



PREPARATIONS FOR THE ENTRY INTO FORCE OF THE SUPPLEMENTARY FUND PROTOCOL

Contribution matters

Note by the Director

Summary:

This document deals with issues relating to contribution matters which will have to be considered in connection with the setting up of the Supplementary Fund, namely submission of oil reports, denial of compensation due to non-submission of oil reports, levying of contributions and capping of contributions.

Action to be taken:

Give the Director instructions in respect of the issues set out above.

1 Introduction

Articles 10 to 15 of the Supplementary Fund Protocol deal with contributions to the Supplementary Fund, including the submission of oil reports, denial of compensation due to non-submission of oil reports, levying of contributions and capping of contributions.

2 Submission of oil reports

- 2.1 The levying of contributions to the Supplementary Fund will be based on oil reports in respect of individual contributors in Supplementary Fund Member States. Article 13 of the Supplementary Fund Protocol provides:

Contracting States shall communicate to the Director of the Supplementary Fund information on oil receipts in accordance with article 15 of the 1992 Fund Convention provided, however, that communications made to the Director of the 1992 Fund under article 15, paragraph 2, of the 1992 Fund Convention shall be deemed to have been made also under this Protocol.

- 2.2 States which become Members of the Supplementary Fund must already be Members of the 1992 Fund and so will be obliged to submit reports on contributing oil to the 1992 Fund.
- 2.3 For States which only receive contributing oil directly by sea, and not by other means of transport such as by pipeline or road, the reports to the Supplementary Fund would be identical to those to the 1992 Fund. It is expected that the great majority of States which join the Supplementary Fund will fall into this category.

- 2.4 However, States which receive contributing oil by other means of transport, such as by pipeline or road, which has previously been received in another State by sea may need to make separate reports to the 1992 Fund and the Supplementary Fund depending on whether or not the latter State is also a Member of the Supplementary Fund and, if so, the date on which it joined that Fund.
- 2.5 The issue can be illustrated by the following example : A company in State A, a Member of the Supplementary Fund, receives 500 000 tonnes of contributing oil by pipeline from State B in which State that quantity had been received directly after sea transport, but the company does not receive any contributing oil directly by sea. If State B is also a Member of the Supplementary Fund, the company in State A would not need to make any report either to the 1992 Fund or to the Supplementary Fund, as the quantity of oil received by pipeline would be reported by the physical receiver in State B. However, should State B be a Member of the 1992 Fund but not a Member of the Supplementary Fund, the company in State A would not need to make a report to the 1992 Fund but should report the receipt of 500 000 tonnes of contributing oil to the Supplementary Fund. If State B joins the Supplementary Fund during a particular year, the company in State A would have to report to the Supplementary Fund that part of the 500 000 tonnes of oil which it received during that year from State B before the Supplementary Fund entered into force for State B whilst the contributor in State B should report the remainder.
- 2.6 A similar situation occurred in respect of the relationship between the 1971 and 1992 Funds. Germany became a Member of the 1992 Fund in May 1996 and so oil received in Italy directly after sea transport and transported to Germany by pipeline prior to Italy joining the 1992 Fund in September 2000 had to be reported by the German receivers.
- 2.7 As a result, the Director considers that in respect of the great majority of States which will become Members of the Supplementary Fund that Fund can simply accept oil reports made under the 1992 Fund Convention as set out in Article 13 of the Supplementary Fund Protocol. It will nevertheless, in his view, be necessary for the Supplementary Fund to issue its own reporting form for use in those cases where the quantities of oil subject to the levy of contributions for 1992 Fund and the Supplementary Fund are not identical. He also considers it necessary to make modifications to the 1992 Fund reporting form so that States can indicate whether a report to the 1992 Fund should be considered as a report to the Supplementary Fund also or whether a separate report will be submitted to the latter Fund.
- 2.8 The Director also intends to consider whether the reporting forms can be revised so as to make them more user-friendly.
- 2.9 Article 14 of the Supplementary Fund Protocol deals with the case where the aggregate quantity of contributing oil received in a Member State in a given calendar year is less than 1 million tonnes. In such a case, that Member State shall assume the obligations that would be incumbent on any person who would be liable to contribute to the Supplementary Fund in respect of oil received in that State in so far as no liable person exists for the aggregate quantity of oil received. That means that the Member State would be liable to pay contributions for a quantity of contributing oil corresponding to the difference between 1 million tonnes and the aggregate quantity of actual contributing oil receipts reported in respect of that State.
- 2.10 Subject to any instruction which the 1992 Fund Assembly may give him, the Director intends to submit drafts of the oil reporting forms and explanatory notes for use by the 1992 Fund and the Supplementary Fund for consideration by the 1992 Fund Assembly at its October 2004 session and at the 1st session of the Supplementary Fund Assembly.

