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MEASURES ENCOURAGING THE SUBMISSION OF OIL REPORTS

EXAMPLES OF PROBLEMS EXPERIENCED RELATING TO THE SUBMISSION OF OIL REPORTS AND COLLECTION OF CONTRIBUTIONS

Note by the Secretariat

Summary:	<p>This document forms part of a series of initiatives proposed by the Joint Audit Body and aimed at improving the accuracy and timeliness of the submission of oil reports by Member States and the prompt payment of contributions by contributors. It sets out examples of problems which the IOPC Funds' Secretariat has experienced in relation to the collection of contributions and submission of oil reports which underpin the contributions system. The document also emphasises the importance of the role of Member States in ensuring both the accurate and timely submission of oil reports as well as the prompt payment of contributions by contributors. It is an abridged version of a more detailed document prepared by the Secretariat on request from the Audit Body and presented at their April 2015 session.</p>
Action to be taken:	<p><u>1992 Fund Assembly and Supplementary Fund Assembly</u></p> <p>Information to be noted.</p>

1 Introduction

- 1.1 This document aims to provide information on examples of problems which the IOPC Funds Secretariat has experienced in relation to the collection of contributions and submission of oil reports which underpin the contributions system. It forms part of a series of initiatives proposed by the Joint Audit Body and aimed at improving the accuracy and timeliness of the submission of oil reports by Member States and the prompt payment of contributions by contributors. A more detailed version of that document was prepared by the Secretariat on request from the Audit Body and presented at their April 2015 session.
- 1.2 Distinct from many other international organisations to which contributions are paid by the Member States' governments, under the 1992 Fund Convention those who are liable to pay contributions are not the governments but instead the receivers of contributing oil as provided in Article 10. Member States' obligations are to ensure that contributors in their jurisdiction pay contributions to the 1992 Fund (Article 13.2) and submit information on the identity of receivers and the amount of contributing oil received (Article 15.1 and 15.2). Unless Member States assume the obligation to pay contributions in accordance with Article 14, Member States' governments themselves are not liable to pay contributions.
- 1.3 The Supplementary Fund Protocol has a similar mechanism in relation to contributions and oil reports in accordance with Articles 10, 12 and 13. However, when a Contracting State submits an oil report in accordance with the 1992 Fund Convention, it is deemed to be made also under the Supplementary Fund Protocol.

- 1.4 The annual process to collect contributions starts with the submission of oil reports by Member States' governments, which forms the foundation for the Secretariat to prepare and send invoices to each contributor. Contributors are expected to pay contributions by the deadline set in the invoices. It is expected that a proper contribution mechanism will have been established in each Member State through which contributors are legally obliged to pay contributions. However, problems sometimes occur where these mechanisms do not function as intended.
- 1.5 To prompt Member States to submit oil reports, the 1992 Fund Assembly adopted Resolution No5 in 1997 whereby the Assembly may take into account the extent to which a particular State has fulfilled its obligation to submit oil reports when electing members of the 1992 Fund Executive Committee. The 1992 Fund Assembly also adopted in 2008 a policy measure whereby payment of compensation can be deferred against government claimants, where that State has two or more oil reports in arrears.
- 1.6 Under the Supplementary Fund Protocol there is a provision for a sanction mechanism whereby no compensation will be paid for pollution damage that occurs in a State which has not fulfilled its obligation to submit oil reports (Article 15). The detailed procedures have been established in the Internal Regulations.
- 1.7 To assist in the examination currently being undertaken by the joint Audit Body of policy measures to address the issue of submission of oil reports and outstanding contributions, examples of problems which the Secretariat has experienced are set out in the following sections. It is to be noted that these examples relate to issues faced by the Secretariat since 2010 and not since the establishment of the 1992 Fund.

2 Problems encountered at the stage of submission of oil reports

- 2.1 The oil reporting system constitutes the foundation of the contributions system under the 1992 Fund Convention. The situation in respect of the non-submission of oil reports has improved in the recent years thanks to the efforts to engage Member States' governments. Below is the summary of the result of the recent improvement in non-submission of oil reporting and the observations obtained through engaging the governments in the oil reporting.

