



International Oil Pollution
Compensation Funds

Agenda Item 6	IOPC/OCT22/6/1	
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1992 Fund Assembly	92A27	●
1992 Fund Executive Committee	92EC79	
Supplementary Fund Assembly	SA19	●

MEASURES ENCOURAGING THE SUBMISSION OF OIL REPORTS

Note by the Secretariat

Summary:

At their October 2019 sessions, the governing bodies instructed the Director to examine ways to incentivise the submission of oil reports, including the possibility of invoicing contributors based on estimates if no reports were submitted (document IOPC/OCT19/11/1, paragraph 5.1.17).

At the November 2021 sessions of the governing bodies, the Director reported that he had discussed the matter with the Audit Body at length throughout 2021 and that he had requested a legal opinion from Professor Dan Sarooshi Q.C., the 1992 Fund's legal counsel in public international law. He also indicated that the Secretariat and the Audit Body would examine the matter further before issuing a recommendation to the governing bodies (document IOPC/NOV21/2/1, paragraph 5.2.9).

This document sets out the work undertaken by the Secretariat and the Audit Body on this matter. It also presents the conclusions drawn by Professor Sarooshi and the Director's considerations in this regard.

In his legal opinions, Professor Sarooshi concluded that there is a legal basis under the 1992 Fund Convention for the Assembly to authorise the Director to issue invoices to contributors on the basis of estimated oil receipts, and to do it retrospectively in relation to past periods. Professor Sarooshi's legal opinions are attached to this document at Annexes I and II.

On the basis of the Secretariat's extensive discussions with the Audit Body and Professor Sarooshi's legal opinions, the Director believes that issuing a resolution on this matter would provide a more tangible measure of the cost resulting from the non-submission of oil reports. It would also be a clear expression of the fundamental importance of the reporting obligation to the entire IOPC Funds system.

Given that the drafting of such a resolution is dependent on its endorsement by the governing bodies, the Director would welcome their guidance on this matter. This will enable the Director to prepare a draft resolution in consultation with the Audit Body and submit it for the consideration of the governing bodies at a future meeting in 2023.

Action to be taken: 1992 Fund Assembly and Supplementary Fund Assembly

- (a) Consider the Director's views, based on the Secretariat's extensive discussions with the Audit Body and Professor Sarooshi's legal opinion; and
- (b) give the Director any instructions as they deem appropriate.

1 Introduction

- 1.1 The 1992 Fund Convention and Supplementary Fund Protocol require that Member States submit annually to the Secretariat reports on oil receipts in respect of individual contributors (oil reports) under Article 15.1 of the 1992 Fund Convention and Article 13.1 of the Supplementary Fund Protocol.
- 1.2 The governing bodies have expressed significant concern that a number of Member States have not met this specific obligation under the Conventions, and the non-submission of oil reports has been a long-standing issue despite the Secretariat's considerable efforts to engage the States concerned.
- 1.3 At its October 2019 sessions, the governing bodies instructed the Director to examine other ways to incentivise the submission of oil reports, including the possibility of invoicing contributors based on estimates if no reports were submitted (document IOPC/OCT19/11/1, paragraph 5.1.17). At the same sessions, the Director had indicated that he would be examining this possibility in consultation with the Audit Body.
- 1.4 The Secretariat and the Audit Body discussed the matter at length throughout 2021. The Director and the Audit Body reviewed a more complete summary of the situations in those Member States with outstanding reports, and recommended measures that could be taken in each instance.
- 1.5 At the November 2021 sessions of the governing bodies, the Director reported that he had discussed the matter with the Audit Body throughout 2021 and that he had requested a legal opinion from Professor Dan Sarooshi Q.C., the 1992 Fund's legal counsel in public international law. He also indicated that the Secretariat and the Audit Body would study the matter further before issuing a recommendation to the governing bodies (document IOPC/NOV21/2/1, paragraph 5.2.9).
- 1.6 Professor Sarooshi was requested to provide a legal opinion as to whether there was a legal basis under the 1992 Fund Convention to authorise the Director to levy contributions based on estimates. Professor Sarooshi presented his legal opinion on this matter at the Audit Body meeting held in November 2021. At that meeting, the Audit Body and the Secretariat noted Professor Sarooshi's conclusion that there is a legal basis under the 1992 Fund Convention for the Assembly to authorise the Director to issue invoices to contributors on the basis of estimated oil receipts. After having discussed this issue extensively during that Audit Body meeting, Professor Sarooshi was requested to provide a second legal opinion on whether invoices could be issued retrospectively in relation to past periods. Professor Sarooshi's legal opinion is attached to this document as Annex I.
- 1.7 At the Audit Body meeting held in April 2022, Professor Sarooshi presented his legal opinion on the possibility of issuing invoices retrospectively and answered the questions that the Audit Body members made. Once again, the Audit Body and the Secretariat noted Professor Sarooshi's conclusion that there is a legal basis under the 1992 Fund Convention for the Assembly to authorise the Director to issue invoices retrospectively in relation to past periods. Professor Sarooshi's second legal opinion is attached to this document as Annex II.

2 Legal opinions of Professor Dan Sarooshi Q.C.

- 2.1 Professor Sarooshi's first legal opinion regarding levying contributions on the basis of estimated oil receipts and the potential enforcement of unpaid contributions by domestic legal action was issued on 15 September 2021 and concludes the following:

'There is a firm legal basis under the Convention for the Director to be authorised by the Assembly to levy contributions on the basis of estimated oil receipts by, e.g., issuing invoices directly to those persons who received oil in total quantities exceeding 150,000 tonnes in the calendar year referred to in Article 12(2)(a) or (b) of the Convention.

