



ASSEMBLY
13th session
Agenda item 14

92FUND/A.13/13/1
12 August 2008
Original: ENGLISH

ASSEMBLY
4th session
Agenda item 14

SUPPFUND/A.4/12/1

SUBMISSION OF OIL REPORTS

Note by the Audit Body

Summary:	The 1992 Fund Assembly considered an Audit Body submission at its October 2007 sessions which, while the Audit Body's proposal appeared to receive considerable support, gave rise to issues which required further study by the Audit Body. The Audit Body was invited by the Assembly to refine its proposal in the light of the discussion, with a view to submitting a document on the subject to a future session of the Assembly. This document provides that additional information.
Action to be taken:	<u>1992 Fund Assembly:</u> To consider adopting a policy decision that where a Member State is in arrears with its oil reports, any claim submitted by the Administration or relevant public authority of that State would be assessed for admissibility and approval for payment. However, any approved payment would be deferred ^{<1>} until the reporting deficiency was rectified. <u>Supplementary Fund Assembly:</u> Information to be noted.

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. The 1992 Fund Assembly considered this matter in detail at its October 2007 session and the relevant paragraphs of its Record of Decisions (document 92FUND/A.12/28) read as follows:

'13.14 The Assembly took note of document 92FUND/A.12/12/2 on the submission of oil reports, in which the Audit Body recalled its long-running concern with this issue and reported on the study which it had undertaken with a view to evaluating what could be done to move the issue forward.

<1> Bold text has been used by the Audit Body throughout this document to indicate where it wishes to add emphasis.

13.15 In that document, 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 a difficult and an undesirable route for the Funds to take. It therefore proposed that the Assembly should take a policy decision that admissible claims submitted by a public authority or agent of the administration of a Member State which was in arrears with the submission of its oil reports could be assessed as normal but that payment of all such claims would be deferred until the reporting deficiency was fully rectified. The Audit Body considered that the adoption of such a policy decision would be consistent with past practice where the Funds had used policy decisions of this type to address and resolve issues not explicitly covered in the Conventions.

13.16 The Audit Body emphasised that all legitimate claims made by other victims would be unaffected by the proposal. However, the Audit Body pointed out that, in almost every case, the non-reporting State concerned would also be a substantial claimant for clean up and other major costs following an incident. The Audit Body emphasised that it did not propose any kind of penalty for a State which was in default with respect to its oil reports since full payment of assessed claims would be made once the deficiency was fully rectified.

13.17 A number of delegations considered that the proposal was a useful one which was legally sound and which fairly reflected the fundamental principle of a balance between the rights and obligations of a State. Those delegations indicated that the proposal would serve as an incentive to States with outstanding oil reports to submit such reports.

13.18 Other delegations were concerned, however, that the notions of 'public authority/administration' and 'substantially in arrears' needed clarification so that the Executive Committee would be able to implement such a policy without extensive debate. Some delegations also questioned whether the proposal was legally sound, pointing out that the 1992 Fund would still be liable to pay admissible claims for damage in such a State and questioning whether the proposal in fact constituted a sanction, which would be outside the scope of the Convention. One delegation also sought clarification as to the effect of the proposal in a case where the total amount of admissible claims exceeded the amount available under the Conventions and the payment of claims therefore had to be pro-rated.'

1.2 The Audit Body now provides this submission in order to address the Assembly's outstanding concerns. The Audit Body remains convinced that its proposal is sound, is justified, is supported by existing precedent decisions made by Funds' governing bodies and does not breach any provisions of the 1992 Conventions.

1.3 It may be helpful for delegations to refer to the Audit Body's document 92FUND/A.12/12/2, SUPPFUND/A.3/10/2 when considering this issue. (Available on the IOPC Fund Document Server on http://www.iopcfund-docs.org/ds/pdf/92a12-12-2_sfa3-10-2.pdf).

2 Assembly's concerns

The Funds' governing bodies have been concerned about this issue for many years and have from time to time instructed the Director to pursue a number of initiatives to resolve the situation. The Assembly's concerns are clearly articulated in the Record of Decisions of the October 2006 session of the 1992 Fund Assembly on this issue (cf document 92FUND/A.11/35, paragraph 15.3):

'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**'.

