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EVALUATION OF THE EFFECTIVENESS OF POLICY INITIATIVES ON OUTSTANDING OIL REPORTS AND OUTSTANDING CONTRIBUTIONS

Note by the Audit Body

Summary:

The Audit Body reports on the evaluation of policy measures taken by the governing bodies for the improvement of the timely submission of oil reports and timely payment of contributions. Those measures include the Policy on Outstanding Oil Reports and Deferment of Compensation Payments (Circular [92FUND/Circ.63](#), adopted by the governing bodies in October 2008) and Resolution N°11 – Measures in respect of Contributions (October 2009). In addition to the evaluation of the effectiveness of these measures, this document examines the measures in the light of the principles of State responsibility.

In this second evaluation of the policy decision and Resolution N°11 (the first evaluation was carried out in October 2011, see document [IOPC/OCT11/6/2](#)), the Audit Body recognises the substantial work done by the Secretariat to improve the timely submission and accuracy of oil reports through its use of the Lloyd's Intelligence Unit database and by means of the assistance that it provides to Member States in ensuring the proper implementation of treaty obligations. The Audit Body concludes that (i) the policy measures remain important expressions of the obligations of Member States and oil receivers and (ii) there appear to be no compelling reasons for repealing the measures but possible amendments may be warranted.

The Audit Body also discusses possible amendments to the measures taken, *inter alia*, by merging the two into a single instrument and by expanding the Policy on Outstanding Oil Reports and Deferment of Compensation to cover outstanding contributions.

Action to be taken:

1992 Fund Assembly and Supplementary Fund Assembly

Consider the Audit Body's recommendations as set out in paragraph 6 and give the Audit Body any instructions as they may deem appropriate.

1 Introduction/Background information

- 1.1 The obligations of Member States to report their receipts of contributing oil (oil reports) and for oil receivers in those States to pay their contributions in a timely manner are fundamental to the effectiveness of the IOPC Funds.
- 1.2 The governing bodies have for many years expressed concern that a number of Member States and oil receivers have not met their obligations under the Conventions with respect to oil reports and

contributions. The issues of non-submission of oil reports and outstanding contributions have been the focus of considerable efforts by the Secretariat to engage the States concerned.

- 1.3 In October 2008 the governing bodies adopted the Policy on Outstanding Oil Reports and Deferment of Compensation Payments (attached at Annex I). It follows from this measure that where a Member State is two or more oil reports in arrears any claim submitted by the Administration of that State or by 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 had been rectified.
- 1.4 The purpose of the measure has been twofold: to persuade those Member States with outstanding oil reports to rectify the situation and to act as a deterrent to other Member States. This objective is clearly founded on the fundamental importance of the reporting obligation to the entire IOPC Funds system.
- 1.5 The measure does not lay down any rule of fault, culpability, negligence or want of due diligence on part of the Member State in question. Thus an “objective” breach of the reporting requirement is sufficient for triggering the application of the measure. This approach too is an expression of the fundamental importance of correct and timely oil reports.
- 1.6 In addition to the Policy on Outstanding Oil Reports and Deferment of Compensation Payments, the governing bodies at their October 2009 sessions adopted Resolution N^o11 – Measures in respect of Contributions (attached at Annex II). Through this Resolution, Member States are urged to ensure that they have taken all necessary measures to implement their obligations under Article 13.2 of the 1992 Fund Convention^{<1>} and Article 12.1 of the Supplementary Fund Protocol^{<2>} and requests Member States to report to the Director the means by which they have implemented those obligations.
- 1.7 Through Resolution N^o11, the governing bodies instructed the Audit Body to monitor and to report back in due course on the effectiveness of the two measures and to make recommendations for further measures as may be warranted.
- 1.8 The Audit Body undertook such an evaluation in the ensuing years and provided a report to the October 2011 sessions of the governing bodies (document [IOPC/OCT11/6/2](#)). With respect to the policy measure on outstanding oil reports, the Audit Body concluded that, while there was no evidence at that point that the policy measure had resulted in a significant improvement in the submission of oil reports, it represented a powerful instrument in compelling Member States to meet their obligations under the Convention. It serves, the Audit Body held, as a clear, concrete and unequivocal signal by the governing bodies of the importance of adhering to Convention requirements for the reporting of contributing oil in order to benefit from the compensation provisions of the Fund. The Audit Body acknowledged that it was difficult, at least with some degree of certainty, to assess what effect the policy measure had had on the submission of oil reports. On the other hand there was nothing to suggest that it lacked effect in this regard. The Audit Body found that its evaluation of the policy measure did not give reason to repeal or change it.
- 1.9 As regards Resolution N^o11, the Audit Body concluded that there had been a drop in the numbers of contributors in arrears since the autumn of 2009. It was difficult though to assess to what extent this was due to the adoption of the Resolution. One feature of the Resolution was a call on Member States to report the means by which they had implemented their obligations under Article 13.2 of the 1992 Fund Convention and Article 12.1 of the Supplementary Fund Protocol. There was, however, a lack of response which the Audit Body found most disconcerting, while acknowledging that this could