2.2 States with outstanding reports for shorter periods of time

States with outstanding reports for one year

- 2.2.1 Experience shows that delays of one year are commonly explained by regular changes in personnel within the Government agency/authority in charge of oil reports and the subsequent lag in understanding of the process for the new personnel in charge. Regular reminders by the Secretariat are usually sufficient to resolve the matter within the following year.

- 2.2.2 The table below shows the evolution of the number of States with one year of outstanding reports over the last five years.

Table 1

Years	2009	2010	2011	2012	2013
States with outstanding reports for 1 year	12	10	13	6	12

States with outstanding reports for two years or more

- 2.2.3 For a number of years, the method for reporting the situation regarding outstanding oil reports has been to differentiate between States that have two to three years' outstanding reports and those that have four years' or more outstanding reports. The table below shows the evolution of those two set of figures and the combined total.

Table 2

Years	2009	2010	2011	2012	2013
States with outstanding reports for 2-3 years	11	5	5	8	1
States with outstanding reports for 4 years or more	17	16	10	9	7

2.2.4 The Secretariat's experience shows that States who recognise and try to rectify the problems sometimes require two or three years to do so. States with two or three years' outstanding oil reports are either:

- (i) in the process of rectifying the problems and will be able to submit within a two or three year time-scale; or
- (ii) going to end up with outstanding reports for four years or more.

The Secretariat focus on the issues affecting those States that have or have had outstanding reports for a longer period.

2.3 List of issues affecting those States with outstanding reports for four years or more

2.3.1 Member States with outstanding reports for four years or more are faced with three types of issues:

- No legislation in place to formally implement the oil reporting obligations
- Lack of awareness and difficulty establishing contact with a competent authority
- Political situation (war, civil unrest, political instability, etc.)

2.3.2 The most common issue is the lack of awareness of the authorities regarding oil reporting obligations, with 14 States facing that issue in the past six years. The Secretariat's engagement with those States has facilitated the submission of long outstanding oil reports for 12 of them with only two still pending.

2.3.3 The lack of implementing legislation has also raised a number of difficulties with five Member States in the past six years and for three of them there are still ongoing issues.

2.3.4 The number of Member States facing a difficult political situation remained limited during the same period with only two cases. However those situations present a difficult challenge since the Secretariat is not in a position to provide assistance to help rectifying the situation.

2.3.5 In most cases where oil reports have been outstanding, the problems have been resolved by the Member States' governments' understanding of the oil reporting mechanism and the submission of nil declarations. However, in the Secretariat's estimate of oil receipts, the non-submission of oil reports by two of those Member States would have implications for outstanding contributions which have not been recognised yet. It should also be noted that these States do not appear under the list of States with outstanding contributions, since no invoice has been sent out.

2.4 Incomplete reporting (partial reporting)

2.4.1 In addition to the above non-submission issues, there are some more complex cases where, although States have submitted oil reports for some contributors, it appears that more contributors should have been reported. Table 3 below sets out the examples that the Secretariat has become aware of.

Table 3

State concerned	Reason for submission of partial report
1.	There is a need to clarify who is reporting and who is paying with regard to a pipeline company in the Member State with clients in other States.
2.	Due to the change of domestic sovereignty, the central government does not have control over a semi-autonomous region (A set of islands that had previously been overseas territories)

3.	One contributor has not submitted its 2013 oil report
4.	There seems to be a lack of a proper oil reporting system. Some contributors refuse to pay contributions, and some contributors have suddenly stopped reporting.

- 2.4.2 It should be noted that Regulation 8 of the Internal Regulations of the Supplementary Fund raises three scenarios under which Member States can be considered to have failed to comply with their obligations in respect of oil reports, namely: (i) the non-submission of oil reports; (ii) the submission of partial reports or incomplete reports; and (iii) deficiencies in the oil reports submitted.

3 Problems encountered at the stage of collecting contributions

3.1 Problems encountered by the Secretariat

Problems are often found when the Secretariat follows up on the invoices sent out to each contributor and requests for payment are rejected. Although the invoices are sent out in accordance with information contained in the oil reports submitted by Member States, some contributors refuse to pay, arguing that they are not legally obliged to pay in that State. Some contributors refuse to pay simply because they do not understand that they are liable to pay contributions. In some exceptional cases, the Secretariat finds difficulties in collecting contributions even though the contributors have tried to pay, for example due to international sanctions based on UN Security Council Resolutions. Below are explanations for some of the reasons that have been found for the non-payment of contributions by contributors.

