



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUNDS

<b>Agenda item: 6</b>	IOPC/APR16/6/1	
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1992 Fund Assembly	<b>92AES20</b>	•
1992 Fund Executive Committee	<b>92EC66</b>	
Supplementary Fund Assembly	<b>SA12</b>	•

## DRAFT RESOLUTIONS IN RESPECT OF OUTSTANDING OIL REPORTS AND OUTSTANDING CONTRIBUTIONS

### Note by the Audit Body

<b>Summary:</b>	<p>The two draft Resolutions on Measures in respect of Outstanding Oil Reports and Outstanding Contributions (relating to the 1992 Fund) and Measures in respect of Outstanding Contributions (relating to the Supplementary Fund), attached at Annexes I and II respectively, represent the culmination of the review undertaken by the Audit Body in response to the decision of the 1992 Fund Assembly and the Supplementary Fund Assembly at their October 2014 sessions that the Policy on Outstanding Oil Reports and Deferment of Compensation Payments (adopted in October 2008) be maintained in principle; that a similar policy should apply in cases of outstanding contributions; and that Resolution N°11 (adopted in October 2009) be recast into a new Resolution (see document <a href="#">IOPC/OCT14/11/1</a>, paragraph 6.2.14).</p> <p>For reasons that are explained below (see paragraphs 2.1–2.3), the Audit Body is of the view that the 1992 Fund Assembly and the Supplementary Fund Assembly should adopt separate and distinct Resolutions to replace existing 1992 Fund Resolution N°11 and Supplementary Fund Resolution N°2.</p>
<b>Action to be taken:</b>	<p><u>1992 Fund Assembly</u></p> <p>Consider, with a view to adoption, the draft Resolution set out at Annex I.</p> <p><u>Supplementary Fund Assembly</u></p> <p>Consider, with a view to adoption, the draft Resolution set out at Annex II.</p>

### 1 **Introduction**

- 1.1 The agenda of the IOPC Funds' governing bodies has for many years included the obligations of Member States to:
- report receipts of contributing oil (oil reports);
  - ensure timely payment of contributions in respect of oil received in their territory; and
  - to this end, take appropriate measures under their law.
- 1.2 In this context, the governing bodies have repeatedly expressed their concern that a number of Member States as well as receivers of oil have not met their obligations under the 1992 Fund Convention and Supplementary Fund Protocol with respect to outstanding oil reports and contributions. This issue has also been the focus of considerable efforts on the part of the Secretariat to engage the States concerned.

- 1.3 At their October 2014 sessions, the governing bodies again discussed these issues and decided<sup><1></sup>:
- (a) that the Policy on Outstanding Oil Reports and Deferment of Compensation Payments be maintained in principle;
  - (b) that a similar policy should apply in cases of outstanding contributions; and
  - (c) that Resolution N°11 be recast into a new Resolution such that it:
    - (i) noted the legal opinion on obligations of Member States under the principles of State responsibility for internationally wrongful acts;
    - (ii) incorporated the Policy on Outstanding Oil Reports and Deferment of Compensation Payments;
    - (iii) expressed the Member States' intention to seek compensation, if the situation so required, under the principles of State responsibility for internationally wrongful acts, in cases of outstanding oil reports and failure by the Funds to obtain contributions due to improper implementation of Article 13.2 of the 1992 Fund Convention and Article 12.1 of the Supplementary Fund Protocol;
    - (iv) took into account any expansion of the policy decision to cover outstanding contributions;
    - (v) retained/reiterated the current provisions of Resolution N°11 in respect of the obligations of receivers of contributing oil;
    - (vi) retained/reiterated obligations of Member States under the Fund Conventions;
    - (vii) reiterated/expanded the request to Member States to report on the means by which they have implemented their obligations under the Fund Conventions; and
    - (viii) directed the Audit Body to monitor the effectiveness of the new measures once implemented.

