is applicable at the time of the incident), when assessing claims for compensation. Accordingly, the Company agrees to use and apply the relevant criteria under the direction of the 1992 Fund, when retained by the 1992 Fund to assist with assessing losses and claims for compensation arising from an incident.
3. The Company also recognises and agrees that the final decision as to the level of compensation to be paid to claimants, rests with the 1992 Fund and therefore any assessments conducted by the Company or recommendations made, are of an advisory nature only and are subject to the 1992 Fund and shipowner's insurer's (P&I Club or otherwise) final approval.
4. Furthermore, the Company agrees to liaise with the 1992 Fund as to the best use of the Company's resources and personnel, specifically with regard to the geographic areas to be investigated, and the groups of claimants to be considered for compensation. The 1992 Fund will accordingly liaise with the Company as to where the Company should direct its personnel and resources in order to swiftly conduct the investigations and assessments requested by the 1992 Fund.
5. In a major incident the time required for all claims to be presented, substantiated and assessed, and for more contentious claims to be finally resolved, may typically run to a period of some years. The 1992 Fund are convinced of the need for prompt payment of compensation. Accordingly, the aim of retaining the Company is to enable the swift assessment and payment of claims for compensation to be made. The Company will therefore use its best endeavours to assist with the process of assessing large numbers of claims using the relevant criteria.
6. The rates for the Company's services are to be agreed by the 1992 Fund with the Company prior to the Company commencing work for the 1992 Fund.
7. Any claims or disputes in relation to this Memorandum shall be governed by English law and be subject to the exclusive jurisdiction of the English High Court of Justice.
8. The Company and the 1992 Fund may terminate this Memorandum by giving three months' prior written notice to the other party.

Dated []

For the Company

For the International Oil Pollution
Compensation Fund 1992

Signed

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Jose Maura
Director