3 Considerations

3.1 It seems clear that the Assembly is interested in the Audit Body's proposal to provide a policy solution to the problem of non-submission of oil reports. Following the debate at the October 2007 sessions, there remain three issues on which the Assembly has requested further information or clarification. These are:

- Which claims/claimants would be targeted for deferral of payment?
- What is the precise meaning of 'substantially in arrears'?
- Is this proposed action legally valid?

3.2 Which claims/claimants would be targeted for deferral of payment?

3.2.1 The Audit Body's proposal is that the 1992 Fund Assembly should take a policy decision that admissible claims for payment lodged by the Administration or a relevant public authority of a Member State which is substantially in arrears in the submission of its oil reports (that is, the reports required to be made by the Member State under Article 15.2) would be assessed in the normal way but that actual payment of these claims would be deferred until that reporting deficiency was fully rectified. A 'relevant public authority' of that Member State is one that is or has been working directly on the response or recovery from the pollution incident on behalf of that State.

3.2.2 The Audit Body emphasises that all legitimate claims made by other victims (including other public authorities in that State) 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.

3.3 What is the precise meaning of 'substantially in arrears'?

3.3.1 In the Audit Body's view, 'substantially in arrears' means failure by a Member State to submit two or more current (ie most recent) annual reports of oil receipts as required by the provisions of Article 15.2. This recognises that from time to time a State may be late in submitting its reports for the most recent year for valid or extenuating reasons and that an outstanding report may be in the course of preparation.

3.3.2 The tests that might assist consideration of a case-by-case decision on implementing such a policy could include:

A Member State shall be considered as having failed to comply with its obligations in respect of reports on contributing oil receipts as set out in Internal Regulation 4 of the 1992 Fund and compensation in respect of claims arising from a particular incident shall therefore be deferred temporarily, if for a given year prior to the occurrence of that incident:

- (i) the Director has neither been notified by that State that no person is liable to contribute to the 1992 Fund in respect of that State nor received any oil reports for that year;
- (ii) the Director has not received all oil reports or has received incomplete reports in respect of that State; or
- (iii) there are deficiencies in respect of one or more reports which would prevent the 1992 Fund from issuing invoices in respect of those contributors, which deficiencies have not been rectified within six months of the relevant State being notified of them.

3.4 Is this proposed action legally valid?

3.4.1 Article 15.2 of the 1992 Convention provides:

'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.'

3.4.2 The obligation to report importations of contributing oil is the only obligation that a Member State has under the Convention, for which the rewards can be considerable. The Audit Body is of the view that not to treat such failures to report seriously can serve to undermine the efficacy of the Fund regime and has the potential to impose greater burdens on contributors in reporting States than is fair or reasonable. For that reason the Audit Body recommends that the obligation to pay approved claims to a Member State be deferred until the obligation that the Member State has to report importations of oil into its territory is similarly met.

3.4.3 The Audit Body emphasises that it is not proposing any kind of sanction or 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. It is submitted that the Assembly, in requiring that a Member State submit its oil reports in accordance with Convention obligations in order to have its accepted claims paid, is doing nothing more than what the Member State requires of the Funds in paying those claims (which, in no way either, can be construed as a sanction) and that the existing precedents support this action by the Funds.

4 Precedents for such a decision by the Assembly

4.1 The adoption of policy decisions by the Assembly is now a clear and established practice. The Funds have on a number of occasions 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 or frustrate any part of the Conventions**. The Audit Body considers that precedent therefore exists for the Funds to make a policy decision to address and resolve issues not explicitly covered in the Conventions where that test is properly met.

4.2 The Audit Body considers that its proposal fully 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 There is, in fact, a relevant precedent to be found in paragraph 5.2 of document 71FUND/AC.22/13 which was considered by the 1971 Administrative Council at its October 2007 session. That paragraph reads:

'As mentioned above, at its October 2003 and October 2004 sessions the Administrative Council decided that reimbursement to contributors in States with outstanding reports of surpluses from any Major Claims Funds (after offset had been made against any arrears) **should be postponed until all contributing oil reports for that State had been submitted**'.

4.4 The Audit Body considers that this decision by the 1971 Fund Administrative Council demonstrates that a policy decision as is now being proposed by the Audit Body is not new to the Funds and therefore is entirely consistent with previous policy decisions taken by the governing bodies of the Funds.

5 Recommendation

The Audit Body recommends that the 1992 Fund Assembly take a policy decision that in cases where a State is two or more oil reports in arrears, any claims submitted for payment 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, be assessed in accordance with usual practice but that payment of all such claims 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 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 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.
