

 <p>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p>	<b>Agenda item: 6</b>	<b>IOPC/OCT09/6/4</b>	
	Original: ENGLISH	25 August 2009	
	1992 Fund Assembly	<b>92A14</b>	●
	1992 Fund Executive Committee	<b>92EC46</b>	
Supplementary Fund Assembly	<b>SA5</b>	●	
1971 Fund Administrative Council	<b>71AC24</b>	●	

## NON-PAYMENT OF CONTRIBUTIONS

### Note by the Audit Body

<b>Summary:</b>	<p>Following its discussion on the issue of outstanding oil reports at the October 2008 sessions, the 1992 Fund Assembly instructed the Audit Body to examine the problem of unpaid contributions with a view to suggesting any possible solutions for the problem. In addressing the instruction of the Assembly, the Audit Body has examined the nature and scope of the issue and has reviewed procedural measures employed by the Secretariat to pursue outstanding contributions. The Audit Body considered the obligations of both the receivers of oil imports and of Contracting States inherent in the 1992 Fund Convention and arising from international treaty law. In seeking possible solutions, the Audit Body has examined the policy measure adopted by the 1992 Fund Assembly in October 2008 in respect of the non-submission of oil reports. This document proposes a two-stage policy-based strategy that emphasizes principles of accountability and due diligence.</p>
<b>Action to be taken:</b>	<p><u>1992 Fund Assembly, Supplementary Fund Assembly and 1971 Fund Administrative Council:</u></p> <p>To take note of the information contained in this document and to consider a two-stage policy-based strategy whereby the first stage would implement a series of measures directed to oil receivers of contributing oil and to Member States, and whereby the second stage would provide for a subsequent policy review of such measures.</p>

### 1 Introduction

- 1.1 The Assembly of the 1992 Fund has expressed concern (most recently at the 13th session of the 1992 Fund Assembly held in October 2008) as to the level of outstanding contributions and the non-fulfilment of obligations by some Member States as to contributions. The Record of Decisions of the October 2008 session (document 92FUND/A.13/25) notes the following:

*14.4 Delegations reiterated that Member States had a legal obligation to ensure contributions were paid and that governments of Member States should take all the necessary steps possible under national law to ensure prompt payment of contributions as set out in the 1992 Fund Convention.*

- 1.2 The Secretariat has a series of procedures in place for dealing with outstanding contributions (Annex) and the Director reports on a regular basis to the Assembly on the status of contributions, including outstanding contributions. Nonetheless the issue remains one of concern for the governing body of the Funds. To this effect and pursuant to its work on the non-submission of oil reports, the Audit Body was asked, as reflected in the Record of Decision of the October 2008 session of the Assembly (cf document cited above), to examine the situation with respect to outstanding contributions. The Assembly held:

14.8 *Following a discussion by Member States, the Audit Body was instructed to review the matter of outstanding contributions and put forward proposals to ensure prompt payment of contributions.*

1.3 This document serves as a response to the instruction given by the Assembly. The document focuses on the 1992 Fund and the 1992 Fund Convention. The Audit Body is nevertheless fully aware that the problems dealt with are highly relevant also with respect to the 2003 Supplementary Fund.

## 2 **Background**

2.1 The prior work of the Audit Body on the non-submission of oil reports is germane to this examination of the issue of outstanding contributions for a number of reasons, namely:

- The submission of oil reports and ensuring payment of contributions are intrinsically linked to the operations of the funds;
- Both the submission of oil reports and remittance of contributions have bearing on obligations of Member States;
- Both issues require not only a careful reading of the Conventions governing the Funds but also consideration of international treaty obligations.

2.2 At its 12th and 13th sessions, the 1992 Fund Assembly considered recommendations by the Audit Body on dealing with the non-submission of oil reports. In its report to the October 2007 Assembly (document 92FUND/A.12/12/2), '... *the Audit Body set out its detailed consideration of the treaty law issues involved and its conclusion that to strive for legal solutions would be both difficult and an undesirable route for the Funds to take. It therefore proposed that the Assembly should take a policy decision...*' That policy proposal was further refined and clarified in the Audit Body's report to the October 2008 session of the Assembly (document 92FUND/A.13/13/1). It will be instructive to review the basis for this policy proposal and its applicability to the issue at hand.