## **2 Work of the Audit Body**

- 2.1 In compliance with this decision the Audit Body has developed the two draft Resolutions attached at Annexes I and II.
- 2.1.1 The draft Resolution relating to the 1992 Fund (hereinafter referred to as 'Annex I'), headed 'Measures in respect of Outstanding Oil Reports and Outstanding Contributions' revises and is intended to replace existing Resolution N°11 of the 1992 Fund Assembly (October 2009) to the extent that it affects the 1992 Fund.
- 2.1.2 The draft Resolution relating to the Supplementary Fund (hereinafter referred to as 'Annex II'), headed 'Measures in respect of Outstanding Contributions' revises and is intended to replace Supplementary Fund Resolution N°2 and 1992 Fund Resolution N°11 (October 2009) to the extent that the latter Resolution affects the Supplementary Fund.
- 2.2 It should be noted that Resolution N°11 (October 2009) was adopted by both the 1992 Fund Administrative Council (acting on behalf of the 1992 Fund Assembly) and the Supplementary Fund Assembly and was later reproduced by the Secretariat as Supplementary Fund Resolution N°2. However, in view of the fact that the 1992 Fund and the Supplementary Fund are separate legal entities and in view also of the fact that not all the measures contained in the draft Resolution set out at Annex I are intended to apply to the Supplementary Fund, the Audit Body recommends that the 1992 Fund Assembly and the Supplementary Fund Assembly, respectively, each adopt separate Resolutions tailored to their specific circumstances.
- 2.3 The main difference between the two draft Resolutions is that Annex I addresses the issues both of outstanding oil reports and outstanding contributions while Annex II addresses only the issue of outstanding contributions. It will be recalled that the issue of outstanding oil reports is already dealt with in the Supplementary Fund Protocol (Article 15), and therefore the Audit Body considers that

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<sup><1></sup> Record of Decisions of the October 2014 sessions of the IOPC Funds' governing bodies (document [IOPC/OCT14/11/1](#), paragraph 6.2.14).

there is no need for the Supplementary Fund Assembly to elaborate any further on this issue in the draft Resolution.

2.4 By way of a brief overview, and in keeping with the issues listed in paragraph 1.3 above, the draft Resolutions:

- maintain, in principle, the Policy on Outstanding Oil Reports and Deferment of Compensation Payments and apply a similar policy in cases of outstanding contributions (see Annex I, penultimate paragraph of the chapeau beginning ‘**RECALLING** the decision...’; and operative paragraphs 8 and 9; Annex II, operative paragraph 8).
- refer to the obligations of Member States under the principles of State responsibility for internationally wrongful acts (see Annex I, chapeau, paragraph 5 beginning ‘**AWARE THAT...**’; and operative paragraph 7; Annex II, chapeau, paragraph 4 beginning ‘**AWARE THAT...**’; and operative paragraph 7).
- reiterate the current provisions of Resolution N°11 in respect of the obligations of receivers of contributing oil (see Annex I, chapeau, paragraph 3 beginning ‘**MINDFUL**, in order to secure...’; chapeau, paragraph 4 beginning ‘**NOTING ALSO ...**’; chapeau, paragraph 6 beginning ‘**BEARING IN MIND...**’; and operative paragraphs 2 and 3; Annex II, chapeau, paragraph 2 beginning ‘**MINDFUL**, in order to secure...’; chapeau, paragraph 3 beginning ‘**NOTING...**’; chapeau, paragraph 5 beginning ‘**BEARING IN MIND...**’; and operative paragraphs 2 and 3).
- reiterate the current provisions regarding obligations of Member States under the Fund Conventions (see Annex I, chapeau, paragraph 2 beginning ‘**NOTING THE OBLIGATION...**’; chapeau, paragraph 4 beginning ‘**NOTING ALSO...**’; and operative paragraphs 4 and 5; Annex II, chapeau, paragraph 3 beginning ‘**NOTING** the duty...’; and operative paragraphs 4 and 5).
- reiterate/expand the request to Member States to report on the means by which they have implemented their obligations under the Fund Conventions (see Annex I, chapeau, paragraph 2 beginning ‘**NOTING** the obligation...’; chapeau, paragraph 4 beginning ‘**NOTING ALSO...**’; chapeau, paragraph 6 beginning ‘**BEARING IN MIND...**’; and operative paragraphs 4, 5 and 6; Annex II, chapeau, paragraph 3 beginning ‘**NOTING...**’; paragraph 5 beginning ‘**BEARING IN MIND...**’; and operative paragraph 4, 5 and 6).

2.5 The issue of the obligations of Member States under the principles of State responsibility for internationally wrongful acts, as set out in paragraph 1.3 (c) (iii) above, has been dealt with in the chapeau in Annex I and Annex II, paragraphs 5 and 4, respectively. However, the issue of the Member States’ intention to seek compensation from a State in cases of outstanding oil reports or contributions has not been incorporated in the draft Resolutions. In this context, the Audit Body wishes to recall its submission to the governing bodies in October 2014 (document [IOPC/OCT14/6/2](#), paragraphs 4.2.3–4.2.6) where it stated its opinion that the Policy on Outstanding Oil Reports and Deferment of Compensation Payments, adopted by the 1992 Fund Assembly in October 2008, was well in line with the principles of State responsibility for internationally wrongful acts but that taking action against a Member State for compensation may prove difficult due to issues of jurisdiction and immunity. In this connection the Audit Body referred to a legal opinion provided by Professor Dan Sarooshi and presented to the governing bodies at their October 2013 session (document [IOPC/OCT13/8/5](#)).

