INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 10	IOPC/APR12/**10/4**
Original: ENGLISH	2 April 2012

1992 Fund Assembly	**92AES17**	
1992 Fund Executive Committee	**92EC55**	
1971 Fund Administrative Council	**71AC28**	
1992 Fund Working Group 6	**92WG6/4**	●
1992 Fund Working Group 7	**92WG7/1**	

1992 FUND SIXTH INTERSESSIONAL WORKING GROUP

FUNDING OF INTERIM PAYMENTS

Submitted by the International Group of P&I Associations

Summary:	The International Group of P&I Associations (International Group) welcomes the report prepared by Mr Måns Jacobsson and Mr Richard Shaw on the funding of interim payments as contained in document IOPC/APR12/10/1. The International Group notes the recommendation in paragraph 11.9 of the report that 'the practice of the shipowners, P&I Clubs and Funds in making interim payments be recorded in Memorandum of Understanding to be approved by the 1992 Fund Assembly in an appropriately worded Resolution.'
Action to be taken:	1992 Fund sixth intersessional Working Group (a) Consider proposed draft 1992 Fund Assembly Resolution which is attached at Annex I; and (b) Consider proposed amendment to the International Group and 1992 Fund Memorandum of Understanding which attached at Annex II.

1 Introduction

1.1 As is noted in document IOPC/APR12/10/1, the International Group jointly instructed Mr Måns Jacobsson and Mr Richard Shaw, with the IOPC Funds' Secretariat, to draft a report addressing the concerns of the International Group in making voluntary interim payments under the international compensation regime and to propose possible solutions to the problems identified.

1.2 The International Group has previously submitted a number of documents to the 1992 Fund's sixth intersessional Working Group on the possible overpayment of claims faced by P&I Clubs as a consequence of making interim payments, particularly when there is a risk of admissible claims exceeding the maximum available compensation.

1.3 The International Group and the 1992 Fund Secretariat have engaged in further discussions in the intersessional period since the Working Group meeting in October 2011 to consider proposals that seek to address these issues and to facilitate interim payments, and have also considered in detail the report prepared by Mr Måns Jacobsson and Mr Richard Shaw (document IOPC/APR12/10/1). The International Group welcomes the report and in particular notes the conclusion contained in paragraph 11.9 that 'the practice of the shipowners, P&I Clubs and Funds in making interim payments be recorded in Memorandum of Understanding to be approved by the 1992 Fund Assembly in an appropriately worded Resolution.'

2 Draft 1992 Fund Assembly Resolution

2.1 In order to facilitate a positive outcome to the deliberations of the Working Group and to assist in implementing the recommendation made in the report jointly commissioned on this subject, Annex I to this document contains a draft 1992 Fund Assembly Resolution and Annex II, a proposed amendment to the existing Memorandum of Understanding (MoU) between the International Group and the 1992 Fund. The current MoU can be found at Annex III. These record the practice which has normally been followed in making interim payments under the international compensation regime and also the intent in making such payments. The draft 1992 Fund Assembly Resolution seeks to:

(i) place the arrangements for interim payments on a clearer footing in a way that will benefit all concerned;

(ii) establish a form of agreement between the International Group and the 1992 Fund that could 'be laid by the shipowner/P&I Club concerned before the court administering the limitation fund as authoritative evidence of the existing practice', as noted in paragraph 11.9 of document IOPC/APR12/10/1;

(iii) establish that the full amount of the owners' interim payments counts towards the maximum compensation available; and

(iv) reaffirm the principle that in practice interim payments funded by one compensation body are made on behalf of them both, as already stated by a previous 1992 Fund Director (document 92 FUND/EXC.20/7, paragraph 3.4.57).

2.2 The draft 1992 Fund Assembly Resolution does not:

(a) transfer any financial risk from the International Group Clubs to the 1992 Fund;

(b) seek to engage the 1992 Fund in the funding of interim payments any earlier than the Fund would currently consider doing so; or

(c) ensure that the Club/owner is reimbursed where an overpayment of claims occurs.