2.3 Since the submission of oil reports is vital to the calculation of contributions, the Assembly has recognised that the failure of a State to submit oil reports has the potential to undermine the viability of the Funds' regime. And fundamentally (or by principle), an equally strong argument can be made in regards to outstanding contributions, since contributions provide the funds for carrying out the mandate of the Funds. The timely and otherwise correct payment of contributions is pivotal to the operations of the Funds. Without financial means, the Funds cannot fulfil the task given to them.

2.4 In addressing this issue the aim should be to establish:

- a. How to recover contributions from oil receivers in arrear;
- b. The nature of obligations on Contracting States to pay contributions in cases of failure on part of the receivers;
- c. Measures in order to avoid unpaid contributions in the future?

## 3 **Nature and scope of the issue**

3.1 The Director's reports on contributions note that assessed contributions are generally remitted in a timely fashion by most contributors (see for example, the Director's report to the 13th session of the 1992 Fund Assembly (document 92FUND/A.13/12)). Outstanding contributions, although limited to a small number of Member States, are nevertheless not insignificant. In the case of 2007 contributions, approximately 4% of assessed contributions, involving eleven Member States, were outstanding six months after the due date. For the period 2000 to 2007 outstanding contributions represent 0.19% of contributions levied; some 81% of these outstanding contributions relate to amounts due from two Member States. A component that is more difficult to quantify arises from the contributions not assessed due to the non-submission of reports on contributing oil receipts.

- 3.2 While Member States listed on annual reports with outstanding contributions are relatively few and circumstances may vary as to reasons (some possibly legitimate as in the case of corporate changes for the reporting entity), the issue is larger than simply the numbers.
- 3.3 The Secretariat makes use of procedural and administrative measures to pursue outstanding contributions (cf. Internal Regulation 3.7). The Secretariat also has the use of legal recourse if warranted (although it is recognized that such recourse is used sparingly and understandably, only as a last resort). More commonly, the Secretariat brings the matter to the attention of representatives from the Member States concerned whenever possible. The Secretariat indicates that this approach has been successful in many instances. Consequently, the Secretariat should be encouraged to continue this approach.
- 3.4 Nevertheless a problem still exists in relation to (i) the inequity to compliant contributors inherent in the non-payment of contributions and in the non-assessment of contributions (owing from the failure of some entities to remit oil reports) and (ii) the duty of care placed on the Assembly and Secretariat to uphold the Conventions and apply them in a fair and equitable manner.

#### **4 Relevant provisions in the 1992 Fund Convention**

- 4.1 Article 10 of the 1992 Fund Convention provides some basic parameters and definitions as to who pays contributions. Of note is the role of national law of the State concerned in determining (as in Article 10.2(a)) inclusions within these parameters. It is clear from these provisions that the obligation to pay contributions rests with the oil receivers.
- 4.2 Article 12 prescribes the role of the Assembly in the calculation of contributions to be perceived and related modalities.
- 4.3 Article 13 delineates the obligations of both the oil receivers and the Contracting State in regards to contributions. For the former, the Convention sets out in article 13.1 the obligation to pay interest rate on any amount due. Article 13.3 instructs the Director to take all appropriate action against oil receivers for the recovery of outstanding contributions.
- 4.4 As for the obligation of the Contracting States with regard to contributions, article 13.2 makes it clear that the Contracting States 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 it may deem necessary, with a view to the effective execution of any such obligation' (Article 13.2).
- 4.5 This provision, *inter alia*, confirms that the obligation to make contributions rests with the receivers of oil. There is no express provision in Article 13 to the effect that Contracting States are under obligation to pay contributions due. According to Article 14.1 a Contracting State may nevertheless assume the obligation to make contributions. This is an option that is open to Contracting States and some have made use of it.
- 4.6 In summary, the Convention frames the role of the oil receiver and the Contracting State. It is instructive to note that the Convention does make a link in Article 15.4 between the obligation of the State to provide data and information used in the calculation of contributions and the liability of the State where non-performance of this obligation results in a financial loss to the Fund.
- 4.7 As such, it can be argued that the Convention is prescriptive on several fronts:
- Role of the Assembly in ensuring sufficient funds to carry out the mandate;
  - Obligations of the Contracting State, in respect of circumstances where the contributor is delinquent;
  - Role of the Director in the case of outstanding contributions.
- 4.8 The closer contents of these roles and obligations are discussed in the following part of this document.