<1> Article 13.2 reads: “Each Contracting State 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 as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.

<2> Article 12.1 reads: “The provisions of Article 13 of the 1992 Fund Convention shall apply to contributions to the Supplementary Fund.”

not be taken to mean that no action had been taken by the parties concerned. In the Audit Body's view the Resolution, together with the strenuous efforts taken by the Secretariat, served to highlight the problem with outstanding contributions and its potential consequences. Such attention was, the Audit Body believed, likely to contribute to a positive development towards prompt and correct payment of contributions.

- 1.10 On the basis of its evaluation, the Audit Body put forward its recommendations (see paragraph 4.3 of document [IOPC/OCT11/6/2](#), a copy of which is attached at Annex III).
- 1.11 This document serves as the second report by the Audit Body on the evaluation of the effectiveness of the Policy on Outstanding Oil Reports and Deferment of Compensation Payments and Resolution N°11 – Measures in respect of Contributions.

2 The Audit Body's work on the subject since October 2011

- 2.1 The Audit Body has kept the subject under constant review. It has worked in close cooperation with the Secretariat and has received valuable information and input from the Director and his staff. It is clear from this information that the Secretariat makes, as it has for many years, considerable efforts to pursue the submission of oil reports and outstanding contributions. This work is reflected through the annual reports by the Secretariat to the governing bodies.
- 2.2 Since October 2011 the Secretariat has played an important role in promoting the timely and accurate submission of oil reports through its use of the Lloyd's Intelligence Unit database. The Secretariat has provided a separate report on this subject to the governing bodies (document IOPC/OCT14/6/1). Therefore in the context of this report the Audit Body merely wishes to refer the governing bodies to that report and express its appreciation to the Secretariat for its work.
- 2.3 The deliberations of the Audit Body have been influenced by the wider issue of the correct implementation of the Conventions discussed in some detail at the October 2013 sessions of the governing bodies. Member States had, through the Director, received a most instructive and elaborate legal opinion by Professor Dan Sarooshi (the legal opinion is annexed to document [IOPC/OCT13/8/5](#) "Implementation of the Conventions into national law").
- 2.4 While the legal opinion has a wider scope than just the consideration and evaluation of the current policy measures, it nevertheless also contains highly relevant reasoning for that subject. In particular, the following conclusions in the legal opinion can be noted:
- If Member States are in breach of their obligation to provide timely and accurate reports so that as a consequence the 1992 Fund is unable to decide which persons must contribute to the 1992 Fund and what is their level of contribution, then the State is responsible under international law for this breach of the 1992 Fund Convention and it bears a responsibility to compensate the 1992 Fund for the missing contributions.
 - If Member States have failed to implement Article 13.2 correctly such that there are no such measures which the State can take under its domestic law against a non-paying person to ensure that he has contributed the amount of his annual contribution as levied upon him by the Director or even where action or inaction by an organ of the State has the consequence that the 1992 Fund does not receive the contribution due, then again the State is arguably responsible for its breach and it bears a responsibility to compensate the 1992 Fund for the missing contribution.
- 2.5 Additional important issues such as jurisdiction and immunity are addressed in Professor Sarooshi's legal opinion.
- 2.6 During the course of its deliberations the Audit Body also discussed the possibility of additional measures in connection with outstanding oil reports or contributions in arrears.