While the Convention does provide the basis for the Director to take legal action to enforce payment by contributors before national courts, this will largely be meaningless in practice in the absence of national legislation by a Member State that provides for the transposition of debts imposed by the Fund into debts under the national law of the State concerned. In the absence of such domestic legislation, any legal proceedings for recovery against a defaulting contributor in the State's domestic courts would, at best, be highly problematic.'^{<1>}

- 2.2 In his second legal opinion on the possibility of issuing invoices on the basis of estimated oil receipts to contributors retrospectively relating to past periods that was issued on 12 April 2022, Professor Sarooshi concludes the following:

'That there is a firm legal basis under the Convention for the 1992 Fund to issue invoices retrospectively to contributors relating to past periods;

That the Director possesses the power to issue such retrospective invoices pursuant to Article 13(3) of the Convention which confers on the Director a power to "*take all appropriate action against [a 1992 Fund Contributor who is in arrears] with a view to the recovery of the amount due*", the issuing of retrospective invoices falling within the scope of such "*appropriate action*" and thus being a lawful action that can be taken by the Director. Accordingly, the Director can apply the levy per tonne for a past year to all persons who are obligated to contribute to the 1992 Fund on the basis of estimated or actual oil receipts in that year;

The question thus arises whether it is necessary for the Assembly to authorise the Director to issue such retrospective invoices given that the Director already possesses such a power under Article 13(3). The answer here is yes and it is largely so for practical reasons. Since Article 12(2) of the Convention expressly stipulates that any decision by the Director in calculating and levying the specific amount to be paid by a 1992 Fund Contributor is to be based on the Assembly's prior determination of the 1992 Fund levy, then it would in my opinion be prudent for the Director to be authorised by a specific resolution of the Assembly authorising the issuance of retrospective invoices to a 1992 Fund Contributor. This would provide an enhanced degree of protection for any such issued invoices from legal challenge by contributors in, e.g., domestic courts.'^{<2>}

- 2.3 Professor Sarooshi's legal opinions are attached to this document at Annexes I and II.

^{<1>} Professor Dan Sarooshi Q.C., legal opinion, *The legality of the 1992 Fund levying contributions on the basis of estimated oil receipts and the potential enforcement of unpaid contributions by domestic legal action*, paragraph 5 (Annex I).

^{<2>} Professor Dan Sarooshi Q.C., legal opinion, *The legality of the 1992 Fund issuing retrospective invoices relating to oil estimates and contributions levied in relation to past periods*, pages 2 and 3, paragraph 4 (Annex II).

3 Director's considerations

- 3.1 The Director notes the fundamental importance of the reporting obligation to the effectiveness of the entire IOPC Funds system. He also notes that the governing bodies have for many years expressed concern that a number of Member States did not meet their obligations under the 1992 Fund Convention and Supplementary Fund Protocol with respect to outstanding oil reports. The Director further notes that progress has been made and that the efforts to pursue the submission of oil reports have resulted in keeping non-compliance to quite low and manageable levels. However, failure by some Member States, as well as by some contributors, to abide by their obligations is not fair to those complying with the Conventions.
- 3.2 The Director is therefore pleased to share with the governing bodies the legal opinions prepared by Professor Sarooshi in relation to other ways to incentivise the submission of oil reports, including the possibility of invoicing contributors based on estimates if no reports were submitted, and doing it retroactively for past periods. The Director is grateful for the assistance provided by Professor Sarooshi to the Secretariat in considering the important issues discussed in the legal opinions.
- 3.3 The Director notes that, as stated in Professor Sarooshi's legal opinions, there is a firm legal basis under the 1992 Fund Convention for the Assembly to authorise the Director to issue invoices to contributors on the basis of estimated oil receipts, and to do it retrospectively in relation to past periods.
- 3.4 The Director believes that issuing a resolution on this matter would provide a more tangible measure of the cost resulting from the non-submission of oil reports and could contribute to more prompt and correct reporting of contributing oil. It would serve as a clear, concrete and unequivocal signal by the governing bodies of the importance of adhering to Convention requirements for the reporting of contributing oil. Furthermore, as stated by Professor Sarooshi in his legal opinion, a resolution would provide an enhanced degree of protection for any invoices issued on the basis of estimated oil receipts from the legal challenge by contributors.
- 3.5 If the governing bodies endorse the Director's considerations, the Director plans to prepare, in consultation with the Audit Body, a draft resolution to enable him to issue invoices to contributors based on estimates if no oil reports are submitted. If instructed by the governing bodies, the Director will present the draft resolution and the relevant draft amendments to the Internal Regulations at a future meeting of the governing bodies in 2023.
- 3.6 The Director strongly encourages all 1992 Fund and Supplementary Fund Member States to support the Secretariat in this matter.

4 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to:

- (a) consider the Director's views, based on the Secretariat's extensive discussions with the Audit Body and Professor Sarooshi's legal opinion; and
- (b) give the Director any instructions as they deem appropriate.

***RE: THE LEGALITY OF THE 1992 FUND LEVYING
CONTRIBUTIONS ON THE BASIS OF ESTIMATED OIL
RECEIPTS AND THE POTENTIAL ENFORCEMENT OF
UNPAID CONTRIBUTIONS BY DOMESTIC LEGAL
ACTION***

LEGAL OPINION

By PROFESSOR DAN SAROOSHI Q.C.