## 5 Considerations

- 5.1 As already stated there is an obligation on Contracting States in respect of contributions set out in Article 13.2. The content of this obligation is however not defined in the Convention itself. The question thus is if it confers any obligation on Contracting States to pay contributions, either jointly or severally with the oil receivers or in cases of default or delinquency on part of the oil receivers. While it may be a matter of debate as to whether or not there is sufficient support in the Convention that such an obligation of either form is conferred on the Contracting States, it is nevertheless clear that the Contracting States are obligated to have in place such legislation as to allow the Fund to take legal action in the Contracting States against oil receivers in arrear and, if they deem it appropriate, to impose sanctions as they deem necessary.
- 5.2 When it comes to the obligation of Contracting States, as interpreted above, there is no consequence attached to it (unlike the situation where a Contracting State has failed to provide reports on oil received, Article 15.4). At least no one can be found in the Convention itself. In other words, the Convention is silent on what measures should be taken against a Contracting State that has failed to implement Article 13.2. The question is though if any sanction exists under general treaty law. In answering this question it would be helpful to recall the discussion and actions by the Assembly with respect to non-submission of oil reports.
- 5.3 In its 2007 report on non-submission of oil reports, the Audit Body argued that, while the 1992 Fund Convention text is unclear on the question of sanctions for non-submission of oil reports, this does not mean that an enforceable obligation does not exist and that a corresponding policy response by the Assembly is not available. On this point the Audit Body based itself on international treaty law.
- 5.4 A similar question can be posed in regards to the obligations of Contracting States for outstanding contributions. Could the treaty law obligation under Article 13.2 be sanctioned through other means? To what extent could the Vienna Convention on the Law of Treaties provide direction in this regard? It would be worthwhile here to review the arguments made Audit Body in respect of the non-submission of oil reports. To this effect, relevant text from document 92FUND/A.12/12/2 is hereby reproduced:
- '3.3 *The essence of a treaty obligation is the package of reciprocal rights that each State gives under the treaty to the other States Parties, in return for acquiring similar rights vis-à-vis those States Parties. Furthermore, the concept of 'reciprocity' is an underlying feature of how public international law as a system works. Specifically, reciprocity is a rule whereby every State claiming a right under customary international law must accord to other States the same right.*
- 3.4 *The Audit Body believes that in signing the 1992 Fund Convention, Member States enter into an agreement with other signatories to the Convention to provide, inter alia, the requisite annual oil reports...*
- ...The benefit that performance of this obligation confers is the payment, up to Fund limits, of all eligible claims associated with all spills covered by the Convention occurring in the territory of that Contracting State while that State remains a party.*
- 3.5 *It is apparent that the 1992 Fund Convention text is unclear on the question of sanctions for non submission of oil reports and that Member States have not, so far, considered themselves well enough informed on the range of options available to address this issue. While it can be argued that the relevant provision in the Supplementary Fund Protocol of 2003 was included due to this apparent deficiency, its absence in the 1992 Fund Convention does not mean that an enforceable obligation does not exist <sup><1></sup> and that a corresponding policy response by the Assembly is not available.'*

- 5.5 In the same document, the Audit Body considered the prospect of sanction by other means than those stipulated in the convention, as evidenced by means of the following explanatory note:

*<1> Any analysis of this question must reflect the precise words of the various Fund Conventions and the rights and obligations of Contracting States to those Conventions, and have regard to the fact that the Conventions (apart from the Supplementary Fund Convention) are silent on the question of a failure of a Member State to fully meet its obligations. Such analysis should also have regard to relevant provisions of the Vienna Convention on the Law of Treaties. Article 2.1.(f) of the Vienna Convention has the following definition: "Contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force'.*

*Article 60 of the Vienna Convention is entitled: 'Termination of the operation of a treaty as a consequence of its breach' and permits parties to a convention, by unanimous agreement, to suspend the operation of the treaty in whole or in part, or, to terminate it either:*

*'(i) in the relations between themselves and the defaulting State, or  
(ii) as between all the parties'.*

*Quite clearly, from the point of view of the raison d'être of the Fund Conventions (ie the payment of claims for oil pollution damage caused by ships to which the Conventions apply), the main contractual obligations of any State Party to the Fund Conventions are:*

- the submission of reports on the importation of contributing oil (so that contributions can be calculated); and*
- ensuring that calls by the Secretariat for contributions duly authorised by the Assemblies are made in good time by importers of that oil.*

*The benefits Member States derive from fulfilment of these obligations include the assurance that all reasonable claims for incidents involving pollution damage which fall within the ambit of the Conventions will be met insofar as the rules of the Conventions allow.'*

- 5.6 The above arguments could be valid also for the issue now at hand and would appear to be consistent with the intent of the drafters of the Fund Convention when considering what the text says about the contractual obligations of Contracting States. In other words, if a Contracting State has refused or failed for some other reason to undertake measures under national law with respect to the oil receivers' obligation to make contributions, it is arguable that the Contracting State would be in breach not only of the Fund Convention but also, or for that reason, of the Vienna Convention on the Law of Treaties.
- 5.7 The Audit Body recognizes that such conclusions could point to various avenues of examination including (i) the circumstances under which a Contracting State ceases to be party to the Fund Convention if obligations under the convention are not met (ii) the right of damages by the Funds and (iii) the scope for withholding of compensation. Clearly these may be legitimate questions to ask, but such questions extend somewhat beyond the reasonable ambit of the instruction to the Audit Body by the Assembly, namely to put forward proposals to ensure prompt payment of contributions.
- 5.8 The Audit Body considered whether legal solutions to the problem exist (ie, either by amending the text of the 1992 Convention or looking to the application of treaty law). With regards to possible amendments to the text of the 1992 Fund Convention, the Audit Body concludes that, for the same reasons as in the case of non-submission of oil reports, this would be a difficult and undesirable route for the Funds to take – at the very least there would be problems of entry into force and transition between the various regimes. Similarly, the Audit Body does not believe that remedies that might be available under treaty law could be practically applied or indeed necessary.
- 5.9 In seeking possible solutions, the Audit Body examined the policy measure adopted by the Assembly for the non-submission of oil reports.

- 5.10 The policy measure taken in respect of non-submission of oil reports is directed specifically to the Contracting State. In prima facia, a similar policy decision would not, it could be argued, apply in the instance of outstanding contributions since it is the 'persons' in receipt of the oil that are responsible for making the contributions and not the State. Only where a State conforms to Article 14.1 does the State become directly responsible under the Convention for the payment of outstanding contributions.
- 5.11 Notwithstanding such a situation, the Convention does make a clear connection between the Contracting State and those 'persons' who are under an obligation to contribute to the Fund. Article 13.2 calls upon Contracting States to take appropriate measures under their respective laws to ensure obligations are met. It can therefore be argued that, by the action of accepting the Convention, the Member State accepts a clear and unequivocal obligation to take the necessary action to ensure that those contributions are paid (and not just legislate that they should be paid). In light of the above, the Audit Body sought to develop a sound, policy-based approach that balanced the inherent provisions of the Convention with the obligations of the Contracting States.