3 Evaluation of the effectiveness of the policy on outstanding oil reports, deferment of compensation payments and of Resolution N°11

3.1 General

In its first evaluation of the policy measures, the Audit Body sought to consider the situation in respect of non-submission of oil reports and outstanding contributions before and after the measures were taken and to review actions taken by Member States and industry associations to address these issues. For this report, the focus is on the period since October 2011.

3.2 The policy measure on non-submission of oil reports

3.2.1 As at 10 September 2014, there were 23 Member States of the 1992 Fund with outstanding oil reports. Of these, nine Member States had outstanding oil reports for two or more years. In the first evaluation report, the figures as of February 2011 were 34 and 21 respectively. The number of Member States with outstanding oil reports has thus decreased. It is worth noting that six of the nine Member States mentioned above had, although having been Members of the 1992 Fund for many years, never submitted any oil reports (see document IOPC/OCT14/5/1)

3.2.2 The policy measure is, in principle, applicable to the group of nine Member States with outstanding oil reports for two or more years.

3.2.3 Since October 2011 there have been no claims from Member States with outstanding oil reports and no Member States have been denied compensation by virtue of this policy decision.

3.2.4 The Audit Body agrees with the Director that, despite the number of States with outstanding oil reports, the financial consequences of the missing reports are limited (see document [IOPC/OCT13/5/1](#), paragraph 2.12). With respect to the six Member States which have never submitted oil reports, according to the Director's assessment, it is expected that few receive contributing oil in significant quantities (see document [IOPC/OCT13/5/1](#), paragraph 2.13). The conclusion appears to be sound, although some caution must be exercised since there are no oil reports to confirm this.

3.2.5 In its analysis for the Audit Body, the Secretariat estimates that the cumulative impact of the non-submission of oil reports for the assessment of contributions in respect of the General Fund and the Major Claims Funds of the 1992 Fund could reach close to £4 million.

3.2.6 These facts show that, measured in terms of incidents that would be subject to the policy decision, the scope of application of the measure is not at all widespread. Nevertheless, in the event of an incident the policy measure would impact on the claims of those nine Member States.

3.3 Resolution N°11

3.3.1 The table below summarises the situation with respect to contributions in arrears for the three reporting periods since the last evaluation report presented at the October 2011 sessions (see document [IOPC/OCT12/5/2](#), document [IOPC/OCT13/5/2](#) and document IOPC/OCT14/5/2). The first evaluation report was provided in a similar table for the period 2009-February 2011 (see document [IOPC/OCT11/6/2](#) paragraph 3.9.9).

	14 September 2012	11 September 2013	5 September 2014
Number of Member States with contributors in arrears	13	13	11
Number of contributors in arrears	22	22	25
Total number of contributors in Member States with contributors in arrears	126	109	96
Total amount in arrears (in £000)	2 687	2 710	2 596

- 3.3.2 With respect to the situation as at 5 September 2014, the salient points to be noted are as follows: Over 85% of the contributions are due from nine contributors in three Member States (Morocco, Russian Federation and South Africa) representing some £2 212 000. The rest of the amount due, £384 000, is due from 16 contributors in ten Member States. The breakdown of the outstanding contributors by Member State is provided in the Secretariat's Report on Contributions (see document IOPC/OCT14/5/2).
- 3.3.3 The table shows that, while the number of Member States with contributors in arrears has dropped over the three year period 2012-2014, there is a slight increase in the number of contributors in arrears. However, there has been a drop in the amount of contributions due over the last three years. Compared to the figures presented in the Audit Body report in October 2011, the increase in the number of contributors in arrears is significant. In February 2011, five Member States had contributors in arrears, the number of contributors in arrears was eight and the total number of contributors in those Member States was 48. In other words, in February 2011 almost 17% of the contributors in the Member States concerned were in arrears. As at 5 September 2014 the portion was over 26%. It is not possible to infer too much from the percentage figures as these would vary based on the number of contributors in the Member States where there are contributors in arrears. The relevant question is, of course, if the trend in the number of contributors in arrears keeps increasing. In analysing the current position from paragraph 3.3.2 above, it can be seen that 85% of the outstanding contributions relate to nine contributors in three Member States. The 1992 Fund has brought legal action against three of the contributors in one Member State (Russian Federation). There are four contributors in another Member State (South Africa) where there have been issues in relation to implementation although it is noted from the Secretariat's Report on Contributions (document IOPC/OCT14/5/2) that steps have now been taken by that Member State to resolve the issue.
- 3.3.4 The issue of outstanding contributions is an important one for both the governing bodies and the Secretariat, both in principle and in practice. The Director and the Secretariat actively pursue outstanding contributions through a variety of measures and these are discussed in the Director's annual report on contributions. In the October 2014 Report on Contributions, it is stated that a total of some £537.2 million has been levied over the years and some £93.2 million has been reimbursed to contributors. As at 5 September 2014, £2 596 867 in contributions were outstanding, representing 0.48 % of contributions levied (see document IOPC/OCT14/5/2).
- 3.3.5 Resolution N^o11 urges associations representing receivers of contributing oil to engage proactively in ensuring that obligations by industry members are met and to report to the Director/Secretariat on the measures taken. In addition the Resolution, as explained above, requests Member States to report on their implementation of Article 13.2 of the 1992 Fund Convention and Article 12.1 of the Supplementary Fund Protocol. Reports from Member States have been few and no industry organisation has submitted a report.