QUEEN'S COUNSEL & BARRISTER

ESSEX COURT CHAMBERS, LONDON

15 September 2021

1. INTRODUCTION

1. I am asked to advise the Director of the 1992 International Fund for Compensation for Oil Pollution Damage (the “**Director**”) on whether there is a legal basis under the International Convention on the Establishment of the 1992 Fund Convention (the “**Convention**”) for the Director to be authorised by the Assembly of States Parties of the 1992 Fund Assembly (the “**Assembly**”) to levy contributions on the basis of estimated oil receipts and, if so, whether the Convention also provides the basis for the Director to enforce payment by contributors before national courts, if required.
2. This would, in effect, permit the 1992 Fund to issue invoices directly to contributors based on estimated oil receipts where the relevant Member State has not complied with its obligation pursuant to Article 15 of the Convention to communicate to the Director both (i) the name and address of any person within the State who is liable to contribute to the 1992 Fund pursuant to Article 10 of the Convention; and (ii) data on the relevant quantities of contributing oil received by any such person during the preceding calendar year (the “**oil reports**”).

3. This Legal Opinion does not address the practical issue of how the Director may proceed to determine the estimated amounts of oil received in States that have not submitted their oil reports. Rather, this Legal Opinion confines itself to answering the questions whether the Director may be authorised by the Assembly to levy contributions on the basis of estimated oil receipts and, if necessary, whether the Convention provides the basis for the Director to enforce payment of levied contributions before national courts.

4. I have approached these matters in this Legal Opinion as follows:

Section 2: contains a summary of my conclusions;

Section 3: Explains the processes envisaged by the Convention in relation to the determination, payment, and if necessary recovery of annual contributions;

Section 4: considers the legal basis for the 1992 Fund to issue invoices to contributors on the basis of estimated oil receipts; and

Section 5: considers whether the Convention provides the basis for the Director to take legal action, if required, to enforce payment by contributors before national courts.

2. SUMMARY OF CONCLUSIONS

5. For the reasons set out in the body of this Legal Opinion, my conclusions are as follows:

(1) There is a firm legal basis under the Convention for the Director to be authorised by the Assembly to levy contributions on the basis of estimated oil receipts by, e.g., issuing invoices directly to those persons who received oil in total quantities exceeding 150,000 tonnes in the calendar year referred to in Article 12(2)(a) or (b) of the Convention (see **Section 4 below**).

(2) While the Convention does provide the basis for the Director to take legal action to enforce payment by contributors before national courts,

this will largely be meaningless in practice in the absence of national legislation by a Member State that provides for the transposition of debts imposed by the Fund into debts under the national law of the State concerned. In the absence of such domestic legislation, any legal proceedings for recovery against a defaulting contributor in the State's domestic courts would, at best, be highly problematic (see **Section 5 below**).

3. THE PROCESSES ENVISAGED BY THE CONVENTION RELATING TO THE DETERMINATION, PAYMENT, AND IF NECESSARY RECOVERY OF ANNUAL CONTRIBUTIONS

6. When considering whether there is a legal basis for the 1992 Fund to issue invoices directly to contributors based on estimated oil receipts, it is first helpful to outline the process envisaged by the Convention as to the determination, payment, and if necessary recovery of contributions. This process is defined by reference to a series of four inter-related obligations imposed by the Convention on Member States as well as certain authorisations given by the Convention to the Assembly and Director to take decisions and act in order to determine the amounts, and secure payment, of annual contributions.
7. ***First, the establishment of the obligation to contribute by persons receiving certain amounts of contributing oil and the associated reporting requirements of Member States:*** Article 10 of the Convention imposes an obligation on those persons within Member States who receive oil in total quantities exceeding 150,000 tonnes to make annual contributions to the 1992 Fund. There is a concomitant obligation on the relevant Member State within whose territory the person is located to provide information relating to such persons to the Fund under Articles 15(1)-(2). More specifically, such Member States shall ascertain and communicate to the Director both the names and addresses of those persons within its territory who receive contributing oil in such quantities that they bear a responsibility to make annual contributions pursuant to Article 10 of the Convention, and annual data on relevant quantities of oil received by such persons. The relevant provisions of the Convention provide:

(1) Articles 15(1)-(2):

“1. Each Contracting State shall ensure that any person who receives contributing oil within its territory in such quantities that he is liable to contribute to the Fund appears on a list to be established and kept up to date by the Director in accordance with the subsequent provisions of this Article.

2. For the purposes set out in paragraph 1, each Contracting State shall communicate, at a time and in the manner to be prescribed in the Internal Regulations, to the Director the name and address of any person who in respect of that State is liable to contribute to the Fund pursuant to Article 10, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year.”

(2) Article 10(1):

“Annual contributions to the Fund shall be made in respect of each Contracting State by any person who, in the calendar year referred to in Article 12, paragraph 2(a) or (b), has received in total quantities exceeding 150,000 tonnes”

8. ***Second, the decision to impose a levy on a specific contributor is taken by the Fund Assembly in conjunction with a decision by the Director:*** the Convention provides in Articles 12(1)-(2) that first the Assembly must decide the overall amount of contributions to be levied on an annual basis, but then Article 12(2) gives authority to the Director to decide – based on the Assembly’s decision – the specific amount of annual contribution to be made by each person within a particular Member State who falls within the requirements of Article 10(1). The key Article 12(2) of the Convention states that *“the Assembly shall decide the total amount of contributions to be levied. On the basis of that decision, the Director shall, in respect of each Contracting State, calculate for each person referred to in Article 10 the amount of the annual contribution”*.
9. ***Third, the obligation on Member States to compensate the Fund for any loss caused by a Member’s failure to comply with its oil reporting obligation and the separate obligation on Member States to ensure levied contributions are***

made by contributors within their territories: It is Article 13(2) which provides that:

“Each Contracting State shall ensure that any obligation to contribute to the Fund arising under this Convention in respect of oil received within the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.”