### **3 New provisions recommended by the Audit Body for adoption**

3.1 It will be recalled that the aforementioned Policy on Outstanding Oil Reports and Deferment of Compensation Payments was intended to address the issue of outstanding oil reports (see [92FUND/Circ.63](#)) and provides that:

‘Where a State is two or more oil reports in arrears, any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State will be assessed for admissibility but payment will be deferred until the reporting deficiency is rectified.’

- 3.2 In line with this Policy, and in keeping with the governing bodies' request to the Audit Body to recast Resolution N°11, the Audit Body is proposing the adoption of three new policy measures as set out in operative paragraphs 8 to 10 of Annex I. The aim of these new measures is to induce Member States to abide by their obligations under the 1992 Fund Convention by incorporating the Policy into the revised Resolution, thereby providing for their practical implementation.
- 3.3 Operative paragraph 8 accordingly provides that the 1992 Fund Assembly decide that:
- ‘it shall make a determination as to those States that are responsible for two or more oil reports in arrears, in which event any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State will be assessed for admissibility but actual payment will be deferred pending rectification of the reporting deficiency’.
- 3.4 A similar provision is recommended for adoption in cases of breach by a Member State of its obligations set out in Article 13.2 of the 1992 Fund Convention (regarding contributions). Operative paragraph 9 accordingly provides that the 1992 Fund Assembly decide that:
- ‘it shall make a determination as to those States that are found to be in breach of their obligations under Article 13.2 of the 1992 Fund Convention for two or more years, in which event any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State will be assessed for admissibility but actual payment will be deferred pending rectification of the breach’.
- 3.5 In each of the above two situations the deferment of compensation can only be triggered by a determination of the 1992 Fund Assembly.
- 3.6 In addition, it is envisaged that the governing bodies should not act precipitously but should only undertake such a determination once it is in possession of all the facts of the matter. To this end, operative paragraph 7 provides, in some detail, the action to be taken by the Director aimed at fully informing the governing bodies prior to the making of any determination.
- 3.7 In similar fashion, operative paragraph 10 aims to provide a further incentive for Member States to abide by their obligations under Articles 13.2, 15.1 and 15.2 of the 1992 Fund Convention. It accordingly provides that ‘those States that are found to be in breach of their obligations’ ‘shall not be eligible to nominate candidates for membership of the Audit Body nor to be elected as members of the 1992 Fund Executive Committee’. This provision is inspired by operative paragraph (d) of Resolution N°5 on the Establishment of the Executive Committee to the effect that, when electing the members of the Committee, the 1992 Fund Assembly may take into account the extent to which a particular State has fulfilled its obligation to submit oil reports in accordance with Article 15 of the 1992 Fund Convention.
- 3.8 Once again, this process can only be triggered by a determination of the governing bodies, which would be made only after the Director has discharged the new obligations set out in operative paragraph 7.
- 3.9 A similar provision to that set out in paragraph 3.4 above is recommended for inclusion in the draft Resolution relating to the Supplementary Fund (with relevant changes to the wording). This provision is to be found at paragraph 8 of Annex II. As already noted in paragraph 2.3 above, the draft Resolution relating to the Supplementary Fund does not cover oil reporting obligations.
- 3.10 Once again, this process can only be triggered by a determination of the Supplementary Fund Assembly which would be made only after the Director has discharged the new obligations set out in operative paragraph 7.

**4     Action to be taken**

4.1    1992 Fund Assembly

The 1992 Fund Assembly is invited to consider, with a view to adoption, the draft Resolution set out at Annex I.

4.2    Supplementary Fund Assembly

The Supplementary Fund Assembly is invited to consider, with a view to adoption, the draft Resolution set out at Annex II.

