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REGIONAL MARINE POLLUTION EMERGENCY
RESPONSE CENTRE FOR THE MEDITERRANEAN SEA (REMPEC)

CENTRE REGIONAL MEDITERRANEEN POUR L'INTERVENTION
D'URGENCE CONTRE LA POLLUTION MARINE ACCIDENTELLE (REMPEC)

MEDITERRANEAN ACTION PLAN
PLAN D'ACTION POUR LA MEDITERRANEE

7th Meeting of Focal Points of the
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Malta, 25-28 April 2005

Agenda Item 6

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THE MARCH 2005 SESSIONS OF THE GOVERNING BODIES – IN BRIEF

23 March 2005

Submitted by the International Oil Pollution Compensation Funds (IOPC Funds)

INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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

FONDO INTERNACIONAL DE INDEMNIZACIÓN DE DAÑOS DEBIDOS A LA CONTAMINACIÓN POR HIDROCARBUROS

The March 2005 sessions of the governing bodies - In brief

23 March 2005

From 14 - 22 March 2005, the governing bodies of the International Oil Pollution Compensation Funds (IOPC Funds) held a number of meetings. The first session of the Assembly of the Supplementary Fund was held in conjunction with an extraordinary session of the 1992 Fund Assembly and a meeting of the 1971 Fund Administrative Council, in order for the three bodies to consider how best to operate the three Funds under one Secretariat and one Director. The 1992 Fund Assembly also considered a number of other matters. In addition, the 1992 Fund held meetings of its Executive Committee, which dealt with various incidents, and of an intersessional Working Group, which was set up in April 2000 to consider the adequacy of the international compensation regime.

The 1992 Fund Assembly elected Mr Jerry Rysanek (Canada) as its Chairman, replacing Mr Willem Oosterveen (Netherlands) who had decided to stand down after five years in office. Mr José Aguilar-Salazar (Mexico) and Professor Seiichi Ochiai (Japan) remain Vice-Chairmen.

The Supplementary Fund Assembly elected Captain Esteban Pacha (Spain) as its Chairman, and Mr Nobuhiro Tsuyuki (Japan) and Mrs Birgit Sølling Olsen (Denmark) as Vice-Chairmen.

Establishment of the Supplementary Fund

The Supplementary Fund was established on 3 March 2005 as a result of the entry into force of a Protocol to the 1992 Fund Convention which was adopted in May 2003 under the auspices of the International Maritime Organization. The Supplementary Fund has at present eight Member States (Denmark, Finland, France, Germany, Ireland, Japan, Norway and Spain). One additional State (Portugal) has deposited an instrument of accession, which will bring the total to nine by May 2005. A number of other States have indicated that they expect to ratify the Supplementary Fund Protocol by the end of 2005.

The Supplementary Fund provides additional compensation over and above that available under the 1992 Fund Convention for pollution damage in the States that become Parties to the Protocol. As a result, the total amount available for compensation for each incident for pollution damage in the States which become Members of the Supplementary Fund will be 750 million SDR (£600 million), including the amounts payable under the 1992 Civil liability Convention and the 1992 Fund Convention, 203 million SDR (£162 million).

The governing bodies of the three Funds considered a number of issues relating to the structure, administration and operation of the Supplementary Fund. In view of the very close link between the three Funds, the governing bodies decided that the Supplementary Fund would be administered by the 1992 Fund Secretariat, which also administers the 1971 Fund, and that the Director of the 1992 and 1971 Funds would also be the Director of the Supplementary Fund.

The non-submission of reports on contributing oil receipts (oil reports) has been a recurring problem for both the 1971 Fund and the 1992 Fund. When the Supplementary Fund Protocol was drafted, it was therefore decided to insert provisions under which compensation would be denied temporarily or permanently in respect of States that failed to fulfil their obligation to submit oil reports. The Supplementary Fund Assembly considered the procedures to be followed in order to establish whether a Supplementary Fund Member State affected by an incident had complied with its obligations in this regard. It would be for the Supplementary Fund Assembly to decide whether or not a State has fulfilled its obligations. During the discussion, it was emphasised that it was essential that the provisions on denial of compensation were applied rigorously but that small formal mistakes in oil reports should not be used as a reason to withhold compensation, unless they prevented the Supplementary Fund from issuing invoices to potential contributors.