10. Moreover, in cases where a Member State does not fulfil its obligations to submit to the Director the oil report and this results in financial loss for the Fund, then pursuant to Article 15(4) *“that Contracting State shall be liable to compensate the Fund for such loss. The Assembly shall, on the recommendation of the Director, decide whether such compensation shall be payable by that Contracting State.”*
11. ***Fourth: the Director is authorised by the Convention to take “all appropriate action” to recover contributions due and in arrears from a contributor.*** This authority is conferred on the Director pursuant to Article 13(3) which provides:

*“3. Where a person who is liable in accordance with the provisions of Articles 10 and 12 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear, the **Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due.** However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.”*

(Emphasis added.)

12. Bearing in mind these inter-related obligations and authorisations relating to the determination by the Fund of the amounts – and the securing of payment – of annual contributions, this Legal Opinion now considers whether there is a legal basis under the Convention for the Director to be authorised by the Assembly

to levy contributions on the basis of estimated oil receipts (see **Section 4 below**); before considering whether the Convention provides the basis for the Director to take legal action, if required, to enforce payment by contributors before national courts (see **Section 5 below**).

4. THE LEGAL BASIS FOR THE 1992 FUND TO ISSUE INVOICES TO CONTRIBUTORS ON THE BASIS OF ESTIMATED OIL RECEIPTS

13. I can state at the outset that there is, in my opinion, a firm legal basis under the Convention for the Director to be authorised by the Assembly to levy contributions on the basis of estimated oil receipts by, e.g., issuing invoices directly to those persons who received oil in total quantities exceeding 150,000 tonnes in the calendar year referred to in Article 12(2)(a) or (b) of the Convention.
14. There are two key issues here: first, whether the Fund can determine a levy based on an estimate made of oil receipts as opposed to oil reports provided by Member States pursuant to Articles 15(1)-(2) (see **Section 4.1 below**); and, second, what importance, if any, flows from the Assembly's authorisation of the Director (see **Section 4.2 below**).

4.1. Whether the Fund can impose a levy based on estimated oil receipts

15. I have explained in **Section 3 above**, that Article 10(1) of the Convention establishes that contributions to the Fund are to be made by persons receiving certain amounts of contributing oil and that there is a concomitant obligation on the relevant Member State within whose territory the person is located to provide information on oil receipts pursuant to Articles 15(1)-(2).
16. It is only the provision of information by Member States to the 1992 Fund that is being sought to be replaced by the proposed alternative mechanism, i.e., whether the Fund can issue invoices based on estimated oil receipts. More

specifically, the proposal does not affect those persons under the Convention who are obligated to contribute. Nor does it affect the process of determining the amount of annual contribution to be made by such persons. Even in the case of the proposed alternative mechanism, the obligation to contribute continues to be imposed only on those persons falling within the scope of Article 10(1), and it remains for the Assembly to decide, pursuant to Article 12(2), on the total amount of contributions to be levied and then subsequently it is for the Director to calculate for each such person “*the amount of his annual contribution*”.

17. Accordingly, the sole potential issue that arises here is whether the Fund is restricted in the information relating to oil receipts that it may use in deciding on levies to that information which is supplied by Member States pursuant to Article 15 of the Convention. If the answer here is affirmative, then a decision by the Fund to levy an individual contributor based on estimated oil receipts would be unlawful, but in my opinion the answer here is a categoric “no” with the consequence that the Fund is able to issue invoices based on estimated oil receipts.
18. The reason for my opinion is that the Convention does not stipulate the only way that the 1992 Fund can receive information relating to those persons falling within Article 10(1) is by oil reports submitted by Member States pursuant to Article 15.
19. Indeed the language of Articles 15(1) and (3) provides cogent support for the view that the identification of such persons can also take place by recourse to information other than the oil reports submitted by Member States.
20. Article 15(1) provides that each Member State is obligated to communicate to the Director the names and addresses of persons who qualify as contributors pursuant to Article 10(1), but that it is the Director who is authorised to “*establish*” a “*list*” and keep this “*up to date*”. Importantly, Article 15(3) goes on to stipulate that “*For the purposes of ascertaining who are, at any given time, the persons liable to contribute to the Fund in accordance with Article 10, paragraph 1, and of establishing, where applicable, the quantities of oil to be taken into account for any such person when determining the amount of his contribution, the list shall be prima facie evidence of the facts stated therein.*” (Emphasis added.)