## **6 Proposal to ensure prompt payment of contributions**

- 6.1 The Convention makes a clear linkage between the Contracting State and contributor and draws in use of national legislation by the former. Coupled with this, the obligation conferred upon the Assembly and the Secretariat - to uphold the Funds Conventions and apply them in a fair and equitable manner - warrants a course of action in respect of outstanding contributions that seeks to improve the workings of the Convention through policy-based measures.
- 6.2 To this end, the Audit Body proposes a two stage approach that emphasizes principles of accountability and due diligence. The first stage comprises measures to deal with outstanding contributions, stressing the obligations of industry (oil receivers) and Member States. The second stage provides for the Audit Body to monitor the effectiveness of the policy measures in respect of outstanding contributions. However, given the linkage between the submission of oil reports and calculation of contributions and the role of the Audit Body in formulating policy measures related to both these issues, the second stage also provides for the Audit Body to monitor the effectiveness of the policy measures adopted by the Assembly in respect of the non-submission of oil reports.

### First stage: Implementation of policy-based measures in respect of outstanding contributions

The 1992 Fund Assembly adopts a Resolution

- a. affirming the fundamental importance of the payment of contributions to the workings of the Funds and the obligations of oil receivers in this regard;
- b. urging associations representing oil receivers of contributing oil to be engaged proactively in ensuring that obligations by their members are met and to report to the 1992 Fund Assembly on the measures taken;
- c. endorsing current measures employed by the Director and Secretariat in follow-up of arrears;
- d. calling upon Member States to make use of Article 14.1 of the 1992 Fund Convention and Article 12.2 of the 2003 Supplementary Fund Protocol;
- e. informing Member States of policy-based measures to address the issue of outstanding contributions;
- f. instructing the Director to issue a questionnaire on what measures Member States have taken to implement Article 13.2 of the 1992 Fund Convention and Article 12.1 of the 2003 Supplementary Fund Protocol and stressing the need that all Member States provide such information as may be required so that, based on the information so gathered, the Secretariat, with the assistance of the Audit Body, would formulate a set of best practices and report such to the Assembly;
- g. requesting the Director to provide, as part of regular reports on outstanding contributions, in addition to the information on the Member State and subject to the respect of applicable privacy laws, a list of non-contributing 'persons' (entities) and that such a list be made prominent in reports of the operations of the Funds.

Second Stage: Policy review of measures in respect of outstanding contributions and non-submission of oil reports

Pursuant to the implementation of the proposed measures above, the 1992 Fund Assembly instructs the Audit Body to (a) monitor the effectiveness of the said measures in respect of outstanding contributions, (b) monitor the effectiveness of the policy measures adopted by the 1992 Fund Assembly at its 13th session in respect of the non-submission of oil reports and (c) report to the 1992 Fund Assembly on its findings including recommendations for further measures as may be warranted.

**7 Action to be taken**

1992 Fund Assembly, Supplementary Fund Assembly and 1971 Fund Administrative Council

Take note of the information contained in this document and consider adopting a two stage policy-based strategy (as detailed in paragraph 6.2 above) whereby the first stage would implement a series of measures directed to oil receivers of contributing oil and to Member States and whereby the second stage would provide for a subsequent policy review of such measures.

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## ANNEX

### Procedure for invoicing

Invoices are normally sent out two and a half months before the due date for payment, eg invoices are sent out in December for payment by 1 March the following year. They are sent by courier to ensure that contributors receive them in a timely manner and that the Funds have proof of delivery in case that may be needed in the future.

Contributors with whom the Funds have had problems in the past of late payment or non-payment also receive the invoices by email and/or fax at the same time as the paper invoices are sent by courier.

Contributors are sent regular reminders of outstanding contributions in March/April and July as well as other reminders in the intervening months by phone, email and/or fax of their obligation to pay. On the subsequent statement/invoice issued, the outstanding amount will then be shown as 'Brought forward'.

Delegates are notified at every meeting of the outstanding contributions due from contributors in their State. In the past the assistance of delegates has often been instrumental in speeding up payment.

When travelling abroad on IOPC Funds' business, whether in the context of an incident or to attend conferences, workshops etc, IOPC Funds' staff make a point of addressing the issue whenever possible. To this end they take details of outstanding contributions and copies of invoices with them.