3.4 Conclusions

- 3.4.1 The conclusions drawn in the first evaluation process reported in October 2011 are to a wide extent still valid. Thus it is difficult to assess to what extent the policy measures on outstanding oil reports and outstanding contributions have improved the situation. The Audit Body wishes to reiterate its opinion in the first evaluation report that the efforts made by the Secretariat have resulted in keeping non-compliance to quite low and manageable levels and that the lack of compliance is not, on current trends, likely to impact materially on the viability of the Funds. However, failure by some Member States to fully implement and abide by their obligations under the Conventions, as well as by some contributors, is not fair for those complying if these matters are not actively pursued.

- 3.4.2 The Audit Body still takes the view that the two policy measures are important expressions, and reminders, with respect to obligations of Member States and oil receivers that are germane to the very core obligations and objectives of the international regime. In particular the policy on outstanding oil reports and deferment of compensation payments serves as a powerful instrument in compelling Member States to meet their obligations under the Convention. Unlike the policy decision, Resolution N°11 does not contain any similar withholding of compensation. Nevertheless it is still the firm belief of the Audit Body that the Resolution, together with the strenuous and continued efforts by the Secretariat, serve to highlight the problem with outstanding contributions and its potential consequences for the international compensation system for oil pollution damage.
- 3.4.3 In the Audit Body's view, so far, nothing in the two evaluation processes of the policy measures that have now taken place would provide any reason for repealing the measures. The question is whether any other circumstances warrant amendments to the measures.

4 Impact of the legal opinion on liability to the 1992 Fund for breaches by Member States of obligations under the 1992 Fund Convention

4.1 The legal opinion

- 4.1.1 The legal opinion by Professor Dan Sarooshi and the Director's considerations based on the opinion have been dealt with extensively both in writing (see document [IOPC/OCT13/8/5](#)) and debated by the governing bodies (see document [IOPC/OCT13/11/1](#), paragraphs 8.5.1-8.5.24) and it is not the intention of the Audit Body to replicate that discussion in this report but to rely on it as an important source.
- 4.1.2 The basis for the legal opinion is the doctrine of State responsibility. There is an international law rule on such responsibility which provides that if a State commits an internationally wrongful act (for instance breaches a treaty obligation), it can be held responsible for the breach and will have to provide reparation for any injury or damage caused by the breach, provided however that the wrongful act can be attributed to the State ^{<3>}.

4.2 Policy decision on outstanding oil reports

- 4.2.1 It seems clear that the failure to provide accurate and timely oil reports constitutes an internationally wrongful act. Thus a Member State is obligated to compensate losses if it fails to:
- provide oil reports at all;
 - provide accurate oil reports; or
 - provide oil reports in time.
- 4.2.2 Any loss sustained by the Fund would, in the first place, be in the form of contributions that should have been paid by oil receivers in the relevant Member States but which, due to the failure of the State to provide accurate and timely oil reports, have not been levied and paid. From this it follows that a loss is deemed to have been incurred only when oil reports would have shown that contributing oil actually is, or was, received in the Member State in question. Although not specifically addressed in Professor Sarooshi's legal opinion or the Director's considerations thereto, other financial consequences for the Funds caused by non-submission of oil reports could constitute a loss which the Member State is obligated to compensate.