21. The use here of the language in Article 15(3) – “*prima facie evidence*” – is important since it indicates that there may be other evidence that can be taken into account by the Director when establishing and keeping the list up to date. Indeed the phrase “*prima facie*” indicates that the information provided by the Member State may potentially be ignored by the Director if other information comes to light – e.g., information provided by the person concerned or obtained through other sources – that demonstrates that the person concerned does not fulfil the requirements of Article 10(1) and thus is not obligated to contribute to the 1992 Fund. This may also work the other way in the sense that the Fund Secretariat may obtain information that identifies persons who should be contributors but who are not listed as such by a Member State. I understand this is consistent with the practice of the Secretariat which has indeed obtained its own information on oil receipts which led it, for example, to identify a new contributor (Nayara Energy, formerly Essar) receiving in excess of 15 million tonnes of contributing oil per year in India and also to identify a new contributor in the United Arab Emirates: see Fund Note by the Secretariat relating to the 57th Meeting of the Audit Body dated 7 April 2021, AB/57/6, paras. 3.6-3.8.
22. Accordingly, I agree with the view expressed by the Director under the heading “*Director’s preliminary considerations*”, as contained in the report of the 57th Meeting of the Audit Body, where it provides that if reports are not submitted then it would still be possible to levy contributions: see Fund Note by the Secretariat relating to the 57th Meeting of the Audit Body dated 7 April 2021, AB/57/6, para. 5.2.
23. These preliminary considerations of the Director in the same document go on to state that four conditions should be met, specifically:
- i. *Details of the contributor to be invoiced are provided by the Member State; name and address of the entity and the amount of contributing oil to be estimated.*
 - ii. *Estimates to be agreed by the Member State, the contributor(s) and the Secretariat. Estimates could be based on the most recent oil report received, on national data sourced by the Member State or on information obtained by the Secretariat from a third-party provider.*

iii. *The national law of the Member State allows for entities to be levied based on estimates, in case the 1992 Fund is required to pursue any outstanding contributions in court.*

iv. *The Member State is responsible for payment of the contributions as per Article 15.4 should the entity not make payment and the 1992 Fund incurs a financial loss.”*

24. These conditions represent an eminently sensible combination of Member State and contributor involvement in the process that should hopefully ensure a high rate of actual payments being made by the contributor, or in lieu thereof, by the Member State concerned. Accordingly, in my Opinion it would be prudent to deploy these conditions if the Fund decides to issue invoices directly.
25. It is worth emphasising that these conditions are not, however, legally required in order for the Fund to impose lawfully a levy on an individual contributor, since as explained above the provision of information by Member States is only one – and not the only – way in which the Fund can receive information relating to oil receipts.
26. In relation to condition (iv) above there is, however, a caveat: where a Member State participates in the process envisaged in conditions (i) and (ii) above – namely, to provide the name/address of a contributor and to agree with the 1992 Fund and the contributor an estimated value of oil received – then can it really be said to have satisfied the requirements of Article 15(2) such that a contributor’s failure to pay its contribution would not engage the Member State’s responsibility to pay in lieu under Article 15(4)? In this scenario, there is an argument that the Member State has provided the contributor’s name/address and in substance could also be said to have provided “*data on the relevant quantities of contributing oil received*” since the State acted to agree with the contributor/Fund the estimate of quantity of oil received that was subsequently used by the Fund to impose a contribution. I note here that the Fund’s Internal Regulation 4 requires that pursuant to Article 15(2) such data should normally be provided by the Member State to the Director no later than 30 April each year, but it would likely be difficult to maintain that where a Member State had participated in agreeing an estimate but that its (technical) failure to provide such data before 30 April in a particular year would by itself constitute a firm basis for finding that the Member State had breached Article

15(2) such that it should bear responsibility in case of non-payment by the contributor concerned.

4.2. What role, if any, is played by the Assembly's authorisation of the Director to issue invoices based on estimated oil receipts

27. I have explained in **Section 3 above** that the decision to impose a levy on a specific contributor is taken by the Fund Assembly in conjunction with a decision by the Director.
28. Thus on one view the decision to impose a contribution on a qualifying person rests solely with the Director, but the position is more nuanced. Since Article 12(2) expressly stipulates that the decision by the Director must be based on the Assembly's prior decision on the total amount of contributions to be levied, it would be prudent for decisions by the Director to invoice contributors to be authorised in general terms by a resolution of the Assembly. This would provide an enhanced degree of protection for any such issued invoices from legal challenge by contributors in, e.g., domestic courts.

5. Whether the Convention provides a legal basis to take legal action, if required, to enforce payment by contributors before national courts

29. In order for the 1992 Fund – through its Director – to take legal action before national courts to enforce payment by contributors of invoices the following three preconditions will need to be fulfilled:
- (1) First, that there is a legal obligation imposed by the Convention on contributors to have to contribute to the 1992 Fund in the amount specified by the Director;

- (2) Second, that the Director has the authority under the Convention to take action on behalf of the Fund in domestic litigation in order to recover amounts due from individual contributors; and
 - (3) Third, that the Member State concerned has transposed the obligation on qualifying persons under the Convention to have to contribute to the Fund into its domestic law such that the contributor's debt under the Convention is recognised as a debt under the State's national law, this being important so as to provide the Director with a viable cause of action in a domestic court when seeking to enforce, e.g., non-payment of an invoice issued by the Director.
30. ***The first precondition: that there is a legal obligation imposed by the Convention on contributors to have to contribute to the 1992 Fund in the amount specified by the Director:*** I can deal briefly with this first precondition which, in my view, is clearly fulfilled. As explained above, Article 10(1) imposes on persons who receive more than 150,000 tonnes of oil a legal obligation to have to contribute to the 1992 Fund, and moreover that the amount of such a contribution is to be determined, pursuant to Articles 12(2), by related decisions of the Assembly and Director.
31. ***The second precondition: that the Director has the authority to take action under the Convention in domestic litigation in order to seek to recover amounts levied on individual contributors:*** The second requirement is met since Article 2(2) provides that “*The Fund shall in each Contracting State be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting State shall recognize the Director of the Fund (hereinafter referred to as ‘The Director’) as the legal representative of the Fund.*” Moreover, Article 28(2) stipulates that the “*Director shall be the legal representative of the Fund*” which includes the competence to act on behalf of the 1992 Fund in domestic litigation; and specifically in relation to recovery of contributions, Article 29(2)(c) provides that the “*Director shall in particular ... (c) collect the contributions due under this Convention while observing in particular the provisions of Article 13, paragraph 3*”.
32. It is important here that Article 13(3) does not stipulate a particular action to be taken by the Director in order to ensure that a person does in fact make their


assessed contribution to the 1992 Fund. All Article 13(3) provides is the following:

*“3. Where a person who is liable in accordance with the provisions of Articles 10 and 12 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear, the **Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due.** However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.”*

(Emphasis added.)