Portland House Stag Place London SW1E 5PN United Kingdom
Telephone: +44-20 7592 7100 Telefax: +44-20 7592 7111
E-mail: info@iopcfund.org Web: http://www.iopcfund.org

The Supplementary Fund Assembly decided that contributions to the Supplementary Fund should be levied every year and that they should be levied at the same time as contributions were levied to the 1992 Fund and/or to the 1971 Fund. Accordingly, the first levy of contributions to the Supplementary Fund will be considered by the Assembly at its October 2005 session.

Status of 1971 and 1992 Fund Conventions

The 1992 Fund has 86 Member States and an additional six States have deposited instruments of accession, which will bring the total to 92 by October 2005.

The 1971 Fund Convention ceased to be in force on 24 May 2002 and does not apply to incidents occurring after that date.

Procedures for recruitment of the next Director

The present Director, Mr Måns Jacobsson, who took up his post on 1 January 1985, will retire on 31 December 2006. The 1992 Fund Assembly considered therefore the procedures for recruitment of his successor, who will be elected at the Assembly's October 2005 session. A note will be circulated to 1992 Fund Member States inviting them to submit candidatures for the post of Director by 30 June 2005 at the latest.

The present Director will retain full responsibility for the Organisations up to 31 October 2006, the newly-elected Director will join the Secretariat on 1 September 2006 and take over responsibility for the Organisations on 1 November 2006, with the present Director continuing to be available up to 31 December 2006.

STOPIA

The 1992 Fund Assembly took note of an offer by the International Group of P&I Clubs 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). The agreement came into force on 3 March 2005, ie the date of the entry into force of the Supplementary Fund Protocol.

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 and reinsured through the Group's pooling arrangement. Under the Agreement the maximum amount of compensation payable by owners of all ships of 29 548 gross tonnage or less would be 20 million Special Drawing Rights (SDR) (£16 million). Although the 1992 Fund is not a party to STOPIA, STOPIA confers legally enforceable rights on the 1992 Fund of indemnification from the shipowner involved in an incident.

The 1992 Fund will, in respect of ships covered by STOPIA, continue to be liable to compensate claimants if and to the extent that the total amount of admissible claims exceeds the limitation amount applicable to the ship in question under the 1992 Civil Liability Convention. The 1992 Fund would be entitled to indemnification by the Shipowner of the difference between the shipowner's liability under that Convention and 20 million SDR, even if the Supplementary Fund was not called upon to pay compensation in respect of the incident.

Working Group of the 1992 Fund on the adequacy of the international compensation regime

This 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 continued to meet the needs of society.

When the Working Group's report of its meeting in 2004 was considered at the October 2004 session of the 1992 Fund Assembly, it was clear that opinions were divided into two large groups, one of which was against any revision of the 1992 Conventions and the continuation of the Working Group, whilst the other considered that there were a number of outstanding issues that needed to be addressed, which could result in the revision

of the Conventions. The Assembly decided that the Working Group should meet in early 2005 and make final recommendations to the Assembly at its October 2005 session on whether or not the Conventions should be revised, and if so, which items required revision.

At its March 2005 meeting the Working Group focused its discussions on the equitable sharing of the compensation burden between shipowners and cargo interests and whether there was a need for a revision of the 1992 Conventions. The Working Group was evenly split as to whether the Conventions should be revised.

The Working Group also considered which issues to recommend to the Assembly for inclusion, if a limited revision of the 1992 Conventions were to be decided upon. It was recommended that a number of issues should be retained for further consideration in the event the revision were to go ahead, and that others should be dropped.

The Assembly will consider the Working Group's report in October 2005 and decide whether or not the Conventions should be revised and, if so, which issues should be included in any such revision.

HNS Convention

The Director had previously 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). Considerable work to that effect has already been carried out.

During the 1992 Fund Assembly session, a number of delegations considered that the Fund should organise a workshop in order to assist States in preparation for the entry into force of the HNS Convention and for the purpose of promoting its uniform interpretation and application. The Secretariat intends to organise a workshop in conjunction with the June 2005 meetings of the IOPC Funds.

Various incidents

***Incident in Germany* (Germany, 1996)**

From 20 June to 10 July 1996 crude oil polluted the German coastline and a number of German islands close to the border with Denmark in the North Sea. The German authorities undertook clean-up operations at sea and on shore and some 1 574 tonnes of oil and sand mixture were removed from the beaches.