^{<3>} The authoritative statement of the international law rules on State responsibility are contained in the Articles on Responsibility of States for Internationally Wrongful Acts of the UN International Law Commission (see Professor Sarooshi's legal opinion).

- 4.2.3 The Policy on Outstanding Oil Reports and Deferment of Compensation Payments does not deal with compensation for losses. In the Audit Body's opinion, this should however not be construed as expressing a decision in principle by the Member States of the 1992 Fund that the 1992 Fund Assembly would refrain from seeking compensation for losses incurred as a result of non-submission of oil reports under the principles of State responsibility. Rather, in the view of the Audit Body, it can be argued that the policy decision amounts to a countermeasure by the Assembly in order to induce the Member State in question to comply with its obligation to provide oil reports. Since the policy measure concerns a breach of a fundamental obligation under the 1992 Fund Convention, deferring compensation for damage sustained by the Member State itself until such time as it has made good what is missing, is considered to be a proportionate measure to the breach of the treaty obligation. The Audit Body believes that it is therefore well in keeping with the principles of State responsibility.
- 4.2.4 As far as compensation for losses is concerned, it seems clear to the Audit Body that, in relation to a wrongful act by a Member State such as non-submission of oil reports, unpaid contributions constitute a damage, as held by Professor Sarooshi in his legal opinion. Obviously the Funds cannot collect the contributions as compensation for damage from the Member State and subsequently collect the same amount from the contributors in that State.
- 4.2.5 The Audit Body is of the opinion that the Policy on Outstanding Oil Reports and Deferment of Compensation Payments is well in line with the principles of State responsibility for internationally wrongful acts. At the same time, those principles do not render the policy decision void or superfluous as it addresses a specific type of countermeasure (if not requirement for restitution). It is also clear, and Professor Sarooshi has explained this thoroughly in his legal opinion, that taking legal action against a Member State for claiming compensation may prove difficult due to issues of jurisdiction and immunity. Such difficulties could also be an argument in favour of the policy decision.
- 4.2.6 If any amendments should be made to the policy decision or supplementary statements be made, the governing bodies may wish to consider clarifying that the Member States, if the situation so requires, will exercise their rights, or the Fund's rights, under internationally recognised principles on State responsibility to seek compensation for damages caused by the non-compliance with reporting obligations. The governing bodies may also wish to consider other measures under international law, such as suspending a Member State's right to participate in Funds' meetings, to vote or in other forms take part in the decisions of the Funds and, ultimately, to terminate the Fund Convention or Supplementary Fund Protocol for that Member State. These elements should, however, perhaps rather be addressed in a broader context, namely the general obligations on Member States to implement and apply the Conventions correctly.
- 4.3 Contributions in arrears
- 4.3.1 When discussing non-payment of contributions there are two main elements to focus on: the failure or unwillingness by contributors to pay contributions levied and the failure by Member States to comply with treaty obligations in relation to contributions. This clearly necessitates different considerations when discussing possible actions (here the Audit Body disregards the possibility that a Member State, in accordance with Article 14.1 of the 1992 Fund Convention and Article 12.2 of the Supplementary Fund Protocol, has assumed itself the obligation to pay contributions).
- 4.3.2 Under Article 13.2 of the 1992 Fund Convention, each Member State shall ensure that any obligation to contribute to the Fund arising under the Convention in respect of oil received in that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary. The minimum standard of such measures is that the Funds can take legal measures in the Member States in order to recover any amount due (see also Article 2.2 of the 1992 Fund Convention). If the 1992 Fund cannot take legal action against a contributor in arrears due to lack of proper national legislation, that seems to be a breach by that Member State to meet its treaty obligations and is likely to be considered an internationally wrongful act. This would carry all the legal consequences discussed previously in this document.