33. This Article 13(3) confers on the Director a broad discretion – to “*take all appropriate action*” – in order to recover a contribution that has been levied by the Director on a contributor. Given the other provisions of the Convention set out in the previous paragraphs, the range of appropriate action here includes the taking of domestic legal action against a contributor to recover sums due.
34. Indeed such a measure would further appear to be envisaged by Article 34(6) which provides that “***Information relating to individual contributors supplied for the purpose of this Convention shall not be divulged outside the Fund except in so far as it may be strictly necessary to enable the Fund to carry out its functions including the bringing and defending of legal proceedings.***” (Emphasis added.)
35. ***The third precondition: that the Member State concerned has transposed the legal obligation on contributors into its domestic law such that the contributor’s debt under the Convention is recognised as a debt under the State’s national law:*** While Member States are obligated under Article 13(2) of the Convention to ensure that payment obligations of contributors are fulfilled by using, if necessary, the coercive powers of the State; there is, however, no obligation on States to have to enact a law or regulation that transposes the legal obligation on contributors into its domestic law, let alone that an unpaid levy by a contributor must be recognised by a State’s law as a debt enforceable under its domestic law.

36. But in practice it is of great importance that the contributor's obligation to pay is transposed into a debt under the relevant Member State's law since otherwise it will be very difficult indeed for the Director to have a viable cause of action before a State's domestic courts. In the absence of enabling domestic law, the domestic court would likely not treat the Convention as having direct effect within the State's national law and nor consider the decision by the Fund imposing the debt under the Convention as having direct effect within the State's legal order.
37. This will certainly be the treatment afforded by the significant number of States which require a treaty to be transposed formally into national law before it can have domestic legal effect (e.g., Canada, Germany, Israel, South Africa, and UK), but even in those States that are generally referred to as so-called "monist States" – i.e., States where obligations under a treaty once ratified pursuant to the State's domestic constitutional processes may have direct effect within the State's legal order – even here it would likely be problematic at best that the debt of a contributor under the Convention would automatically be recognised as a debt within the State's legal order.
38. In this context, the report by the Secretariat relating to the 57th Meeting of the Audit Body dated 7 April 2021, AB/57/6, at para. 4.4 is highly relevant when it explains that of the nine Member States with two or more years of outstanding reports and from whom reports of more than 150,000 tonnes of contributing oil may reasonably be expected, that "[i]t is unclear if national legislation implementing the Convention exists in any of the other States [other than the Netherlands] that have failed to submit their reports. If no national legislation exists and a contributor fails to pay an invoice that has been issued on the basis of an estimate, the 1992 Fund may not be able to recover the contributions due."
39. In conclusion on **Section 5**, while the Convention does provide the basis for the Director to take legal action to enforce payment by contributors before national courts, this will in practice largely be meaningless in the absence of national legislation by a Member State that provides for the transposition of debts imposed by the Fund into debts under the national law of the State concerned. In the absence of such a domestic legal provision, legal proceedings for recovery against a defaulting contributor in the State's domestic courts would, at best, be highly problematic.



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15 September 2021

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***RE: THE LEGALITY OF THE 1992 FUND ISSUING
RETROSPECTIVE INVOICES RELATING TO OIL
ESTIMATES AND CONTRIBUTIONS LEVIED IN
RELATION TO PAST PERIODS***

LEGAL OPINION

By PROFESSOR DAN SAROOSHI Q.C.

**QUEEN'S COUNSEL & BARRISTER
ESSEX COURT CHAMBERS, LONDON**

12 April 2022

1. INTRODUCTION

1. I am asked to advise the Director of the 1992 International Fund for Compensation for Oil Pollution Damage (the “**Director**”) on whether there is a legal basis under the International Convention on the Establishment of the 1992 Fund Convention (the “**Convention**”) for the 1992 Fund to issue invoices to contributors on a retrospective basis by looking at previous years oil estimates and contributions levied for those years.
2. One of the issues on which I have previously advised the Director in a Legal Opinion dated 15 September 2021 is that there is a firm legal basis under the Convention for the Director to be authorised by the 1992 Fund Assembly (“**Assembly**”) to levy contributions on the basis of estimated oil receipts. It is in this context that I now proceed to advise on whether such invoices can be issued retrospectively and on the basis of previous years oil estimates and contributions levied for those years.

3. I have approached these matters in this Legal Opinion as follows:

Section 2: contains a summary of my conclusions;

Section 3: Explains the processes envisaged by the Convention in relation to the determination and payment of annual contributions; and

Section 4: Considers the legal basis for the 1992 Fund to issue invoices retrospectively to contributors relating to past periods.