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## ANNEX I

### 1992 Fund Resolution N°[ ]

Adopted on [date]

#### **Measures in respect of outstanding oil reports and outstanding contributions**

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992 (1992 Fund),

**RECALLING** that the International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund) was established by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund Convention) in order to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,

**NOTING** the obligation of States Parties pursuant to Article 15 of the 1992 Fund Convention to communicate to the Director of the Fund (the Director), at a time and in the manner provided in the Internal Regulations, the name and address of any person who in respect of those States is liable to contribute to the 1992 Fund pursuant to Article 10 of the 1992 Fund Convention, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year (oil reports),

**MINDFUL**, in order to secure adequate compensation, of the need to ensure payment of annual contributions to the 1992 Fund as required by Article 10 of the 1992 Fund Convention,

**NOTING** also the duty of States Parties pursuant to Article 13.2 of the 1992 Fund Convention to ensure that any obligation to contribute to the 1992 Fund arising under the Convention in respect of oil received within the territory of those States is fulfilled and to this end to take appropriate measures under their law,

**AWARE THAT**, where States Parties are in breach of their obligations under Article 13.2 or Article 15 of the 1992 Fund Convention, then those States Parties bear a responsibility to the 1992 Fund under public international law,

**BEARING IN MIND** that the 1992 Fund cannot carry out its mandate nor operate effectively unless accurate oil reports and contributions are received in a timely manner,

**RECALLING** the decision taken in October 2008 by the 1992 Fund Assembly at its 13th session to adopt a policy whereby, in the event that a State is two or more oil reports in arrears, any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State will be assessed for liability but payment will be deferred until the reporting deficiency is rectified,

**RECALLING** also Resolution N°11—Measures in respect of Contributions (October 2009),

- 1 **ENDORSES** the current efforts of the Director to follow up on arrears of oil reports and contributions;
- 2 **CALLS ON** all receivers of contributing oil to discharge their obligations under the 1992 Fund Convention in a timely manner;
- 3 **URGES** associations representing receivers of contributing oil to engage proactively in ensuring that industry members meet their obligations and to report to the Director on the measures taken in this regard;
- 4 **FURTHER URGES** all States Parties to fulfil their obligations under Articles 13.2, 15.1 and 15.2 of the 1992 Fund Convention, in particular, to provide oil reports in a timely and accurate manner and to ensure payment of contributions;

- 5 **REMINDS** States Parties of the option contained in Article 14.1 of the 1992 Fund Convention whereby a State Party may at any time declare that it assumes the obligation to make contributions to the 1992 Fund that are otherwise incumbent on persons pursuant to Article 10.1 of the Convention;
- 6 **REQUESTS** those State Parties which have outstanding oil reports or which have contributors that are in arrears with their payments to report to the Director on any steps they have taken to redress these situations;
- 7 **INSTRUCTS** the Director:
  - (a) in consultation with the Audit Body, to examine the reports referred to in paragraphs 4 and 6 above and to present any recommendations to the 1992 Fund Assembly;
  - (b) to report at each regular session of the 1992 Fund Assembly the names of those States which have not provided oil reports or which have not taken steps to ensure the timely payment of contributions; and
  - (c) to include in such reports an account of what actions, if any, have been taken by the States referred to in sub-paragraph (b) in the previous 12 month period in response to any request made by the Director to rectify the situation;
- 8 **DECIDES** that it shall make a determination as to those States that are responsible for two or more oil reports in arrears, in which event any claim submitted by the Administration of those States, including a claim submitted by a public authority working directly on the response or recovery for the pollution incident on behalf of those States, will be assessed for admissibility, but actual payment will be deferred pending rectification of the reporting deficiency;
- 9 **DECIDES ALSO** that it shall make a determination as to those States that are found to be in breach of their obligations under Article 13.2 of the 1992 Fund Convention for two or more years, in which event any claim submitted by the Administration of those States, including a claim submitted by a public authority working directly on the response or recovery for the pollution incident on behalf of those States, will be assessed for admissibility, but actual payment will be deferred pending rectification of the breach;
- 10 **DECIDES FURTHER** that it shall make a determination as to those States that are found to be in breach of their obligations under Articles 13.2, 15.1 or 15.2 of the 1992 Fund Convention, in which event those States shall not be eligible to nominate candidates for membership of the Audit Body nor to be elected as members of the 1992 Fund Executive Committee;
- 11 **INSTRUCTS** the Director to develop guidelines in relation to implementation by States Parties of their obligations under Articles 13.2, 15.1 and 15.2 of the 1992 Fund Convention;
- 12 **DIRECTS** the Audit Body to:
  - (a) monitor the effectiveness of the above actions in respect of outstanding oil reports and outstanding contributions; and
  - (b) report to the 1992 Fund Assembly on its findings, including recommendations for further measures as may be warranted;
- 13 **REVOKES** Resolution N°11 of the 1992 Fund Assembly (October 2009) to the extent that it affects the 1992 Fund.