- 4.3.3 Article 13.2 also mentions “sanctions”. If a Member State fails to adopt sanctions (whether of penal or administrative nature), one might ask if it would constitute an internationally wrongful act. It is also relevant to ask whether it should be considered that it is the absence of sanctions that has caused the contributors not to pay contributions due and may thus have caused damage to the Funds. The answer would of course depend on the circumstances in the individual case. If the Member State did not deem sanctions necessary, it seems, in the Audit Body’s view, difficult to attribute that lack of action as an internationally wrongful act. The Audit Body would welcome the views of the governing bodies as to whether a different conclusion may be warranted if contributions have been outstanding for a long time.
- 4.3.4 This triggers the question as to whether there is a need to express, in a policy decision, Resolution or other instrument, the Member States’ position with regards to State responsibility for outstanding contributions.
- 4.3.5 If any statement of position would be deemed desirable, it must be decided if – like the policy decision on outstanding oil reports – it should set out under what conditions the Funds’ policy would be exercised. Such conditions ought to indicate in which situations the Funds would exercise the rights under principles of State responsibility for internationally wrongful acts, eg when there is no national obligation on contributors to pay contributions although they receive relevant quantities of oil and when there is no possibility for the Funds to take legal action against contributors in arrears. If so, consideration would have to be given to whether any kind of “countermeasures”, ie withholding compensation, should apply, and the prerequisite for such a measure (for instance: only for State claims and only when pollution damage has occurred in that State). This would however only cover one particular situation. It may be argued that countermeasures could be justified and proportionate in principle in other situations too. As the Funds may need the contributions to satisfy claims from victims in other Member States, arguably withholding compensation for the Member State in which contributors are in arrears – if available only when oil pollution damage has been sustained in and by that State – would not be sufficient. If any thresholds for the policy to be applied were to be discussed, it would be necessary to decide the type of threshold and how to calculate it or otherwise delimit it (number of years of outstanding contributions, amount due etc).
- 4.3.6 Here too, the governing bodies may wish to consider whether perhaps such measures as indicated in paragraph 4.2.6 above would be more effective.
- 4.3.7 The doctrine of responsibility of States for internationally wrongful acts obviously does not apply to acts or omissions by individual contributors. Wrongful acts by Member States cannot be attributed to individual contributors.
- 4.3.8 The 1992 Fund Convention, and the Supplementary Fund Protocol, are clear on what awaits a defaulting contributor: the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due (Article 13.3 of the 1992 Fund Convention). This is already being done by the Director and it seems that, as for legal options, there is not much more to do. It is for the Director to decide, on a case-by-case basis, what measures to take and to what length and cost.

5 Other considerations

5.1 Charging interest as a penalty?

- 5.1.1 The Audit Body has considered, on the basis of ideas provided by the Secretariat, whether interest could be charged differently than today and so function as a sanction for contributions in arrears.
- 5.1.2 Annual contributions are calculated on the basis of the oil reports submitted by the Member States. The Assembly decides the total amount of contributions to be levied. On the basis of that decision, the Director shall in respect of each Member State calculate for each person having received more than 150 000 tonnes of contributing oil the amount of his annual contribution. The annual contribution shall be due on the date to be laid down in the Internal Regulations of the Fund. The

Assembly may decide on a different date of payment. According to Internal Regulation 3.6, payment of annual contributions shall be due on 1 March of the year following that in which the Assembly decides on the levy of annual contributions, unless the Assembly decides otherwise ^{<4>}.

- 5.1.3 It could be argued that charging interest from the date the levy is due for payment as decided by the governing bodies would be more equitable. However, it would be difficult to impose this late interest penalty on individual contributors as the responsibility to submit the oil report rests with the Member State. The question therefore arises as to whether instead the Member State should be liable for this interest penalty. The idea would be to amend the policy decision on outstanding oil reports to include an interest penalty for the period from when the levy was due in accordance with governing bodies' decision and the new due date for invoice raised as a result of the late oil report.
- 5.1.4 The 1992 Fund Convention only mentions interest in connection with payment of contributions. It follows from this that it is only the person on whom contributions are levied that can be obligated to pay interest. This could also be the case for a Member State which has assumed the responsibility to pay contributions in accordance with Article 14.1 of the 1992 Fund Convention. This is already reason to exercise some caution in establishing a new obligation on Member States, ie to pay an interest penalty (default interest). Such interest is normally charged on a person who has failed to pay a debt on a given due date. The Member State is, however, under no obligation to pay anything to the Funds.
- 5.1.5 The Audit Body is aware that several jurisdictions use various forms of administrative and other charges when a person, natural or legal, has failed to meet a legal obligation, for instance to pay tax. Such charges can be a percentage of the portion of the financial obligation that is unpaid. Imposing any such additional obligation seems to require a clear legal basis such as primary or secondary legislation – in an international context a Convention or other instrument based on a Convention.
- 5.1.6 In this regard, it could be worthwhile taking into account that if a Member State has injured the Funds through an internationally wrongful act and thus is liable to pay compensation for damage, such compensation could cover loss of interest on contributions that, if levied and properly paid, could have been invested and yielded interest. Arguably this is an injury for which the Member State is obligated to pay compensation as a result of its wrongful act (non-submission of oil reports), ie the obligation follows from the doctrine of State responsibility.
- 5.1.7 If Member States were to be required to pay an interest penalty, or any similar penalty charge, as a result of late submission of oil reports and as a consequence contributions are levied later than should have been the case with timely reports, this would mean imposing a penalty which is not provided for in the 1992 Fund Convention. To impose it merely through a policy decision seems, in the Audit Body's view, somewhat doubtful. The principles on State responsibility for internationally wrongful acts do not provide a clear-cut basis for such a measure. Subject to the governing bodies' views, the matter may however need further consideration.