3 Denial of compensation due to non-submission of oil reports

- 3.1 Both the 1971 and the 1992 Funds have encountered significant difficulties in the operation of the contributions system as a result of a number of Member States not fulfilling their obligations under

the 1971 and 1992 Fund Conventions to submit their reports on oil receipts, making it impossible for the Funds to issue invoices to contributors in those States. Article 15.4 of the 1992 Fund Convention contains provisions relating to sanctions against States which do not fulfil their obligations in this regard. The issue of whether it was possible to use sanctions against States which had not submitted oil reports was considered several times by the 1992 Fund Assembly. The conclusion was that there was not much that could be done under the text of the 1992 Fund Convention (cf document 92FUND/A.8/30, paragraph 15.7).

- 3.2 The Supplementary Fund Protocol contains in Article 15.2 provisions corresponding to Article 15.4 of the 1992 Fund Convention. The Protocol also contains, in Article 15 paragraphs 2 and 3, provisions designed to address the problem encountered by the 1971 and 1992 Funds.
- 3.3 Article 15.1 of the Supplementary Fund Protocol provides that States in which no person or group of associated persons received more than 150 000 tonnes of contributing oil in a given calendar year shall notify the Director of the Supplementary Fund accordingly. As regards the 1992 Fund, this requirement is contained in Internal Regulation 4.4.
- 3.4 Article 15.2 provides that no compensation shall be paid for oil pollution damage in a particular Member State (ie in its territory, territorial sea, exclusive economic zone or area determined under Article 3(a)(ii) or for preventive measures to prevent or minimise such damage until that Member State has fulfilled its obligations up to and including the year preceding the incident either to submit oil reports under Article 13.1 or to notify the Director of the Supplementary Fund that reports are not required under Article 15.1. Under Article 15.2 the Assembly shall determine in the Internal Regulations the circumstances under which a Member State shall be considered as having failed to comply with its obligations. Article 15.3 provides that if compensation has been temporarily denied and the State has still not fulfilled its obligations to report one year after the Director of the Supplementary Fund has notified the State of its failure to report, then compensation shall be denied permanently.
- 3.5 It should be noted that the scope of the provision was subject to considerable discussion in the Intersessional Working Group set up by the 1992 Fund Assembly. The text which was adopted for inclusion in the Supplementary Fund Protocol refers in this regard to a geographical criteria, ie the place where the damage occurred. The residence or nationality of the claimant is therefore not relevant for the purpose of deciding whether or not compensation should be denied.
- 3.6 The Director intends to examine further the conditions under which a Member State shall be considered as having failed to comply with its obligations and submit a proposal to the 1st Assembly of the Supplementary Fund for provisions in this regard to be included in the Internal Regulations.

4 Levying of contributions

- 4.1 The Supplementary Fund will need to levy contributions in order to obtain sufficient liquid funds for its administration, for the reimbursement to the 1992 Fund of costs incurred in relation to the International Conference which adopted the Supplementary Fund Protocol and for the preparations for the entry into force of the Supplementary Fund Protocol and for the payment of claims, if any (cf document 92FUND/A/ES.8/2/7).
- 4.2 Under the Supplementary Fund Protocol, the Assembly shall adopt a budget for each calendar year (Article 11.1). Since the Supplementary Fund will probably be involved in very few incidents, it is possible that the expenses incurred by that Fund will for a number of years only be for administrative costs. It may therefore be worth considering whether it would be appropriate not to levy contributions every year to cover these expenses, which will be relatively low, but to make a levy for an amount which would cover the administrative expenses for two or three years.