3.2 Examples and reasons behind the problems encountered

Lack of national legislation

- 3.2.1 Some contributors in one Member State refused to pay contributions due to the lack of domestic legislation obliging them to pay contributions to the 1992 Fund. According to the Government, it had considered the 1992 Fund Convention to be part of its national law upon ratification and that there was no need to put separate domestic legislation in place so as to enforce the contributor's obligations to pay contributions. However, this was not the case. Through dialogue between the Secretariat and the Government, the domestic legislation has now been passed. However, since it does not apply retrospectively, dialogue continues to address who should pay past outstanding contributions and interest on them.

Incorrect information provided in oil report - Discrepancy with Court decision

- 3.2.2 Two contributors in a Member State refused to pay contributions arguing that they were merely engaged in transshipment services for the titleholders of the oil and therefore they should not be held liable to pay contributions under the 1992 Fund Convention. They had been named in the oil reports submitted by the Member State. That Government had followed the past decisions of the governing bodies which had decided that a physical receiver of contributing oil should be liable to pay contributions but also allowed some discretion for each Member State on their interpretation as to who should be liable to pay contributions as long as contributions were ensured.
- 3.2.3 The 1992 Fund commenced legal proceedings against non-paying contributors in the State in accordance with Article 13.3 of the 1992 Fund Convention, having obtained the agreement of the Government to do so.
- 3.2.4 The Supreme Court ruled in one case that those who should be liable to pay contributions under the 1992 Fund Convention were those who had an interest in the carriage of oil ('titleholder') and did not take into account the past decisions of the Funds that a physical receiver should pay contributions. This Court decision also ignored the fact that the contributor had been named in the oil reports submitted by the Government in accordance with the 1992 Fund Convention and the Internal Regulations.

3.2.5 In the second case the Court of First Instance decided that the contributor was rendering trans-shipment services and was not the 'first receiver' therefore not liable for contributions. However, the Cassation Court specified that the conclusions of the First Instance Court that the company was not a contributor had no grounds and violated the rules of material law. It further stated that the notion of 'first receiver' should be based on the sense prescribed in the 1992 Fund Convention and not on internal Federal Law. The Cassation Court has sent the case back to the First Instance Court for reconsideration. In its judgement in August 2015 the First Instance Court decided that the company was a 'receiver' and satisfied the claim of the 1992 Fund. The judgement is subject to appeal.

3.2.6 Dialogue has continued with the Government to recover the loss and ensure that in future oil reporting criteria are made consistent with the Convention.

Incorrect information provided in oil report

3.2.7 Although oil reports are completed by contributors, the person filling in the oil report may not be the person authorising and making the payment of contributions and may not realise the importance of providing the correct invoicing contact details. In such instances there are delays in the payment of contributions.

3.2.8 The issue becomes more difficult to resolve when a storage company completes the oil report but provides details of the owner of the oil. In such a case, neither is willing to take responsibility for the contributions. The issue is further complicated where the two parties oil receiver/owner of the oil are in different Member States.

3.2.9 There are also rare instances of the refinery completing the oil report with its own details. When payment of contributions is requested they claim that the responsibility lies with the owner of the oil. This was the case in an example where the refinery existed in one Member State and the owner of the oil was in another. In that particular case, the owner agreed to pay even though this is not envisaged in the 1992 Fund Convention.

3.2.10 The general trend that can be seen is that pipelines, storage companies and refining facilities are the physical receiver of oil but they want to pass on the responsibility of payment of contributions to the owners of the oil. In these cases, the Secretariat has informed those pipelines, storage companies and refining facilities and the respective authority and requested written confirmation from the companies that they are responsible for the payment of contributions in the event that the owner of the oil defaults.

3.2.11 In all events the Secretariat produces invoices in accordance with the oil reports provided by Member States.

Lack of knowledge of the contribution system

3.2.12 Contributors in a Member State that has newly ratified the Convention, or contributors who have been newly identified in Member States do not necessarily understand the contribution system. There are generally overdue contributions in these cases. Dialogue is held with the contributor and the authority to overcome this matter.