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The amount of any contributions due under Article 12 of the 1992 Fund Convention and which is in arrears shall bear interest (Article 13.1). Interest shall be charged on unpaid annual contributions from the date on which payment is due at an annual rate which for each period of twelve months from 1 March shall be 2% higher than the lowest London clearing bank base rate prevailing on 1 March (Internal Regulation 3.8).

The current practice is that interest is charged only from the due date shown on the invoice. For late oil reports invoices are raised outside the normal invoice run for all contributors and the due date is normally set two months from date of invoice. Invariably the due date for an invoice based on the late oil reports will be later than the due date for the levy as decided by the governing bodies. The result of this is that there is no financial penalty for late submission of oil reports.

5.2 Punishment or inducement?

- 5.2.1 The measures discussed above of course also intend to induce Member States not to breach their treaty obligations. If the IOPC Funds have a clear strategy and legal basis for acting when Member States fail to comply with their treaty obligations, the governing bodies are well equipped to deal with such situations when they occur. When discussing treaty obligations and Member States' ability or willingness to comply with them, there is a risk that too much emphasis is put on punishment. Measures aiming at preventing wrongfulness should also be considered.
- 5.2.2 A Member State's non-compliance with treaty obligations can of course be deliberate and intentional, but less culpable reasons may be possible. There may be a genuine lack of understanding of the nature of the treaty obligations and how to implement them into national law and there may be administrative shortcomings within a Member State leading to non-submission of oil reports or non-payment of contributions. It could be worthwhile considering to what extent this is a problem and how to rectify it, for instance through model legislation and education. To this aim Resolution N°11 requested Member States to report the means by which they had implemented certain obligations in the 1992 Fund Convention and the Supplementary Fund Protocol. This could of course be elaborated on further to cover other parts of the Conventions. Regardless of whether Resolution N°11 should stay in place or not, consideration should be given as to how Member States, through information about their national legislation, can help establish a set of best practices to assist other Member States.
- 5.2.3 The work undertaken by the Secretariat with regard to information from the Lloyd's Intelligence Unit database clearly shows the effectiveness of such additional measures. This experience should, in the Audit Body's view, work as an incentive for the Secretariat to consider other measures for control and assistance.
- 5.2.4 Finally, the above represents the Audit Body's consideration of these issues as at 22 September 2014. While a number of policy options and possible directions have been raised, the Audit Body believes that the subsequent development and implementation of a coherent and concise policy regarding these issues is subsequently dependent on the guidance provided by the governing bodies. The Audit Body would welcome the consideration of and guidance from the governing bodies on these matters in order to enable the preparation of a draft policy for consideration by the governing bodies at the earliest opportunity.