2.3 The International Group agrees with the view of the authors of the report that 'there is no legally binding solution to this problem within the framework of the present text of the Conventions' (paragraph 11.8 of document IOPC/APR12/10/1). The attached draft 1992 Fund Assembly Resolution would however provide a 'measure of protection' for the International Group Clubs in the form of authoritative evidence of the existing practice in the event that there is a risk that a court would not give credit for the interim payments made by a Club.

2.4 The International Group also refers to the operative paragraph in the draft 1992 Fund Assembly Resolution commencing 'NOTES WITH APPROVAL', which outlines the principle that interim payments funded by one compensation body are made on behalf of them both. If this principle is not upheld by the Working Group, then the International Group believes that consideration would need to be given in the future to the practice by which the 1992 Fund Executive Committee establishes the *pro rata* percentage of compensation to be paid to claimants where the total cost of claims exceeds the limit of the 1992 Fund, since such *pro rata* percentages would have to be calculated in the future in accordance with the total amount of compensation available under the 1992 Fund Convention only rather than the total amount of compensation available under the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund. This would be a fundamental change in the current practice of the 1992 Fund Executive Committee where the *pro rata* percentage payments are established in such cases in accordance with the total amount of compensation available under the 1992 CLC and 1992 Fund Convention.

2.5 The proposed draft amendment to the International Group and 1992 Fund MoU seeks to take account of a view expressed by the 1992 Fund Secretariat that this principle should be applicable only in cases where an incident has been reported to the 1992 Fund.

2.6 The International Group has previously informed the 1992 Fund Member States that overcoming the risk of overpayment can normally be met by simply following the procedures set down in the 1992 CLC and establishing a limitation fund for distribution as the court sees fit, as happened in the *Prestige* case. Whilst the International Group Clubs fully appreciate that this approach may result in the funds they provide being unavailable to claimants until a considerable time after the incident, if adequate safeguards (such as agreement on the draft 1992 Fund Assembly Resolution contained in Annex I to this document) cannot be found for the International Group Clubs to continue to make interim payments then there is undoubtedly a greater need that this approach will be followed by the International Group Clubs in future cases, which will be to the detriment of the compensation regime as a whole.

3 Action to be taken

1992 Fund sixth intersessional Working Group

The 1992 Fund sixth intersessional Working Group is invited to:

(a) take note of the information contained in this document;

(b) consider proposed draft 1992 Fund Assembly Resolution which is attached at Annex I; and

(c) consider proposed amendment to the International Group and 1992 Fund Memorandum of Understanding which attached at Annex II.

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ANNEX I

PROPOSED DRAFT 1992 FUND ASSEMBLY RESOLUTION

RESOLUTION N^{o} [ ]

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992

HAVING CONSIDERED the practice which the 1992 Fund ('the Fund') and insurers have normally followed in making interim payments under the international regime of compensation established by the 1992 Civil Liability Convention ('1992 CLC') and the 1992 Fund Convention ('the Fund Convention'),

CONVINCED that this practice should be maintained in order to meet the needs of society,

APPRECIATING the importance in this respect of cooperation between the Fund and insurers,

AWARE that in respect of incidents in Member States, interim payments have normally been made for amounts which reflect the claimants' rights under both Conventions, whilst taking into account any risk of the maximum available compensation being exceeded by admissible claims,

ALSO AWARE that difficulties are involved in such payments being funded jointly by insurers and the Fund, in proportion to the amounts of their prospective legal liabilities to each claimant, as well as undesirable delays in postponing payments until these amounts are ascertained,

FURTHER AWARE that, by arrangement between the Fund and insurers, interim payments have in practice normally been made by the insurer to parties whose claims were assessed first in time, have continued to be funded by the insurer until the total amount of such payments reached the 1992 CLC liability limit, and have thereafter normally been made by the Fund,

APPRECIATING that interim payments made by insurers, being calculated by reference to the compensation available under the international regime as a whole, have commonly exceeded the amounts which the claimants concerned would have been entitled to receive under the 1992 CLC alone,

CONSCIOUS of concerns on the part of shipowners and insurers that this practice can be maintained only if it does not prejudice their rights of limitation under the 1992 CLC, and if full account is taken of all interim payments,

