



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

FONDS INTERNATIONAUX
D'INDEMNISATION POUR
LES DOMMAGES DUS À LA
POLLUTION PAR LES
HYDROCARBURES

FONDOS INTERNACIONALES
DE INDEMNIZACIÓN DE
DAÑOS DEBIDOS A
CONTAMINACIÓN POR
HIDROCARBUROS

The October 2005 sessions of the governing bodies - In brief

25 October 2005

During the week of 17 - 21 October 2005, the governing bodies of the International Oil Pollution Compensation Funds (IOPC Funds) held a number of meetings. The 1992 Fund held meetings of both its Assembly, which deals with administrative matters and issues of principle, and its Executive Committee, which considers individual incidents. The Supplementary Fund held an extraordinary session of its Assembly and the 1971 Fund held a meeting of its Administrative Council, both of which dealt with administrative matters and incidents.

Status of Conventions

The 1992 Fund now has 92 Member States and an additional four States have deposited instruments of accession, which will bring the total to 96 by October 2006. The Supplementary Fund now has 11 Member States and one additional State (Italy) has deposited an instrument of accession, which will bring the total to 12 by January 2006. A number of other States have indicated that they expect to ratify the Supplementary Fund Protocol by the end of 2005. The 1971 Fund Convention ceased to be in force on 24 May 2002 and does not apply to incidents occurring after that date.

Election of the next Director of the IOPC Funds

The 1992 Fund Assembly elected Mr Willem J G Oosterveen of the Netherlands as the next Director of the IOPC Funds. Mr Oosterveen will take up his duties on 1 November 2006. The current Director of the IOPC Funds, Mr Jacobsson, will retain full responsibility for the Organisations up to 31 October 2006. Mr Oosterveen will join the Secretariat on 1 September 2006 and take up office on 1 November 2006, with Mr Jacobsson continuing to be available until his retirement on 31 December 2006.

Review of the international compensation regime

A Working Group was set up in April 2000 to consider the need to improve the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention in order to ensure that the regime continues to meet the needs of society.

The 1992 Fund Assembly considered the report of the Working Group's ninth meeting, held in March 2005. The Working Group had continued to be divided on the question of whether the Conventions should be revised and had not been in a position to make a recommendation to the 1992 Fund Assembly. It was therefore for the Assembly to make a decision at this session on whether the revision should go ahead. Discussions that ensued reflected the continued division among Member States with one group supporting limited revision, and the other -- holding a slighter majority -- being strongly against revision and proposing to terminate the Working Group. The Assembly acknowledged that there was insufficient support to move forward with revision of the Conventions -- even if limited -- and therefore decided that the Working Group should be disbanded and that the revision of the Conventions should be removed from its agenda.

At the Assembly's March 2005 session, the International Group of P&I Clubs had offered to increase, on a voluntary basis, the limitation amount for small tankers by means of an agreement to be known as the Small Tankers Oil Pollution Indemnification Agreement (STOPIA). STOPIA, which applies to pollution damage in a State for which the Supplementary Fund Protocol is in force, is a contract between owners of small tankers. It applies to all ships insured by one of the P&I Clubs that are members of the International Group of such Clubs and reinsured through the Group's pooling arrangement. The agreement came into force on 3 March 2005, ie the date of the entry into force of the Supplementary Fund Protocol.

At the Assembly's October 2005 session, the International Group of P&I Clubs made another proposal, subject to the condition that the revision of the Conventions was not carried forward, whereby it would extend STOPIA to all States parties to the 1992 Civil Liability Convention as well as establish a second agreement to be known as the Tanker Oil Pollution Indemnification Agreement (TOPIA) through which the Clubs would indemnify the Supplementary Fund in respect of 50% of the amounts paid in compensation paid by that Fund. In light of the decision to terminate the Working Group, the Assembly instructed the Director to collaborate with the International Group of P&I Clubs (on behalf of the shipping industry) and the Oil Companies International Marine Forum (OCIMF) before the voluntary agreement package was submitted to the Assembly for consideration at its next session and provide technical and administrative advice with a view to consolidating the package and ensuring that it was legally enforceable.