2. SUMMARY OF CONCLUSIONS

4. For the reasons set out in more detail in the body of this Legal Opinion, my conclusions are as follows:

- (1) That there is a firm legal basis under the Convention for the 1992 Fund to issue invoices retrospectively to contributors relating to past periods;
- (2) That the Director possesses the power to issue such retrospective invoices pursuant to Article 13(3) of the Convention which confers on the Director a power to “*take all appropriate action against* [a 1992 Fund Contributor who is in arrears] *with a view to the recovery of the amount due*”, the issuing of retrospective invoices falling within the scope of such “*appropriate action*” and thus being a lawful action that can be taken by the Director. Accordingly, the Director can apply the levy per tonne for a past year to all persons who are obligated to contribute to the 1992 Fund on the basis of estimated or actual oil receipts in that year;
- (3) The question thus arises whether it is necessary for the Assembly to authorise the Director to issue such retrospective invoices given that the Director already possesses such a power under Article 13(3). The answer here is yes and it is largely so for practical reasons. Since Article 12(2) of the Convention expressly stipulates that any decision by the Director in calculating and levying the specific amount to be paid by a 1992 Fund Contributor is to be based on the Assembly’s prior determination of the 1992 Fund levy, then it would in my opinion be

prudent for the Director to be authorised by a specific resolution of the Assembly authorising the issuance of retrospective invoices to a 1992 Fund Contributor. This would provide an enhanced degree of protection for any such issued invoices from legal challenge by contributors in, e.g., domestic courts.

3. THE PROCESSES ENVISAGED BY THE CONVENTION RELATING TO THE DETERMINATION AND PAYMENT OF ANNUAL CONTRIBUTIONS

5. In order to determine whether the Assembly has legal authority under the Convention to authorise the Director to issue invoices retrospectively to contributors by looking at previous years oil estimates and contributions levied for those years, it is first necessary to consider briefly the process that is expressly envisaged by the Convention relating to the determination and payment of contributions.
6. This process is defined by reference to a series of four inter-related obligations imposed by the Convention on Member States as well as certain authorisations given by the Convention to the Assembly and Director to take decisions and act in order to determine the amounts, and secure payment, of annual contributions.
7. Before considering the four inter-related obligations under the Convention, my understanding of how the Convention envisages the determination and apportionment of contributions to the 1992 Fund can be summarised as follows:
 - (1) **First**, the Assembly will establish for each calendar year the total amount of contributions to be made to the 1992 Fund (the so-called “**1992 Fund levy**”). This is the Assembly exercising its power pursuant to Article 12(1) of the Convention: “[t]he Assembly shall decide the total amount of contributions to be levied”;
 - (2) **Second**, then it is for the Director to determine the so-called “levy per tonne” which is simply calculated by dividing the 1992 Fund levy by the reported and estimated oil receipts for the relevant period. This is an exercise by the Director of his power under Article 12(2) to “*calculate*

for each [contributor] ... the amount of his annual contributor” on “the basis of [the Assembly’s] decision” on “the total amount of contributions to be levied”; and

- (3) **Third**, the Director then proceeds to calculate for each contributor the amount of contribution to be made by multiplying the levy per tonne by the actual amount of oil reported or estimated to have been received by each specific contributor. Again, this is the Director exercising his power pursuant to Article 12(2) of the Convention to “*calculate for each [contributor] ... the amount of his annual contributor” on “the basis of [the Assembly’s] decision” on “the total amount of contributions to be levied”*”.
8. Having considered the process under the Convention for the determination and apportionment of contributions to the 1992 Fund, I now turn to consider briefly the four inter-related obligations under the Convention.
9. ***First, the Convention establishes an obligation to contribute by persons receiving certain amounts of contributing oil and establishes an associated reporting requirement on Member States:*** Article 10 of the Convention imposes an obligation on those persons within Member States who receive oil in total quantities exceeding 150,000 tonnes to make annual contributions to the 1992 Fund (“**1992 Fund Contributor**”). There is a concomitant obligation on the relevant Member State within whose territory the person is located to provide information relating to such persons to the Fund under Articles 15(1)-(2). More specifically, such Member States shall ascertain and communicate to the Director both the names and addresses of those persons within its territory who receive contributing oil in such quantities that they bear a responsibility to make annual contributions pursuant to Article 10 of the Convention, and annual data on relevant quantities of oil received by such persons. The relevant provisions of the Convention provide:

- (1) Articles 15(1)-(2):

“1. Each Contracting State shall ensure that any person who receives contributing oil within its territory in such quantities that he is liable to contribute to the Fund appears on a list to be established and kept up to date by the Director in accordance with the subsequent provisions of this Article.

2. For the purposes set out in paragraph 1, each Contracting State shall communicate, at a time and in the manner to be prescribed in the Internal Regulations, to the Director the name and address of any person who in respect of that State is liable to contribute to the Fund pursuant to Article 10, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year.”

(2) Article 10(1):

“Annual contributions to the Fund shall be made in respect of each Contracting State by any person who, in the calendar year referred to in Article 12, paragraph 2(a) or (b), has received in total quantities exceeding 150,000 tonnes”

10. ***Second, the decision to impose a levy on a specific contributor is taken by the Fund Assembly in conjunction with a decision by the Director:*** the Convention provides in Articles 12(1)-(2) that first the Assembly must decide the overall amount of contributions to be levied on an annual basis, but then Article 12(2) gives authority to the Director to decide – based on the Assembly’s decision – the specific amount of annual contribution to be made by each person within a particular Member State who falls within the requirements of Article 10(1). The key Article 12(2) of the Convention states that *“the Assembly shall decide the total amount of contributions to be levied. On the basis of that decision, the Director shall, in respect of each Contracting State, calculate for each person referred to in Article 10 the amount of the annual contribution”*.
11. ***Third, the obligation on Member States to compensate the Fund for any loss caused by a Member’s failure to comply with its oil reporting obligation and the separate obligation on Member States to ensure levied contributions are made by contributors within their territories:*** It is Article 13(2) which provides that:

“Each Contracting State shall ensure that any obligation to contribute to the Fund arising under this Convention in respect of oil received within the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such

measures shall only be directed against those persons who are under an obligation to contribute to the Fund.”

