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SUBMISSION OF OIL REPORTS

Note by the Audit Body

Summary:

For many years the Governing Bodies of the 1971 and 1992 Funds have expressed concern that a number of Member States have not met their obligation to report their receipts of contributing oil (oil reports). This situation continues in spite of considerable efforts made by the Secretariat to engage the States concerned. These efforts have been rewarded by some States submitting their outstanding reports but the overall problem remains.

Considerations

It is clear that failure to meet the requirement to submit oil reports should be characterised as frustrating the essential obligations of States to the Conventions' proper operation. It is also clear that failure to submit oil reports has the potential to threaten the viability of the Funds' regime since these reports are crucial to the successful operation of the Funds. The Audit Body has researched this issue and now suggests that there are certain measures that could be taken by the 1992 Fund Assembly to address this problem.

Solutions

The possibility of amending the 1992 Fund Convention would be a long and difficult process and a resolution passed by the Assembly could have some enforcement difficulties. Therefore, the Audit Body recommends (cf paragraph 5) that the Assembly adopt a policy decision stating that where a State is in arrears with its oil reports, any claim submitted by a public authority/administration of that State would be assessed for admissibility but payment would be deferred until the reporting deficiency was rectified.

Important Note:

Such deferment would only apply to claims made by a public authority/administration of the State involved - claims submitted by other claimants in that State would be subject to the normal Fund's rules.

Action to be taken:

1992 Fund Assembly: Consider adopting a policy decision that where a State is in arrears with its oil reports, any claim submitted by a public authority/administration of that State would be assessed for admissibility but payment would be deferred until the reporting deficiency was rectified; and

Supplementary Fund Assembly: Take note of the information contained in this document.

1 Introduction

- 1.1 The governing bodies of the 1971 and 1992 Funds have noted with considerable concern over many years that a number of Member States have not met their specific obligation under the relevant Conventions to ensure that oil reports are submitted to the IOPC Fund Secretariat in a timely manner.
- 1.2 The Secretariat has made considerable efforts over the years to engage with States concerned, including on occasion visiting to offer training and familiarisation with Funds' processes. Diplomatic efforts have also been made to secure the provision of the outstanding oil reports. These efforts are applauded by the Audit Body and have been rewarded in a number of cases by the provision of some of the outstanding oil reports, but despite this success, the problem remains a recurring and difficult one. Sadly a significant number of Member States appear not to recognise the importance of complying with their obligations under the Conventions.

2 Audit Body and Assembly concerns

- 2.1 The Report of the Audit Body to the October 2006 meetings of the Funds' governing bodies outlined the Audit Body's long running concern on this issue and reported its intention to undertake a study to see what could be done to move the issue forward.
- 2.2 The Record of Decisions of the 1992 Fund Assembly deliberations on this issue at that meeting (cf document 92FUND/A.11/35, paragraph 15.3) states: 'The Assembly expressed its very serious concern as regards the number of Member States which had not fulfilled their obligations to submit oil reports, since the submission of these reports was **crucial to the functioning of the IOPC Funds.**' (emphasis added).
- 2.3 The Annex to this paper shows the status of outstanding reports at 1 October 2007.

3 Considerations

- 3.1 It is clear that both the Assembly and the Secretariat have a duty to uphold the Conventions and apply them in a way that is seen by all to be fair. Therefore, the need to consider any solutions that might be applied to help encourage Member States to meet their obligations to submit oil reports must be considered against the specific requirements of the Conventions.
- 3.2 Failure to submit oil reports by a State has the potential to seriously undermine the ultimate viability of the Funds regime because submission of reports on receipts of contributing oil (including nil reports) is vital to the calculation of the contributions of not just that one particular State, but ultimately affects the calculation of the contributions from all Member States. Those contributions, taken together, provide the funds for the payment of claims, the primary function of the IOPC Funds. This point has already been emphasised by the Assembly – see reference in paragraph 2.2 above where such reporting is described as 'crucial'.
- 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. This obligation flows from the provisions of Article 15.2, namely:

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

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 ^{<1>} and that a corresponding policy response by the Assembly is not available.
- 3.6 It has been argued that, because the Convention lacks a provision specifying that compensation can be withheld from a State that is in breach of its obligation to submit oil reports, no such withholding of compensation can be considered. This argument is not persuasive because, taken to its logical conclusion, this would mean that the Fund would be obligated to continue to pay claims even if no States submitted oil reports. Clearly that would immediately lead to the insolvency of the Funds for, without oil reports, no contributions can be calculated and requested.
- 3.7 It is unarguable that failure to meet the requirement to submit oil reports should be characterised as frustrating the essential obligations of States to the Convention's proper operation. It is also most important to state here that this is a matter of principle. It is just as important for Member States having major receivers of oil to report as it is for those having small receivers and even, for Member States in which no receiver meets the threshold (150 000 tons – cf Article 10) to lodge 'nil' reports. The regime depends on all Member States fully meeting their reporting obligations so that all Member States can benefit from the payment of compensation.

<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 fulfillment 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.

- 3.8 Legal solutions to the problem, either to amend the text of the 1992 Convention or to try to apply any sanctions that might be available under the Vienna Convention would be both a most difficult and an undesirable route for the Funds to take. In the first case, there would be the problems of entry into force and transition between the various regimes and, in the case of the Vienna Convention, there are issues of obtaining clear advice on what actually might be achievable and secondly, the apparent requirement for unanimity of Contracting States in any action that might be contemplated.