Non-submission of oil reports

More than 99% of the annual contributions for previous years have been received in respect of each Fund. However, each Fund Member State is obliged to submit a report every year on the quantities of contributing oil received in that State. There were no outstanding reports in respect of the Supplementary Fund. Nevertheless, the non-submission of oil reports by 28 States in respect of the 1971 and 1992 Funds is a matter of serious concern to other Member States, particularly to the contributors in those States, since without oil reports the Secretariat cannot issue invoices to the contributors in the defaulting States. During the discussion, it was emphasised that the non-submission of oil reports was a violation of States' treaty obligations under the 1992 Fund Convention. Measures to assist States to submit oil reports were also considered and a number were subsequently endorsed by the governing bodies.

Budgetary decisions

A joint administrative budget for the 1992 Fund, the Supplementary Fund and the 1971 Fund of £3 601 900 was adopted for 2006.

Contributions

The 1992 Fund and the 1971 Fund each have a General Fund to pay administrative expenses and compensation claims up to a specific amount per incident and Major Claims Funds to pay compensation claims above that amount. The Supplementary Fund has a General Fund to pay administrative expenses and will have Claims Funds to pay compensation claims.

The governing bodies decided not to levy contributions to the respective General Funds nor to the Major Claims Funds of the 1971 Fund and the Claims Funds of the Supplementary Fund. The governing bodies also decided to raise 2005 contributions to the *Erika* (France) and *Prestige* (Spain) Major Claims Funds of £2.0 million and £3.5 million respectively, the entire levies to be deferred. The Director was authorised to decide whether to invoice all or part of the deferred levies for payment during the second half of 2006, if and to the extent required.

HNS Convention

The Director has been instructed to prepare for the setting-up of the Fund (HNS Fund) to be established under the 1996 Convention on liability and compensation for damage in connection with the carriage of hazardous or noxious substances by sea (HNS Convention). The preparations should be based on the assumption that the HNS Fund will have a joint Secretariat with the IOPC Funds and be based in London.

The Fund Secretariat has completed the development of a system to monitor contributing cargo under the HNS Convention, which includes a database of all substances qualifying as hazardous or noxious substances (HNS). The final system was circulated in August 2005 in the form of a CD-ROM containing software for installation on a user's personal computer. The Secretariat has developed a dedicated website for the system (www.hnscccc.org) as well as a website dedicated to the implementation of the HNS Convention (www.hnsconvention.org).

The Secretariat intends to organise a further Workshop on the HNS Convention in the Spring of 2006, focusing on more practical aspects of the implementation of the HNS Convention.

Incidents

Erika (France, 1999)

Legal actions have been taken against the shipowner, his insurer and the 1992 Fund by 795 claimants. Out-of-court settlements have been reached with 423 of these claimants. The Courts have rendered judgements in respect of 55 actions and actions by 328 claimants (including 139 salt producers) were pending. The total amount claimed in the pending actions, excluding the claims from the French State and TotalFinaElf, was €65 million (£44 million).

A number of judgements have been rendered by the French Courts since the Executive Committee's June 2005 session. Summaries of these judgements are contained in documents 92FUND/EXC.30/6/Add.1 and 92FUND/EXC.30/6/Add.2.

One judgement related to a claim by a student who, contrary to what had been the case in 1998 and 1999, had not been employed in the summer of 2000 at a camping site as a kitchen assistant. The French Court accepted the claim, which had been rejected by the 1992 Fund. The policy of the IOPC Funds has been that claims by employees who had been made redundant or put on part-time work are not admissible. The Executive Committee considered whether it should review the policy in this regard and if the policy were changed to the effect that such claims are admissible in principle, to decide whether the claim by the student who did not have employment but had an expectation to obtain employment, was admissible.