ALSO CONSCIOUS of their concerns that they may be unable to maintain this practice in any incident where the right of limitation under the 1992 CLC is conditional, in the contracting State concerned, on the establishment of a limitation fund by means of cash deposit (or on the provision of an undertaking to make such a deposit if so required by the competent court or other authority),

RECOGNISING the absence of any obligation on the part of the shipowner or insurer to make interim payments independently of a distribution by the competent court of a fund established under the 1992 CLC,

DESIROUS of addressing their concerns in order to facilitate the continuance of the current practice,

CONVINCED of the need for common understanding of the intended effect of interim payments,

NOTES WITH APPROVAL that any interim payment made in accordance with the above practice (and whether made by the insurer or by the Fund) is intended to have the effect, unless otherwise stated, firstly of satisfying the claimant's claim to the amount they would be entitled to receive from the distribution of a fund established under the 1992 CLC; and secondly, if and to the extent that it proves to exceed this amount, of discharging wholly or in part the liability to them of the Fund,

CONFIRMS the authority of the insurer, with the prior agreement of the 1992 Fund Director, to make any jointly approved payments in accordance with this practice on behalf of the Fund as well as on behalf of itself and the shipowner,

CONFIRMS the authority of the 1992 Fund Director to make payments in accordance with this practice on behalf of the shipowner and insurer as well as on behalf of the Fund,

APPROVES of such payments being made on the condition (unless otherwise agreed by the Fund and the insurer) that documentation is executed which records the claimant's acceptance of the amount paid on the basis set out above,

and

INVITES Member States to consider any measures they may take to ensure that their domestic laws with respect to limitation proceedings do not present obstacles to interim payments by insurers.

* * *

ANNEX II

MEMORANDUM OF UNDERSTANDING - 2006 REVISION

Proposed amendment

Add the following in Clause 4:

4. Claims handling

D. Where an incident has been reported to the Fund, and it has been agreed between the Fund and the Club concerned that this Memorandum is to apply to the incident, any compensation payments by either of them are to be made (unless otherwise stipulated) on behalf of them both, in accordance with Resolution No. [ ] of the Fund Assembly dated [ ].

* * *

MEMORANDUM OF UNDERSTANDING BETWEEN THE INTERNATIONAL GROUP OF P & I CLUBS, ON THE ONE PART, AND THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992 AND THE INTERNATIONAL OIL POLLUTION COMPENSATION SUPPLEMENTARY FUND 2003, ON THE OTHER PART

The Members of the International Group of P & I Clubs ("the Clubs"), whose names and addresses are scheduled hereto, on the one part, and the International Oil Pollution Compensation Fund 1992 ("1992 Fund") and the International Oil Pollution Compensation Supplementary Fund 2003 ("Supplementary Fund"), hereinafter referred to collectively as "the Funds", on the other part, agree as follows:

1 Notification of incidents to the 1992 Fund

The Clubs will report to the 1992 Fund each escape or discharge of oil where there is a reasonable risk that claims for oil pollution damage may be made against that Fund. Thereafter the Club concerned and the 1992 Fund will exchange views concerning the incident and co-operate with a view towards avoiding, eliminating or minimising pollution damage.

2 Preventive measures

The Clubs (together or individually, as the case may be) shall encourage and recommend that each of their Members promptly take or cause to be taken or co-operate in taking preventive measures (as defined in Article I(7) of the 1992 Civil Liability Convention) when there is an escape or discharge of oil from a ship entered with any of the Clubs which threatens to cause pollution damage in the territory, including the territorial sea, exclusive economic zone or area designated under Article 3(a)(ii) of the 1992 Fund Convention of a State party to the latter Convention, unless there is no liability on the part of the shipowner concerned. However, the Clubs shall not be obliged to encourage or recommend their Members to take or cause to be taken or co-operate in taking preventive measures to the extent that the cost thereof is likely to exceed the limit of that Member's legal and contractual liability or the maximum P & I cover available for oil pollution liabilities.

