

 <p><b>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</b></p>	<b>Agenda item: 7</b>	IOPC/JUL11/7/6	
	Original: ENGLISH	23 June 2011	
	1992 Fund Assembly	<b>92AES16</b>	
	1992 Fund Executive Committee	<b>92EC52</b>	
1992 Fund Working Group	<b>92WG6/3</b>	•	

## 1992 FUND SIXTH INTERSESSIONAL WORKING GROUP

### LARGE NUMBERS OF SMALL CLAIMS

#### Submitted by the International Group of P&I Clubs

<b>Summary:</b>	The International Group of P&I Clubs provides the following comments on the issues for consideration and discussion by the Working Group on the handling of large numbers of claims for small amounts.
<b>Action to be taken:</b>	<u>1992 Fund sixth intersessional Working Group:</u>  Information to be noted.

### **1 Introduction/Background information**

- 1.1 The International Group of P&I Clubs (International Group) welcomes the proposal by the Chairman of the 1992 Fund sixth Intersessional Working Group to concentrate further discussion on those contributions from Member States which, by way of changes to the Claims Manual/rules/policies, would give the Secretariat and IOPC Funds more flexibility in the assessment procedure, specifically those contained in section 4 of document IOPC/JUL11/7/1. These proposals, as well as those submitted by the Member States to the previous meeting of the Working Group, are of equal importance to the International Group Clubs as they are to the 1992 Fund.
- 1.2 The International Group Clubs and the 1992 Fund face the same challenges in handling large numbers of claims. The efficient processing of claims is only possible if the P&I Club and the Fund share a common approach. The current practices in relation to the handling of claims have gradually developed since the 1971 Fund Convention came into force in 1978 and reflect the joint experience gained during that period by the IOPC Funds and the International Group Clubs. The International Group is accordingly in broad agreement with very many of the points made by States and the Secretariat.
- 1.3 The International Group also notes the statement in paragraph 1.2 of document IOPC/JUL11/7/1 that 'any proposals made by the Working Group such as lump sum payments or comparable measures, should not mean that contributors have to pay higher contributions than otherwise'. The same can again be said of the International Group Clubs.
- 1.4 There is of course a limit on the amount of compensation available under the Conventions and, until it becomes clear that claims will not exceed the 1992 Fund limit, all claimants have an interest in all other claims. It is important therefore for the Working Group to take full account of the role of both claimants and the Member States in ensuring that the claims assessment process runs as smoothly as can be expected following an incident.

- 1.5 The International Group welcomes the reference by States to the role which States can play following an incident. The Chairman's document refers to a number of specific examples of circumstances where States can assist, for example by providing statistical data and encouraging the grouping of claims. In more general terms, a State is in a position to assist by providing objective information and guidance about the compensation system and by encouraging realistic expectations and a constructive dialogue between the parties.
- 1.6 The International Group also supports the proposal made by the International Tanker Owners Pollution Federation (ITOPF) (cf document IOPC/JUN10/6/6) for a MoU between P&I Clubs, the 1992 Fund and Member States and looks forward to further consideration of this by the Working Group.
- 1.7 The International Group offers the following comments on those items listed in section 4 of document IOPC/JUL11/7/1 for further discussion.

## **2 Compensation based on estimation**

- 2.1 The International Group notes the Director's proposal in section 14.4 of document IOPC/MAR11/8/1 that consideration be given to exercising a degree of flexibility in respect of claims under a certain amount, provided it is clear that (1) the claimant has suffered an admissible loss, (2) there is a sufficiently close link of causation and (3) it could reasonably be expected that the cost of assessing the claim would be higher than a certain percentage of the claimed amount.
- 2.2 However, the International Group remains cautious with regard to any proposed acceptance of a lowering in the standard of proof that claimants must provide as evidence in order to have an admissible claim. It would be inconsistent with the basic principle of the Conventions, that all claimants are treated equally, if a particular claim is settled on the basis of a lower standard of proof than other claims. For example, what would happen if a claim for a higher amount, but otherwise identical both in nature and in terms of the pollution damage incurred, was rejected for not reaching a higher standard than a similar claim for a lesser amount? How would this be viewed by a court if called upon to adjudicate the rejected claim? In such a circumstance, the claimants with the rejected claim would always be entitled to pursue their claims through the relevant court process and indeed they would probably be expected to do so in such a case.
- 2.3 It is inevitable that claims for larger amounts are more thoroughly examined. It would seem to be a fair use of the resources for the assessment of the claims to be proportionate to the amount and type of the claims.
- 2.4 In certain cases, such as the *Hebei Spirit*, there may be a very large number of claims for a smaller quantum but where the total aggregated cost of such claims is very high. However, the prospect of available compensation can also lead to the submission of a number of inadmissible and sometimes fraudulent claims which can end up slowing the claims assessment process to the detriment of those claimants with legitimate claims who may be in urgent economic and financial need. This can discredit the system and create dissatisfaction amongst those with legitimate claims (and also States) at the very start of the claims assessment process.
- 2.5 The International Group believes that all claims must meet a minimum standard of proof. Too much flexibility will undermine both the key principles that underpin the Conventions and the claims assessment process.

## **3 Limited or no investigation for faster payment of compensation; lump sum payments**

- 3.1 The International Group questions whether reference to the United Nations Compensation Commission (UNCC) is appropriate and whether any experience can be gained from the work of the UNCC in the assessment of claims. The UNCC was a public scheme with criteria set up in response to one particular (non-marine) event where an individual State accepted the legal responsibility and liability for the losses arising from the event. This effectively amounted to a war reparations scheme.