12. Moreover, in cases where a Member State does not fulfil its obligations to submit to the Director the oil report and this results in financial loss for the Fund, then pursuant to Article 15(4) *“that Contracting State shall be liable to compensate the Fund for such loss. The Assembly shall, on the recommendation of the Director, decide whether such compensation shall be payable by that Contracting State.”*

13. ***Fourth: the Director is authorised by the Convention to take “all appropriate action” to recover contributions due and in arrears from a contributor.*** This authority is conferred on the Director pursuant to Article 13(3) which provides:

*“3. Where a person who is liable in accordance with the provisions of Articles 10 and 12 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear, the **Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due.** However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.”*

(Emphasis added.)

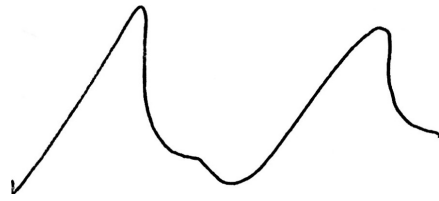
14. Bearing in mind these inter-related obligations and authorisations relating to the determination and securing of payments by the Fund of annual contributions, I now turn to consider whether such invoices can be issued retrospectively and on the basis of previous years oil estimates and contributions levied for those years.

4. THE LEGAL BASIS FOR THE 1992 FUND TO ISSUE INVOICES RETROSPECTIVE RELATING TO PAST PERIODS

15. The starting point here is the finding made in my previous Legal Opinion dated 15 September 2021 that there is a firm legal basis under the Convention for the Assembly to authorise the Director to levy contributions on the basis of estimated oil receipts by, e.g., issuing invoices directly to those persons who received oil in total quantities exceeding 150,000 tonnes in the calendar year referred to in Article 12(2)(a) or (b) of the Convention.
16. In relation to the issuing of retrospective invoices, my view is that the Director does indeed possess the power to do so pursuant to Article 13(3) of the Convention which confers on the Director a power to “*take all appropriate action against [a 1992 Fund Contributor who is in arrears] with a view to the recovery of the amount due*”. The issuing of retrospective invoices in my view does fall within the scope of such “*appropriate action*” and is thus a lawful action that can be taken by the Director.
17. Moreover, the existence of “*contributions due and in arrears*” in Article 13(3) can in my view include contributions that are assessed and calculated in respect of a past calendar year, and once such an assessment and calculation is made then the contribution becomes due and will be in arrears. Quite separately such a position is important in order to maintain the integrity of the obligations imposed on 1992 Fund Contributors by the Convention regardless of when their actual existence may be discovered by the Fund.
18. What is of importance here is that the issuing of such retrospective invoices by the Director does not involve the creation of an obligation to contribute to the 1992 Fund for persons who did not otherwise bear such an obligation, but is rather a mechanism by which the Director is seeking to recover an amount due under the obligation already imposed on them by the Convention. As explained in **Section 3 above**, Article 10 of the Convention imposes an obligation on 1992 Fund Contributors (i.e. those persons within Member States who receive oil in total quantities exceeding 150,000 tonnes) to make annual contributions to the 1992 Fund; and Article 12(2) confers on the Director the power to calculate the amount due from each 1992 Fund Contributor in relation to a specific calendar year. Whether this is recovered at the time or by issuing a retrospective invoice

does not affect in any way the existence of the obligation of the person to contribute to the 1992 Fund under the Convention.

19. Nor indeed does retroactive invoicing affect the integrity of the process under the Convention for determining the amount of contribution to be made by each 1992 Fund Contributor. As explained in **Section 3 above**, Article 12 empowers the Assembly to determine the 1992 Fund levy (total amount of contributions to be levied), and it then empowers the Director to calculate the contribution due from each contributor “*on the basis of that decision* [i.e. the amount of levy decided by the Assembly]”. What is important here are the words “*on the basis of*” since this supports the argument that there is no fixed (i.e. maximum) amount of contributions that can be received by the 1992 Fund in relation to a specific calendar year. Rather once the Director has calculated the levy per tonne – by dividing the total levy by the oil receipts for that year – then it is this levy per tonne figure which is fixed and which is then applied to all persons who are obligated to contribute to the 1992 Fund pursuant to Article 10 of the Convention as explained in **Section 3 above**.
20. This legal analysis is of considerable importance for the legality of the issuance by the 1992 Fund of retrospective invoicing since it means that the Director can apply the levy per tonne for a past year to all persons who are obligated to contribute to the 1992 Fund on the basis of estimated or actual oil receipts in that year pursuant to the Director’s power to take “*appropriate action*” under Article 13 of the Convention.
21. The question thus arises whether it is necessary for the Assembly to authorise the Director to issue such retrospective invoices given that the Director already possesses such a power based on the analysis set out above. The answer here is yes and it is largely so for practical reasons. Since Article 12(2) of the Convention expressly stipulates that any decision by the Director in calculating and levying the specific amount to be paid by a 1992 Fund Contributor is to be based on the Assembly’s prior determination of the 1992 Fund levy, then it would in my opinion be prudent for the Director to be authorised by a specific resolution of the Assembly authorising the issuance of retrospective invoices to a 1992 Fund Contributor. This would provide an enhanced degree of protection for any such issued invoices from legal challenge by contributors in, e.g., domestic courts.



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