The Committee decided that the Fund's policy regarding claims for losses suffered by employees laid off temporarily, put on part-time work or made redundant should not be changed and that the 1992 Fund should continue to reject such claims. The Committee instructed the Director to appeal against the judgement in respect of the claim by the student despite the small amount claimed compared with the likely legal costs, since an important question of principle was involved.

The Executive Committee considered a judgement by the Commercial Court in La Roche sur Yon in respect of a company selling water sports equipment for losses suffered in its dual activity of selling such equipment to individual tourists and to sailing schools in Vendée. The Fund had accepted as admissible in principle the claim for loss of income from reduced sales to tourists, but had rejected the claim for loss of sales to sailing schools on the ground that such sales related to services provided to other businesses in the tourism industry but not directly to tourists ('second degree tourism claims'). The IOPC Funds' established policy is that second degree tourism claims are not normally admissible since there is not a sufficiently close link of causation between the contamination caused by an oil spill and any losses suffered by such claimants. The Director had expressed the view that the sales to sailing schools fell within the category of second degree tourism claims and should therefore not normally qualify for compensation in principle. The Committee decided that, since there were no particular facts in this case that would justify a departure from the position taken by the Funds in respect of second degree tourism claims, the claim was inadmissible, and in spite of the modest amount involved, endorsed the Director's proposal that the 1992 Fund should appeal against the judgement.

Prestige (Spain, 2002)

Level of payments

The maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention in respect of the *Prestige* incident is €171.5 million (£118 million). The figures given in May 2003 by the Governments of the three States affected by the incident, Spain, France and Portugal, as to the damage caused indicated that the total amount of the damage could be as high as €1 050 million (£710 million). Under the 1992 Conventions, the Fund has to give all claimants equal treatment. The Executive Committee therefore decided in May 2003 that the 1992 Fund's payments should be for the time being limited to 15% of the loss or damage actually suffered by each individual claimant as assessed by the 1992 Fund's experts. The Committee reconsidered the payment level several times but decided, as late as in June 2005, that the level of 15% should be maintained.

The level of the 1992 Fund's payments has in the past generally been determined on the basis of the total

amount of claims already presented and possible future claims against the Fund, and not on the basis of the Fund's assessment of the admissible amounts. When the level of payments was considered by the Executive Committee in October 2005 on the basis of the figures presented by the Governments of the three States affected by the incident, it was clear that the level of payments would probably have to be maintained at 15% for several years, unless a new approach were taken.

The Director suggested that an alternative way of determining the Fund's level of payments would be to base it on an estimate of the final amount of the admissible claims against the Fund, established either as a result of agreements with the claimants or by final judgements of a competent court, which was unlikely to be exceeded.

In view of the magnitude of the *Prestige* incident and the exceptional circumstances surrounding it, the Executive Committee agreed to the Director's proposal to increase the level of payments from 15% to 30% of the actual losses suffered by claimants. The Committee also decided to apportion on a provisional basis the amount payable by the 1992 Fund, minus a reserve of 10%, amongst the three States affected by the incident. Both these decisions were subject to the provision of certain guarantees and undertakings by the States concerned so as to ensure that the Fund was protected against overpayment. In agreeing to the proposal, several delegations stressed that it should not be seen as a precedent for future incidents.

Removing of the oil from the wreck

The Executive Committee also considered whether a claim for €109 million (£74 million) by the Spanish Government relating to the cost of the operation to remove oil from the wreck of the *Prestige* was admissible in accordance with the 1992 Fund's criteria.

The *Prestige* had broken in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. On the basis of surveys carried out in 2003 the quantity of oil remaining in the wreck had been estimated to be 13 100 tonnes in the bow section and 700 tonnes in the stern section. The Spanish Government decided that the cargo remaining in the wreck should be removed using aluminium shuttle containers filled by gravity through holes cut in the tanks. The removal of the oil, which commenced in May 2004, was completed in September 2004. Some 13 000 tonnes of oil cargo was removed from the forepart of the wreck. No attempt was made to remove the 700 tonnes of oil in the aft section, which was instead treated with biological agents aimed at accelerating the degradation of the oil.