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## ANNEX II

### Supplementary Fund Resolution N°[ ] Adopted on [date]

#### Measures in respect of outstanding contributions

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION SUPPLEMENTARY FUND, 2003 (Supplementary Fund),

**RECALLING** that the International Oil Pollution Compensation Supplementary Fund, 2003 (the Supplementary Fund) was established by the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the Supplementary Fund Protocol) in order to ensure that victims of oil pollution damage are compensated in full for their loss or damage in cases where there is a risk that the amount of compensation available under the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1992 (the 1992 Fund Convention) will be insufficient,

**MINDFUL**, in order to secure full compensation, of the need to ensure payment of annual contributions to the Supplementary Fund as required by Article 10 of the Supplementary Fund Protocol,

**NOTING** the duty of States Parties pursuant to Article 12.1 of the Supplementary Fund Protocol to ensure that any obligation to contribute to the Supplementary Fund arising under the Protocol in respect of oil received within the territory of those States is fulfilled and to this end to take appropriate measures under their law,

**AWARE** that, where States Parties are in breach of their obligations under Article 12.1 of the Supplementary Fund Protocol, then those States Parties bear a responsibility to the Supplementary Fund under public international law,

**BEARING IN MIND** that the Supplementary Fund cannot carry out its mandate nor operate effectively unless contributions are received in a timely manner,

**RECALLING** Supplementary Fund Resolution N°2—Measures in respect of Contributions (October 2009),

**RECALLING FURTHER** 1992 Fund Resolution N°11—Measures in respect of Contributions (October 2009) <sup><2></sup>,

- 1 **ENDORSES** the current efforts of the Director of the Supplementary Fund (the Director) to follow up on arrears of contributions;
- 2 **CALLS ON** all receivers of contributing oil to discharge their obligations under the Supplementary Fund Protocol in a timely manner;
- 3 **URGES** associations representing receivers of contributing oil to engage proactively in ensuring that industry members meet their obligations and to report to the Director on the measures taken in this regard;

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<sup><2></sup> It is necessary in this Resolution of the Supplementary Fund Assembly to make reference to Resolution N°11 because, as is apparent from a reading of the Record of Decisions of the governing bodies (October 2009), only Resolution N°11 was actually considered and adopted, respectively, by the governing body of each Fund.

Resolution N°11 was, after the event, and for the purposes of listing separately as a Resolution of the Supplementary Fund Assembly, renumbered and reproduced as Resolution N°2 of the Supplementary Fund Assembly.

Similar considerations apply to operative paragraph 11 below.



- 4 **FURTHER URGES** all States Parties to fulfil their obligations under Article 12.1 of the Supplementary Fund Protocol, in particular, to ensure payment of contributions;
  - 5 **REMINDS** States Parties of the option contained in Article 12.2 of the Supplementary Fund Protocol whereby a State Party may at any time declare that it assumes the obligation to make contributions to the Supplementary Fund that are otherwise incumbent on persons pursuant to Article 10.1 of the Protocol;
  - 6 **REQUESTS** those State Parties which have contributors that are in arrears with their payments to report to the Director on any steps they have taken to redress the situation;
  - 7 **INSTRUCTS** the Director:
    - (a) in consultation with the Audit Body, to examine the reports referred to in paragraph 6 above and to present any recommendations to the Supplementary Fund Assembly;
    - (b) to report at each regular session of the Supplementary Fund Assembly the names of those States which have not taken steps to ensure the timely payment of contributions; and
    - (c) to include in such reports an account of what actions, if any, have been taken by the States referred to in sub-paragraph (b) in the previous 12 month period in response to any request made by the Director to rectify the situation;
  - 8 **DECIDES** that it shall make a determination as to those States that are found to be in breach of their obligations under Article 12.1 of the Supplementary Fund Protocol for two or more years, in which event any claim submitted by the Administration of those States or public authority working directly on the response or recovery for the pollution incident on behalf of those States will be assessed for admissibility, but actual payment will be deferred pending rectification of the breach;
  - 9 **INSTRUCTS** the Director to develop guidelines in relation to implementation by States Parties of their obligations under Article 12.1 of the Supplementary Fund Protocol;
  - 10 **DIRECTS** the Audit Body to:
    - (a) monitor the effectiveness of the above actions in respect of outstanding contributions; and
    - (b) report to the Supplementary Fund Assembly on its findings, including recommendations for further measures as may be warranted;
  - 11 **REVOKES** Supplementary Fund Resolution N°2 and 1992 Fund Resolution N°11 (October 2009) to the extent that these Resolutions affect the Supplementary Fund.
-