Financial difficulty

3.2.13 Companies sometimes fail to pay contributions solely due to their own company's financial difficulty. In one Member State there is a company in financial difficulty and therefore contributions are overdue. In this instance, although assistance has been requested from the authority, the contributions continue to be overdue.

Bankruptcy or liquidation of company

- 3.2.14 Contributions remain due from companies who have declared bankruptcy or gone into liquidation. In liquidation cases, the Secretariat receives notification from the administrator or liquidator of the company with forms that need to be submitted to lodge claims in the liquidation process. A claim is filed with the liquidator and the Secretariat receives periodic notices of the proceedings throughout the liquidation process. When filing the claim, the Secretariat requests preferential treatment being an inter-governmental organisation. However, in past experiences the IOPC Funds have been categorised as unsecured creditors under the relevant domestic law; also, generally, no claims are accepted for interest on contributions. Assistance from legal liquidation experts has not been used so far since the amounts involved do not seem to warrant it. The files are only closed when the liquidation process is complete and amounts receivable under the liquidation process have been received.
- 3.2.15 At its October 2014 session, the 1992 Fund Assembly authorised to write off the unrecovered amount of outstanding contributions once the liquidation process is complete in accordance with Article 13.3 of the 1992 Fund Convention which provides that ‘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’

International sanctions

- 3.2.16 The 1992 Fund may fail to receive contributions due to international economic sanctions such as those based on UN Security Council Resolutions, which prevent banks from dealing with transactions involving certain States.

Late submission of oil reports

- 3.2.17 Occasionally, a number of years of oil reports are submitted at one time together for a contributor. The contributions payable becomes substantial and possibly beyond the contributor’s budget. In one instance, a Member State submitted a number of past years oil reports together, when it was made clear that due to the non-submission of oil reports they might fail to receive compensation by operation of the policy measures in respect of an ongoing incident in that State.

4 Conclusion

- 4.1 As seen above, apart from exceptional cases, such as UN sanctions being in place or the liquidation of contributors, most cases of outstanding contributions are related to failures in the oil reporting process. The other cases are more serious since the legislation to oblige contributors to pay has not been enacted.
- 4.2 The 1992 Fund Convention and Supplementary Fund Protocol recognise that the oil reports underpin the contributions system and they therefore contain provisions which imply that the Assemblies’ might seek compensation from those Member States whose failure to fulfil their obligations in relation to oil reporting causes a loss to the Funds (Article 15.4 of the 1992 Fund Convention and Article 13 of the Supplementary Protocol). The Supplementary Fund Protocol further contains a provision of sanction measures against all claimants with respect to an incident having occurred in a State that has failed to submit oil reports.
- 4.3 From the Secretariat’s experience, wherever there is confusion in oil reports it becomes more difficult to collect contributions since no one accepts the responsibility for paying them. It can never be overemphasised that the oil reports are the only source of information for the IOPC Funds to identify the contributors and the amount of their liability to pay contributions. It is the responsibility of Member States to provide the correct information in accordance with the provisions set out in the Internal Regulations adopted by the Assembly. When there is confusion in the oil reports it is the Member States’ responsibility to resolve issues and the Funds’ Secretariat can only assist.

- 4.4 The issues surrounding oil reports and collection of outstanding contributions do not at present have a financial impact on the operations of the IOPC Funds. The level of outstanding contributions is some 0.47% of the total contribution levies and the majority relates to one Member State where steps are being taken to resolve the issue. Despite the fact that the matter of outstanding oil reports currently relates to a handful of Member States where the amount of oil receipts are believed to be either nil or small, it is a legal obligation under the Conventions and an issue of principle that all States should fulfil their obligations in a timely manner.

Consideration by the Audit Body

- 4.5 The Secretariat regularly updates the joint Audit Body on both the non-submission of oil reports and the non-payment of contributions. As part of its current work-plan, taking into account the difficulties faced by the Secretariat set out in this document, the Audit Body is developing further proposals to encourage the timely submission of oil reports and payment of contributions in order to ensure that Member States fulfil their obligations under the 1992 Fund Convention and Supplementary Fund Protocol. The Audit Body is expected to submit proposals in this regard for consideration at the next session of the governing bodies in spring 2016.

5 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to take note of the information.