3 Consultations

The Funds recognise the primary responsibility of the Clubs for the handling of claims for compensation for oil pollution damage against their Members. However, the Clubs will consult with the 1992 Fund concerning the handling of claims arising from incidents in respect of which claims will be made against that Fund or there is a reasonable risk that such claims will be made.

4 Claims handling

A. The Club concerned and the 1992 Fund shall consult each other in order to agree on the most appropriate procedures for the handling of claims arising out of a particular incident, including the need for the establishment of a joint Claims Handling Office in the area affected by the incident.

B. Wherever possible and practical, the Club concerned and the Funds shall co-operate in the use of surveyors and other experts necessary to determine the liability of the shipowner to third party claimants as well as in the assessment of the admissibility of compensation claims under the 1992 Conventions and the Supplementary Fund

Protocol and the admissible quantum of such claims, except to the extent that there may be a conflict of interest or a potential conflict of interest between the shipowner/Club and the Funds. Where joint surveyors and experts are used or joint Claims Handling Offices are established, the costs incurred shall be pro-rated between the shipowner and the Funds in accordance with the respective amounts of their ultimate liability for the incident, including sums of indemnification paid to the 1992 Fund and the Supplementary Fund in accordance with STOPIA 2006 and TOPIA 2006 referred to in Clauses 9 and 10.

C. The Club concerned and the 1992 Fund shall send to each other copies of invoices or other relevant documents relating to fees and expenses incurred in connection with the use of joint surveyors and experts, unless these documents have already been sent to the other party, and jointly approve such invoices or documents before they are paid.

5 Interpretation of the term "pollution damage"

The Clubs and the Funds shall exchange views from time to time with each other and shall co-operate in an effort to alleviate and dispose of such problems as may arise. In particular, the Clubs and the Funds will exchange views and will consult with one another when an incident occurs so that the term "pollution damage", which has the same definition in the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol, is given the same interpretation by the Clubs and by the Funds. The Clubs shall endeavour to ensure that, in respect of incidents falling within the scope of the 1992 Civil Liability Convention but where the 1992 Fund is not called upon to pay compensation, the term "pollution damage" is also given the same interpretation as if the 1992 Fund had been involved.

6 Prompt payment of compensation

The Clubs and the Funds shall also co-operate throughout with the aim of ensuring that, within the legal framework of the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol, compensation is paid as promptly as possible.

7 Subrogated rights

Where on payment of compensation the Funds acquire subrogated rights, the Club concerned will use its best efforts to ensure that any of its Members who have received any such compensation shall fully assist the Funds to enforce such rights, subject to the usual indemnity as to costs and other customary indemnities being provided by the Funds.

8 Recourse actions against third parties

A. Any decisions as to whether the Club concerned or the Funds are to take recourse actions against any third parties, and as to the conduct of any such actions, including any out-of-court settlement, are at the absolute discretion of each party.

B. Either party may consult with the other party in relation to any recourse action in which they are actual or potential claimants. Nothing in this Memorandum shall prevent the parties from agreeing on any arrangements relating to such actions as may be considered appropriate in the particular case, including any terms as to the apportionment of the costs of funding such actions, or as to the allocation of any recoveries made.

9 **STOPIA 2006**

A. As regards the implementation of the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006[<1>], the Clubs undertake as follows for the period STOPIA 2006 is in force.

B. The Clubs undertake to provide cover, on terms similar to those governing other forms of oil pollution risk, against any liabilities incurred by their Members to pay Indemnification to the 1992 Fund under STOPIA 2006, subject always to such cover being provided in accordance with the Rules of the Club concerned at the time of the incident.

C. In respect of Relevant Ships, Club cover shall provide for automatic entry in STOPIA 2006 by virtue of entry in the Club for Insurance against oil pollution risks. However, nothing in this Clause 9 shall require the terms of Club cover -

(a) to apply such automatic entry to any Ship the Owner of which expressly objects to becoming a Participating Owner or has previously withdrawn from STOPIA 2006; or

(b) to affect the right of the Participating Owner to withdraw from STOPIA 2006 at a later date; or

(c) to exclude any Ship not entered in STOPIA 2006 from cover against pollution risks.