Investigations by the German authorities revealed that the Russian tanker *Kuzbass* (88 692 GT) had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. According to the German authorities there remained on board some 46 m^3 of oil which could not be discharged by the ship's pumps.

The German authorities approached the owner of the *Kuzbass* and requested that he should accept responsibility for the oil pollution. They stated that, failing this, the authorities would take legal action against him. The shipowner and his P&I insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), denied any responsibility for the spill.

The German authorities informed the 1992 Fund that, if their attempts to recover the cost of the clean-up operations from the owner of the *Kuzbass* and his insurer were to be unsuccessful, they would claim against the 1992 Fund.

In July 1998 the Federal Republic of Germany brought legal actions in the Court of first instance in Flensburg against the owner of the *Kuzbass* and the West of England Club, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£920 000). The claim was subsequently increased to €1.4 million (£990 000) plus interest.

In December 2002 the first instance Court rendered a joint judgement holding that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable. The Court stated that although the German authorities had failed to provide conclusive evidence that the *Kuzbass* was responsible, the circumstantial

evidence pointed overwhelmingly to that conclusion. The Court did not address the quantum of the losses.

The shipowner and the West of England Club appealed against the judgement. At a hearing in December 2004, the Schleswig-Holstein Appeal Court indicated that on the basis of the evidence submitted it was far from convinced that the *Kuzbass* was the source of the pollution and that the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government. The Court strongly recommended that the parties reach an out-of-court settlement and made a recommendation to the effect that the shipowner/West of England Club should pay the German authorities €120 000 (£85 000) and that the recoverable costs should be shared on a 92%-8% basis. The settlement proposal implied that the 1992 Fund should pay the balance of the admissible amount of the German Government's claim.

Following the hearing, the shipowner and the West of England Club have made a proposal for a possible out-of court settlement involving all the parties whereby the shipowner and the West of England Club would pay 18% and the 1992 Fund 82% of any proven losses suffered by the Federal Republic of Germany as a result of the incident.

The Executive Committee authorised the Director to seek an out-of-court settlement with all other parties involved (ie, the Federal Republic of Germany, the shipowner and the West of England Club) and conclude such a settlement on behalf of the 1992 Fund, provided the amount to be paid by the shipowner and the West of England Club was increased above the 18% currently on offer.

***Erika* (France, 1999)**

A number of court actions for compensation have been brought in various jurisdictions in France against the 1992 Fund, the owner of the *Erika* and his liability insurer. Out-of-court settlements have been reached in 400 of these cases.

There have been a total of 21 judgements involving claims against the 1992 Fund in various French courts, the majority of which related to issues of admissibility. The judgements are in general very favourable for the Fund, since the Courts have in most cases where the Fund had rejected claims as not admissible concurred with the Fund's position. In some cases the Courts have applied the Fund's admissibility criteria, in other cases the Courts have not applied them but have taken them into account, and in some cases the Courts have stated that the Fund's criteria are not binding and that the admissibility should be decided by the application of French law but have reached the same results as the Fund on its rejection of the claims by applying the French requirement of a link of causation between the event and the damage. A few judgements have related to issues of quantum, and where the courts have not agreed with the Fund's assessments, the Fund has not appealed unless the amounts awarded by the Court are significantly different or appeared arbitrary.

Summaries of these judgements are contained in documents 92FUND/EXC.28/4 and 92FUND/EXC.28/4/Add.1.

***Prestige* (Spain, 2002)**

When the Executive Committee considered the level of payments in May 2003, it was estimated on the basis of figures given by the Spanish, French and Portuguese Governments that the losses in respect of the *Prestige* incident, which affected Spain, France and Portugal, could total €1 038 million (£700 million) which greatly exceeded the amount of compensation available, €171.5 million (£121 million). For this reason the Executive Committee decided in May 2003 that the 1992 Fund's payments should be limited to 15% of the loss or damage actually suffered by the respective claimants.

In view of the figures available in March 2005 and the remaining uncertainties as to the level of admissible claims, the Executive Committee decided to maintain this level of payments.