- 4.3 The 1st Assembly of the Supplementary Fund will need to decide when the first levy of contributions should be payable. The Director submits two options for consideration: to decide at its first session to levy contributions or to defer that decision to a later session.
- 4.4 If the first session of the Assembly of the Supplementary Fund is held during the autumn of 2004, as seems likely at this stage, contributions could be levied at that session for payment by 1 March 2005, ie at the same time as any contributions to the 1971 and 1992 Funds will be payable. This would have the advantage that the Supplementary Fund would quickly become financially independent. The Supplementary Fund would then be in a position to repay the 1992 Fund for expenses incurred by the latter Fund on behalf of the Supplementary Fund, and there should be no need for the Supplementary Fund to obtain funds from other sources. On the other hand, this proposal would mean that arrangements for invoicing contributions would have to be made very quickly, which might give the Secretariat insufficient time to prepare the invoices, given that the contribution system of the Supplementary Fund has some fundamental differences compared with that of the 1971 and 1992 Funds.
- 4.5 Under the other option, the first levy would be decided at a subsequent session of the Supplementary Fund Assembly, for example at its ordinary session in 2005, which will probably be held in the autumn of that year. This option would have the advantage of reducing the administrative burden both on the Secretariat and on contributors in States which will be Members of both the 1992 Fund and the Supplementary Fund. It would also be likely to result in the sharing of the burden of the initial costs of setting up the Supplementary Fund among contributors in a large number of Member States, since more States will probably have joined the Supplementary Fund by the autumn of 2005. However, this approach would have the disadvantage that it would delay the Supplementary Fund's financial independence and its ability to reimburse the 1992 Fund the amounts owed to it referred to in paragraph 4.1. If this approach were adopted, the Supplementary Fund would be obliged to take up loans, either from banks or from the 1992 Fund, to cover its administrative expenses during a number of months.
- 4.6 The Director takes the view that it would be better to choose the second option, ie to postpone the first levy of contributions until the Supplementary Fund Assembly's ordinary session in 2005.
- 4.7 If the approach set out in paragraph 4.6 were taken, the Supplementary Fund Assembly might wish to request the 1992 Fund Assembly to authorise the Director of the 1992 Fund to make the necessary funds available to the Supplementary Fund in the form of loans from the 1992 Fund, to the extent that this can be done without prejudice to the operations of the 1992 Fund. Such loans would be repaid, with interest, when the Supplementary Fund has received the first levy of contributions decided by its Assembly. It should be noted that the amounts required would be very modest.
- 4.8 If an incident were to occur during the period immediately after the entry into force of the Supplementary Fund Protocol which would require that Fund to make compensation payments, it would be necessary to convene an extraordinary session of the Assembly to consider when contributions should be levied to cover compensation payments in respect of this incident. However, the Supplementary Fund will only make payments when the amount available under the 1992 Conventions has been paid in compensation, ie 203 million SDR. It is therefore unlikely that the Supplementary Fund will be called upon to make payments in the early stages of an incident.
- 4.9 It would be desirable if procedures could be developed which did not put an unnecessary administrative burden on the contributors to the IOPC Funds. For this reason, it is proposed to adopt, as a general policy, that contributions to the Supplementary Fund should be levied and invoiced at the same time as contributions are levied to the 1971 and 1992 Funds.
- 4.10 As is already the case for States which were Members of the 1971 Fund and are Members of the 1992 Fund, it is proposed that contributors in States which are Members of the Supplementary Fund would be issued with a single invoice covering the levies, if any, to all three Funds,

indicating the amounts payable to the respective Funds. It is also proposed that such contributors could make a single payment in respect of the aggregate amounts invoiced in respect of each Fund. It would be for the Secretariat to make the appropriate apportionment of the payment between the 1971 Fund, the 1992 Fund and the Supplementary Fund.