D. (a) The Clubs shall through the International Group Secretariat notify the 1992 Fund every six months of the names of all Ships entered in each Club which are Entered Ships.

(b) Each Club shall through the International Group Secretariat notify the 1992 Fund as soon as practicable of the name of any Entered Ship which was not included in the most recent notification made to the 1992 Fund under Clause D(a) above.

(c) Each Club shall notify the 1992 Fund as soon as practicable of the name of

(1) any Relevant Ship which is accepted for entry in that Club for Insurance against oil pollution risks without being or becoming entered in STOPIA 2006; or

(2) any Ship which has been entered in STOPIA 2006 (whether as a Relevant Ship or pursuant to Clause III(D) of the scheme) and which ceases to be entered in STOPIA 2006 whilst remaining insured against such risks by that Club.

E. Where Pollution Damage is caused by an Incident involving an Entered Ship, the Clubs agree that a claim by the 1992 Fund under STOPIA 2006 may be brought directly against the Club through which the Ship is insured. The Clubs reserve the right to avail themselves of the defence that the Pollution Damage resulted from the wilful misconduct of the Participating Owner himself but they shall not avail themselves of any other defence which they might have been entitled to invoke in proceedings brought by the Participating Owner against them. The Clubs also reserve the right to require in any event the Participating Owner to be joined in proceedings

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<1> The terms 'Club', 'Indemnification', 'Insurance', 'Insured', '1992 Fund', 'Relevant Ship', 'Entered Ship', 'Pollution Damage', 'Incident', 'Oil', 'Owner', 'Participating Owner', 'Liability Convention', 'Ship' and 'Protocol' are defined in Clause I of STOPIA.

against the Club concerned. Save as aforesaid, any such proceedings against the Clubs shall be subject to the same provisions of STOPIA 2006 as those applying to a claim against the Participating Owner.

F. Where Pollution Damage is caused by an Incident involving a Relevant Ship which is not an Entered Ship at the time of the Incident, the Clubs agree that the 1992 Fund shall enjoy the same rights against the Club insuring the Ship at that time as are set out in Clause 9E above, notwithstanding that there is no liability under STOPIA 2006 on the part of the Owner, unless the 1992 Fund has previously received notice, whether under Clause 9D(c) above or otherwise, of the Ship's non-entry (or cesser of entry) in STOPIA 2006.

G. For the avoidance of doubt, it is agreed that this Clause 9 does not apply to any Ship which at the time of the Incident is not a Relevant Ship as defined by STOPIA 2006, and that it does not confer on the 1992 Fund any rights of action against any insurer other than the Club insuring the Relevant Ship at the time of the Incident.

H. The Clubs agree that rights of direct action conferred by this Clause 9 shall apply irrespective of whether the Relevant Ship is required by Article VII of the Liability Convention to carry a certificate of insurance.

I. Notwithstanding Clause XI(B) of STOPIA 2006, the Clubs undertake to consult with the 1992 Fund well in advance of any decision being taken if the Clubs consider terminating or amending STOPIA 2006, so as to enable the 1992 Fund to present its views.

10 TOPIA 2006

A. As regards the implementation of the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006[<2>], the Clubs undertake as follows for the period TOPIA 2006 is in force.

B. The Clubs undertake to provide cover, on terms similar to those governing other forms of oil pollution risk, against any liabilities incurred by their Members to pay Indemnification to the Supplementary Fund under TOPIA 2006, subject always to such cover being provided in accordance with the Rules of the Club concerned at the time of the incident.

C. In respect of Relevant Ships, Club cover shall provide for automatic entry in TOPIA 2006 by virtue of entry in the Club for Insurance against oil pollution risks. However, nothing in this Clause 10 shall require the terms of Club cover –

(a) to apply such automatic entry to any Ship the Owner of which expressly objects to becoming a Participating Owner or has previously withdrawn from TOPIA 2006; or

(b) to affect the right of the Participating Owner to withdraw from TOPIA 2006 at a later date; or

(c) to exclude any Ship not entered in TOPIA 2006 from cover against pollution risks.