There was no cap on compensation and it was not intended to compensate only for financial or environmental losses. Whilst the International Group believes that lessons can be taken from the experience of compensation schemes in other sectors, spills of persistent oil carried as cargo by sea do not fall into the same category as the UNCC. The Conventions are defined by their own terms and exist to compensate for pollution damage and are funded to a very large extent by industry rather than public funds.

- 3.2 The same considerations described above in section 2 in terms of undermining the key principles of the Conventions also apply with regard to the possibility of creating different categories of claims and different levels of compensation. Similarly, different requirements in relation to the supporting evidence applicable to each category (as proposed in documents IOPC/MAR11/8/3 submitted by the Philippines and document IOPC/MAR11/8/4 submitted by Australia) could lead to unequal treatment of claims.
- 3.3 The Clubs and the Funds have always supported the idea that groups of claimants should work in conjunction. This has been done effectively in other cases through an existing trade organisation or through a committee set up for the special purpose of dealing with claims, which is to the benefit of all concerned. With this in mind, the International Group would add the following points for consideration:
- (a) The claimants' organisation or committee should establish a line of communication at an early stage and discuss with the Club and the Funds and their joint experts before claims are submitted. This will help claims to be submitted in the correct manner and hopefully prevent inadmissible and inflated claims slowing down the claims assessment process. In this regard the organisation or committee and the State have an important role in ensuring that this is not the case;
  - (b) Equally, efforts should be made to agree the methodology to the extent possible. If this can be agreed before claims are submitted it will again ease the assessment process; and
  - (c) If it is accepted that a claim is legitimate but there are disagreements on quantum, claims can be submitted or assessed on a preliminary basis, leaving the controversial issues for later discussion.
- 3.4 There remains a risk with group claims that they can be used as a means of submitting claims without proof of loss, for example the group simply states that there has been a fisheries loss and that should suffice, but of course such a loss could be due to many factors. This emphasises the importance of the role that the State and the claimants' organisation or committee should play with regard to ensuring that only admissible claims are submitted. The more realistic the claims are, the smoother the process. If claims are inflated, unsubstantiated or, in rare cases, fraudulent, or if the claimants or their representatives pursue the claims aggressively, the process becomes less efficient.
- 3.5 The Deepwater Horizon incident is illustrative in this respect, as is explained in the email to the Chairman from the National Pollution Fund Center (annexed to document IOPC/JUL11/7/1) and the Gulf Coast Claims Facility (GCCF) that has been established under Mr. Ken Feinberg. The International Group notes that the GCCF has faced exactly the same issues that the Club and Fund have faced in the *Hebei Spirit* incident and the submission of large numbers of claims with little supporting documentation. Indeed, in an update to the Washington Press Centre on 28 February 2011, Mr Feinberg stated that '80 percent of those claimants filing for a final payment or an interim payment - that's about 130,000 claims - have inadequate documentation, no proof, inadequate proof. We can only process claims with some proof. Now, we're working with the claimant to try and get additional documentation, additional proof. But that is a serious problem in the Gulf.'
- 3.6 The International Group also has the following comments on a number of those issues listed in sections 2 and 3 of document IOPC/JUL11/7/1:

*Use of the Social Security System*

- 3.7 The International Group Clubs are generally the first to make interim payments and hardship may be a factor in making such payments. However, even these payments must fulfil the criteria under the Conventions. As the Chairman has rightly noted, the criteria for payment under the Conventions do not necessarily equate to payments which may be made under a comprehensive social security system.

*Expert Mediation Panel*

- 3.8 P&I Clubs, in common with the Funds, always focus on trying to agree settlements. Mediation requires special skills and there are generally very few people who are able to do this in the special circumstances of pollution claims. Furthermore, a mediator is generally focused not on the rights and wrongs of claims but on a settlement being reached. Mediation would be an unsuitable procedure when there is disagreement on whether the claim is admissible. Furthermore, claims settled following mediation would be open to challenge by other claimants and the Court.

*Remuneration of Experts*

- 3.9 In considering fixed rates, it has to be borne in mind that if the paying parties adopt fixed rates or rates based on the amount of compensation, it may be difficult to resist reimbursing claimants' representatives on the same basis. In the past claims for fees calculated on this basis have been rejected in favour of payment on the basis of work done and time spent. Any other approach could open the door to claimants' representatives who charge on a contingency basis and who have an incentive in maximising the amount and volume of claims. This could slow down rather than speed up the assessment process.
- 3.10 It should be noted that the instruction of experts jointly by the IOPC Funds and the Club, together with agreement as to sharing of costs, is already dealt with in the Memorandum of Understanding (MoU) between the International Group and the Funds dated 19 April 2006 (which is an updated version of the MoU originally agreed in November 1980).

**4 Summary**

- 4.1 The Conventions provide a unique system which operates only within the terms they prescribe. They are not incident specific and must apply to all claims in all Member States.
- 4.2 There is a limit on compensation which means that until it is clear that claims will not exceed the Fund limit, all claimants have an interest in all other claims; a 'flexible' approach must be defensible towards other claimants whose recovery is reduced because of this flexibility. If there is a large volume of claims, there is often a risk that the available compensation will be exceeded and that claims will need to be pro-rated.
- 4.3 Furthermore whatever methods the Clubs, IOPC Funds and States adopt, they remain subject to the scrutiny of the Courts.

**5 Action to be taken**1992 Fund sixth intersessional Working Group

The 1992 Fund sixth intersessional Working Group is invited to take note of the information contained in this document.

---