***Incident in Bahrain* (Bahrain, 2003)**

In March 2003 the coast of Bahrain was polluted by oil from an unknown source. Analyses of the pollution indicated that it had a chemical 'fingerprint' that closely matched Iraq (Basrah) crude oil. Satellite imagery and

oil slick trajectory analyses indicated that the oil was most probably spilled on or around 8 March 2003 in the vicinity of the Al Ju'aymah oil terminal off the coast of Saudi Arabia, although the Bahrain authorities were unable to identify any specific vessel. Further trajectory analyses indicated that the oil could not have originated from any offshore oil fields, pipelines or shore based facilities, including the oil terminal at Al-Baker (Iraq) from where Iraq (Basrah) crude oil was exported.

At its May 2004 session the Executive Committee considered that the evidence pointed overwhelmingly to the source of the pollution having been a ship as defined in the 1992 Conventions and expressed their appreciation for the systematic way in which the authorities in Bahrain had carried out their investigations. The Committee decided that the claims arising from the incident were covered by the 1992 Fund Convention and that the claims by the Bahrain authorities in respect of clean-up costs and damage to fisheries were admissible in principle.

Following the Committee's decision, seven claims totalling US$1.1 million (£573 000) were submitted for the costs of preventive measures and clean-up operations. These claims were settled for a total of US$689 000 (£383 000). Claims totalling US$1.6 million (£830 000), submitted on behalf of 434 fishermen who had suffered property damage and economic losses, were settled for a total of US$542 000 (£284 000). All claims arising from the incident were settled within seven months of their submission to the 1992 Fund.

Incident in the Russian Federation **(Russian Federation, 2003)**

In September 2003 the Russian oil-ore carrier *Nefterudovoz-57M* (2 605 GT), laden with a cargo of heavy fuel oil, struck the Cyprus tanker *Zoja I* (18 625 GT) in the outer roads of Onega, White Sea (Russian Federation). The surveyor attending the incident on behalf of the shipowner initially estimated that 0.2 tonnes of cargo had been spilled but the Russian authorities later calculated the quantity spilled at 53.9 tonnes, of which 8.9 tonnes had been recovered by skimming.

The *Nefterudovoz-57M* was insured by the North of England P&I Club and carried a certificate issued by the Harbour Master of Astrakhan on behalf of the Government of the Russian Federation attesting that the ship was insured in accordance with the 1992 Civil Liability Convention.

A claim for Roubles 14.8 million (£242 000) for pollution damage was submitted by the Arkhangelsk Specialised Maritime Inspectorate of the Ministry of Natural Resources of the Russian Federation, calculated on the basis of the 'Methodika', a method developed in 1967 for quantifying environmental damages. The claim was referred to the Arkhangel Arbitration Court, which dismissed the shipowner's argument that compensation for pollution damage should be governed by the 1992 Civil Liability Convention which excluded claims for impairment of the environment based on abstract quantification calculated in accordance with theoretical models. The Court held that the 1992 Civil Liability Convention applied to vessels carrying oil and oil products which called at a foreign port and which were on the high seas or on inland waters of a foreign State. The *Nefterudovoz-57M*, which was a river-sea vessel, was at the time of the oil spill undertaking deliveries of oil products in internal waters of the Russian Federation, and the calculation of the amount of the losses should therefore, in the Court's view, be carried out under the rules of the Russian Federation, but not under the rules of international law or the provisions of international treaties and accepted the claim for Roubles 12.4 million (£202 000).

The shipowner appealed against the decision by the Arbitration Court to the Appeal Court of Arkhangel and then to the Court of Cassation in St Petersburg, maintaining that the claim should be subject to the 1992 Civil Liability Convention, but both these Courts upheld the ruling of the first instance Arbitration Court.

Although the scale of the incident was such that the 1992 Fund will not be required to pay compensation, the International Group of P&I Clubs brought the Executive Committee's attention to the decision by the Russian Courts, in view of the importance that the 1992 Fund Member States placed on the uniform application of the international compensation regime. The International Group made the point that the 1992 Civil Liability Convention stipulated that the Convention applied to pollution damage in the territory, including the territorial sea of a State party to the Convention.

The Executive Committee considered that the 1992 Civil Liability Convention should have been applied to the *Nefterudovoz-57M* incident and that had the Convention been applied, claims based on the 'Methodika' would not have been admissible.

Future meetings

The following meetings have been scheduled for the remainder of 2005.

Week of 27 June	1992 Fund Executive Committee 1971 Fund Administrative Council (if required) Workshop on the HNS Convention
Week of 17 October	1992 Fund Assembly 1992 Fund Executive Committee 1971 Fund Administrative Council Supplementary Fund Assembly