<2> The terms 'Club', 'Indemnification', 'Insurance', 'Insured', '1992 Fund', 'Relevant Ship', 'Entered Ship', 'Pollution Damage', 'Incident', 'Oil', 'Owner', 'Participating Owner', 'Liability Convention', 'Ship' and "Supplementary Fund" are defined in Clause I of TOPIA.

D. Each Club shall through the International Group Secretariat notify the Supplementary Fund as soon as practicable of

(a) any Relevant Ship which is accepted for entry in that Club for Insurance against oil pollution risks without being or becoming entered in TOPIA 2006; or

(b) any Ship which has been entered in TOPIA 2006 (whether as a Relevant Ship or pursuant to Clause III(D) of the scheme) and which ceases to be entered in TOPIA 2006 whilst remaining insured against such risks by that Club.

E. Where Pollution Damage is caused by an Incident involving an Entered Ship, the Clubs agree that a claim by the Supplementary Fund under TOPIA 2006 may be brought directly against the Club through which the Ship is insured. The Clubs reserve the right to avail themselves of the defence that the Pollution Damage resulted from the wilful misconduct of the Participating Owner himself but they shall not avail themselves of any other defence which they might have been entitled to invoke in proceedings brought by the Participating Owner against them. The Clubs also reserve the right to require in any event the Participating Owner to be joined in proceedings against the Club concerned. Save as aforesaid, any such proceedings against the Clubs shall be subject to the same provisions of TOPIA 2006 as those applying to a claim against the Participating Owner.

F. Where Pollution Damage is caused by an Incident involving a Relevant Ship which is not an Entered Ship at the time of the Incident, the Clubs agree that the Supplementary Fund shall enjoy the same rights against the Club insuring the Ship at that time as are set out in Clause 10E above, notwithstanding that there is no liability under TOPIA 2006 on the part of the Owner, unless the Supplementary Fund has previously received notice, whether under Clause 10D above or otherwise, of the Ship's non-entry (or cesser of entry) in TOPIA 2006.

G. For the avoidance of doubt, it is agreed that this Clause 10 does not apply to any Ship which at the time of the Incident is not a Relevant Ship as defined by TOPIA 2006, and that it does not confer on the Supplementary Fund any rights of action against any insurer other than the Club insuring the Relevant Ship at the time of the Incident.

H. The Clubs agree that rights of direct action conferred by this Clause 10 shall apply irrespective of whether the Relevant Ship is required by Article VII of the Liability Convention to carry a certificate of insurance.

I. Notwithstanding Clause XI(B) of TOPIA 2006, the Clubs undertake to consult with the Supplementary Fund well in advance of any decision being taken if the Clubs consider terminating or amending TOPIA 2006, so as to enable the Supplementary Fund to present its views.

11 Applicable law and jurisdiction

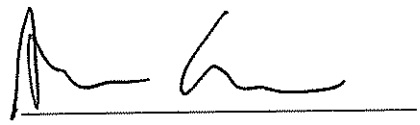
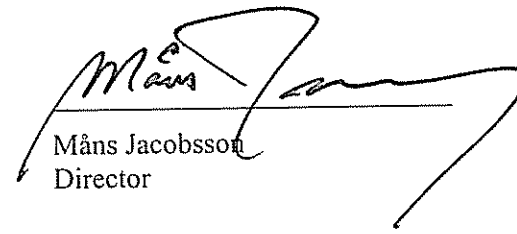
Any claims or disputes in relation to this Memorandum shall be governed by English law and be subject to the exclusive jurisdiction of the English High Court of Justice.

12 Entry into force and termination

A. This Memorandum shall enter into force when signed on behalf of the International Group of P & I Clubs and the Funds.

B. The International Group and the Funds may terminate this Memorandum by giving six months' prior written notice to the other party.

Dated 19 April 2006

	For the International Group of P&I Clubs	For the International Oil Pollution Compensation Fund 1992 and the International Oil Pollution Compensation Supplementary Fund 2003
Signed		
	Alistair Groom Chairman	Måns Jacobsson Director