4 Proposal to resolve the impasse

- 4.1 Having considered all of these issues very carefully, the Audit Body considers that there is a clear solution: namely, for the 1992 Fund Assembly to take a policy decision that admissible claims for payment lodged by a public authority/administration of Member States which are substantially in arrears in their oil reports could be approved for payment but that actual payment of these claims would be deferred until that reporting deficiency was fully rectified. The adoption of such a policy decision would be consistent with past practice where the Funds have used policy decisions of this type to address and resolve issues not explicitly covered in the Conventions, and by this means to improve or facilitate the working of the Conventions on a practical level, where the policy decision is clearly reasonable and does not contradict any part of the Conventions ^{<2>}.
- 4.2 The Audit Body considers that its proposal meets this test and that this approach is consistent with the type of policy decisions the Assembly has taken in the past in support of that objective, for example, Resolution N°5 which the 1992 Fund Assembly adopted on the eligibility of States for election to the Executive Committee.
- 4.3 The Audit Body emphasises that all legitimate claims made by other victims would be unaffected by the proposal, since such claimants have a direct right of suit against the 1992 Fund by virtue of the 1992 Fund Convention. However, in almost every case, the non-reporting State concerned is also a claimant for clean up and other major costs following an incident and in many cases a very substantial claimant indeed.
- 4.4 The Audit Body further emphasises that it does not propose any kind of penalty for a State which is in default with respect to its oil reports for once the deficiency is fully rectified, payment in full of the appropriate claim settlement will be made.
- 4.5 If such a policy decision were approved by the Assembly, the Secretariat could in future rely on clearly defined parameters when making recommendations to the governing bodies on how to treat individual incidents or claims submitted by States that are in arrears with their oil reports. It might be argued that if such a policy decision were made, a State might only choose to meet its reporting obligations if there was an incident in its territory and historical reporting of imports and payments of contributions could go unpaid for many years, thus increasing the onus on those States that did report. However, the Audit Body sees no evidence to anticipate such cynical flouting of the Conventions and expects that Member States will continue to meet their obligations in accordance with normal practice as the vast majority do now.

5 Recommendation

The Audit Body recommends that the 1992 Fund Assembly take a policy decision that in cases where a State is in arrears with its oil reports, any claims submitted for payment by a public authority/administration of that State be assessed as normal but that payment of all such claims

^{<2>}

The Assembly has previously taken a number of important policy decisions, designed to improve or facilitate the working of the Conventions on a practical level. Examples include the establishment of Administrative Councils by both the 1971 and 1992 Assemblies to allow the functioning of the Conventions when a quorum could not be obtained. Further examples are where the 1992 Fund Assembly decided on an interpretation of coverage under the 1992 CLC/Fund regime of FPSO and FSU and on another occasion, on the concept of 'pure economic loss' neither of which were the subject of specific treatment in the Convention.

which are accepted as admissible in principle be deferred until the reporting deficiency is rectified to fully meet the outstanding 1992 Fund Convention requirements.

6 Action to be taken by the Assemblies

6.1 The 1992 Fund Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to consider adopting a policy decision that where a State is in arrears with its oil reports, any claim submitted by a public authority/administration of that State would be assessed for admissibility but payment would be deferred until the reporting deficiency was rectified.

6.2 The Supplementary Fund Assembly is invited to take note of the information contained in this document.

* * *

ANNEX

| State | Number of outstanding reports | Quantity given in most recent report (tonnes) | Years for which reports outstanding | |
|----------------------------------|-------------------------------|---|-------------------------------------|------------|
| | | | 1971 Fund | 1992 Fund |
| Bahrain | 10 | 0 | 1997 | 1997-2006 |
| Dominican Republic | 8 | No reports received | | 1999-2006 |
| Comoros | 7 | No reports received | | 2000-2006 |
| Mauritania | 7 | No reports received | 1995-2001 | |
| Dominica | 6 | No reports received | | 2001-2006 |
| Grenada | 6 | 0 | | 2001-2006 |
| Guinea | 5 | No reports received | | 2002-2006 |
| Guyana | 5 | No reports received | 1997-2001 | |
| Saint Vincent and the Grenadines | 5 | 0 | | 2001-2005 |
| Cape Verde | 4 | No reports received | | 2003-2006 |
| Cambodia <1> | 3 | | | 2004-2006 |
| Oman | 3 | 0 | | 2004-2006 |
| Panama | 3 | 7 330 968 | 1998 | 2003, 2006 |
| Papua New Guinea | 3 | 0 | | 2004-2006 |
| Russian Federation | 3 | 3 440 569 | | 2004-2006 |
| Saint Lucia | 3 | No reports received | | 2004-2006 |
| South Africa | 3 | No reports received | | 2004-2006 |
| Tuvalu | 3 | 0 | | 2004-2006 |
| United Republic of Tanzania <2> | 3 | | | 2004-2006 |
| Belize | 2 | 0 | | 2005-2006 |
| Congo | 2 | 0 | | 2005-2006 |
| Kenya | 2 | 243 274 | | 2005-2006 |
| Luxembourg | 2 | No reports received | | 2005-2006 |
| Madagascar | 2 | 237 657 | | 2005-2006 |
| Maldives | 2 | 0 | | 2005-2006 |
| Saint Kitts and Nevis | 2 | 0 | | 2005-2006 |
| Tonga | 2 | 0 | | 2005-2006 |
| Argentina | 1 | 14 202 906 | | 2005 |
| Djibouti | 1 | 0 | | 2006 |
| Georgia | 1 | 0 | | 2006 |
| Indonesia | 1 | 12 006 831 | 1998 | |
| Kuwait | 1 | 0 | 2001 | |
| Morocco | 1 | 6 907 300 | | 2006 |
| Mozambique | 1 | 0 | | 2006 |
| Nigeria | 1 | 519 348 | | 2006 |
| Samoa | 1 | 0 | | 2006 |
| Tunisia | 1 | 3 428 380 | | 2006 |

<1> reports for 2001-2003 received but incomplete

<2> reports for 2002-2003 received but incomplete