The Executive Committee took note of the two technical opinions, one by the International Tanker Owners Pollution Federation Limited (ITOPF) requested by the Director, and another by a team of experts from the Centre de documentation de recherche et d'expérimentations sur les pollutions accidentelles des eaux (CEDRE) (France), the Institut océanographique de Paris (IOP) (France) and the Istituto Centrale per la Ricerca Scientifica e Tecnologica Applicata al Mare (ICRAM) (Italy) requested by the Spanish Government.

The main differences between the opinions of the two groups of experts was that the experts appointed by the Spanish Government had taken into account the possible social impact of leaving the oil in the wreck, whereas ITOPF had focused solely on the 1992 Fund's admissibility criteria, which did not take social, non-economic effects into account.

The Director agreed with the position taken by ITOPF that the oil remaining in the sunken sections of the *Prestige* did not pose a significant pollution threat and that the costs of the operation to remove the oil were disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck. For this reason, the Director considered that the Spanish Government's claim did not fulfil the criteria for admissibility laid down by the IOPC Funds' governing bodies, namely that the operation should be reasonable from an objective, technical point of view.

The Spanish delegation referred to the opinion presented by the group of three experts who maintained that doing nothing with the oil in the wreck would have meant passing the problem to future generations, that there could be no doubt that the oil in the wreck of the *Prestige* had to be treated and that the responsibility of the Spanish authorities went beyond the purely national framework since the oil in the wreck threatened also the coasts of France and Portugal. That delegation pointed out that ITOPF had concluded in its report that there

was a perceptible risk of oil escaping from the wreck reaching Galicia and stated that this could have had a serious effect on fishing resources. The point was also made that the islands off the coast of Spain, which were very sensitive and received a very high degree of environmental protection, could have been affected. The Spanish delegation emphasised that the decision to remove the oil from the wreck had been taken after the deliberations and advice of a scientific advisory committee composed of more than 40 internationally recognised experts. That delegation maintained that the costs of the oil removal operation were not disproportionate, bearing in mind the amount of oil that was removed and in comparison with costs of similar operations that had been accepted by the IOPC Funds in relation to past incidents.

During the discussions some delegations supported the Spanish Government's view that the claim was admissible. Other delegations expressed sympathy with the Spanish delegation but stressed nevertheless that the Fund's admissibility criteria had to be respected and considered that the cost of the oil removal operation was disproportionate to any potential economic and environmental consequences. The point was made that it was the right of individual States to decide what measures it should take, but that if the decision was made on the basis of potential social, non-economic effects, these could not be taken into account when assessing the admissibility of claims.

Some delegations expressed the view that, since it was not possible to predict with any certainty what the outcome of leaving the oil in the wreck would have been, it would have been very difficult for any government to resist pressure from the public to ensure that the risk was eliminated and thus suggested that the measures taken by the Spanish Government were reasonable and that the claim was admissible in principle.

Other delegations stated that whilst the total costs associated with the oil removal operation seemed to be disproportionate to the likely environmental and economic consequences of leaving the oil in the wreck, it could be that some of the costs of the surveys and studies may have been reasonable up to the point when the actual cost of the oil removal operation was known.

The Executive Committee decided to defer any decision on the admissibility of the claim, but instructed the Director to collaborate with the Spanish Government to examine all the elements of the claim with a view to identifying possible admissible items and to assess the admissible quantum of those items for consideration by the Committee at a future session.

Future meetings

The following meetings have been scheduled for 2006. Additional meetings may be necessary, depending on developments in respect of existing incidents and the occurrence of new ones.

Week of 27 February	1992 Fund Executive Committee 1971 Fund Administrative Council
Week of 22 May	1992 Fund Executive Committee 1971 Fund Administrative Council
Week of 23 October	1992 Fund Assembly 1992 Fund Executive Committee 1971 Fund Administrative Council Supplementary Fund Assembly