- 4.11 In June 1996 the Assemblies of the 1971 and 1992 Funds introduced a deferred invoicing system. Under this system the Assemblies fix the total amount to be levied in contributions for a given calendar year, but may decide that only a specific lower amount should be invoiced for payment by 1 March in the following year, the remaining amount, or a part thereof, to be invoiced later in the year, if necessary (documents FUND/A.18/26, paragraph 18.2 and FUND/A.1/34, paragraph 16.1). The Director considers that a deferred invoicing system should be introduced also in respect of the Supplementary Fund.
- 4.12 The 1971 Fund and the 1992 Fund have established a working capital to be used for payments of compensation which have not been taken into account in the determination of the amount of annual contributions to be levied. The level of the working capital is fixed by the respective Assembly. The working capital is at present £5 million for the 1971 Fund and £20 million for the 1992 Fund. In view of what is stated in paragraph 4.8 above in respect of the Supplementary Fund's involvement in the payment of compensation, the Director does not consider it necessary for the Supplementary Fund to have a working capital for this purpose. However, in order to enable the Supplementary Fund to respond to unforeseen expenditure which will probably be modest, it is proposed that the Supplementary Fund should have a small working capital of, say, £1million.

5 Capping of contributions

- 5.1 As was the case for the 1992 Fund Convention, the Supplementary Fund Protocol provides for a system of capping of contributions during a transitional period. That system is governed by Article 18 of the Protocol which reads:
- 1 Subject to paragraph 4, the aggregate amount of the annual contributions payable in respect of contributing oil received in a single Contracting State during a calendar year shall not exceed 20% of the total amount of annual contributions pursuant to this Protocol in respect of that calendar year.
 - 2 If the application of the provisions in article 11, paragraphs 2 and 3, would result in the aggregate amount of the contributions payable by contributors in a single Contracting State in respect of a given calendar year exceeding 20% of the total annual contributions, the contributions payable by all contributors in that State shall be reduced pro rata so that their aggregate contributions equal 20% of the total annual contributions to the Supplementary Fund in respect of that year.
 - 3 If the contributions payable by persons in a given Contracting State shall be reduced pursuant to paragraph 2, the contributions payable by persons in all other Contracting States shall be increased pro rata so as to ensure that the total amount of contributions payable by all persons liable to contribute to the Supplementary Fund in respect of the calendar year in question will reach the total amount of contributions decided by the Assembly.
 - 4 The provisions in paragraphs 1 to 3 shall operate until the total quantity of contributing oil received in all Contracting States in a calendar year, including the quantities referred to in article 14, paragraph 1, has reached 1,000 million tons or until a period of 10 years after the date of entry into force of this Protocol has elapsed, whichever occurs earlier.

- 5.2 As the capping system under the Supplementary Fund Protocol is, from a technical point of view, identical to that under the 1992 Fund Convention, it may be useful to recall certain decisions taken by the 1992 Fund Assembly as regards the application of the capping provisions in that Convention (documents 92FUND/A.1/17 and 92FUND/A.1/34, paragraphs 17.2-17.4):

The 1992 Fund Assembly decided that the capping system should apply separately for a given year to each levy for the general fund and to each levy for a major claims fund. It was agreed that the assessments should be made in such a way that the basic levy and the additional capping levy (or capping deduction, in respect of contributors in a capped State) were shown separately in the Fund's accounts and on the invoices sent to contributors.

It was decided by the 1992 Fund Assembly that the Director should make the decision - at the time of invoicing - of whether to cap contributions, since this would make it possible to base the decision on more complete figures on oil receipts than if the decision were taken by the Assembly.

The 1992 Fund Assembly decided that the capping procedure should not apply in respect of decisions to levy contributions taken by the Assembly after the date on which the Director received from Member States reports on contributing oil where the reported quantity received in all Member States (ie those States for which the 1992 Fund Convention has entered into force) together exceeded 750 million tonnes.^{<1>} It was noted in this context that the timing of a decision by the Assembly to levy contributions could affect whether or not the capping procedure would be applied.

- 5.3 The Director is of the opinion that corresponding procedures should be followed in respect of the Supplementary Fund.

6 **Action to be taken**

The Assembly is invited

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions as it deems appropriate in respect of:
 - (i) submission of oil reports;
 - (ii) denial of compensation due to non-submission of oil reports;
 - (iii) levying of contributions; and
 - (iv) capping of contributions.

^{<1>} the quantity which would trigger the termination of the capping under the 1992 Fund Convention.