6 Recommendations

The Audit Body accordingly recommends:

- (a) that the Policy on Outstanding Oil Reports and Deferment of Compensation Payments be maintained in principle;
- (b) that the governing bodies consider, possibly by further instructions to the Audit Body, whether a similar policy should apply in cases of outstanding contributions and, if so, under what conditions;
- (c) that Resolution N°11 be recast into a new Resolution such that it:
 - (i) notes the legal opinion on obligations of Member States under the principles of State responsibility for internationally wrongful acts;
 - (ii) incorporates the Policy on Outstanding Oil Reports and Deferment of Compensation Payments;
 - (iii) expresses the Member States' intention to seek compensation, if the situation so requires, 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) takes into account any expansion of the policy decision to cover outstanding contributions (item b above);
- (v) retains/reiterates the current provisions of Resolution N°11 in respect of the obligations of receivers of contributing oil;
- (vi) retains/reiterates obligations of Member States under the Fund Conventions;
- (vii) reiterates/expands the request to Member States to report on the means by which they have implemented their obligations under the Fund Conventions; and
- (viii) directs the Audit Body to monitor the effectiveness of new measures once implemented; and

(d) that the Audit Body be given such instructions as the governing bodies deem appropriate.

7 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to consider the Audit Body's recommendations as set out in paragraph 6 above and give the Audit Body any instructions as they may deem appropriate.

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Outstanding Oil Reports and Deferment of Compensation Payments:
New 1992 Fund Policy

The failure of a number of IOPC Funds' Member States to submit oil reports has been a very serious issue for a number of years. At its October 2008 session, the 1992 Fund Assembly therefore decided to adopt a new policy on the deferment of compensation payments in States which have outstanding oil reports.

Background

The 1992 Fund is financed by contributions paid by any person who has received in the relevant calendar year in excess of 150 000 tonnes of crude oil or heavy fuel oil (contributing oil) in ports or terminal installations in a 1992 Fund Member State, after carriage by sea. The levy of contributions is based on reports on oil receipts in respect of individual contributors (oil reports) which the Governments of Member States are obliged to submit annually to the Fund Secretariat under Article 15 of the 1992 Fund Convention and Internal Regulation 4 of the 1992 Fund. Contributions are paid by the individual contributors directly to the 1992 Fund. Governments are not responsible for these payments, unless they have voluntarily accepted such responsibility.

Both the IOPC Funds' governing bodies and the joint Audit Body have repeatedly expressed their very serious concern as regards the number of Member States which had not fulfilled their treaty obligation to submit oil reports, since the submission of these reports is crucial to the functioning of the IOPC Funds. At the time of the Assembly's last meeting in October 2008, 27 out of the 101 States which were Members of the 1992 Fund at that time had outstanding oil reports in respect of 2007 and/or previous years.

When the 2003 Supplementary Fund Protocol was developed, provisions on the withholding of compensation in States with outstanding oil reports were inserted. However, the 1992 Fund Convention does not contain any similar provisions.

New Policy

At its October 2008 session, the 1992 Fund Assembly therefore adopted the following policy which had been developed by the Audit Body in order to address this issue:

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.

In developing the policy, the Audit Body emphasised that payment of any such claims would be made once the reporting deficiency had been fully rectified and that all legitimate claims made by other victims, including other public authorities in that State, would be unaffected by the policy. The Audit Body also considered that a State should be two or more annual oil reports in arrears for payment of approved claims to be deferred, since it recognised that there could be valid or extenuating reasons for a State to be late in submitting reports and that an outstanding report may be in the course of preparation.

The Assembly decided to apply this policy after a grace period of 90 days. This policy will therefore apply as of 28 April 2009 to all relevant claims in Member States with outstanding oil reports.

The Assembly instructed the Director to distribute this Circular to all Member States and to bring the policy to the attention of Member States by any other appropriate means.

Further information

Further details on the background to the policy described in this Circular can be found in documents [92FUND/A.13/13/1](#) (Submission of Oil Reports – Note by the Audit Body) and [92FUND/A.13/25](#) (Record of Decisions of the thirteenth session of the 1992 Fund Assembly), which are available on the IOPC Funds' Document Server at <http://documentservices.iopcfunds.org/>.

Further information on the membership and operation of the IOPC Funds can be found on its website at www.iopcfund.org.

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ANNEX II

Resolution N°11 - Measures in respect of Contributions (October 2009)

THE ADMINISTRATIVE COUNCIL ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992 (1992 Fund), and

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

NOTING that the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 and the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 were established to pay adequate compensation and to this end contributions are required to fund payment of claims,

RECOGNISING that States Parties in accepting the Conventions have agreed to ensure that contributors fulfil their obligations under Article 13, paragraph 2 of the 1992 Fund Convention and Article 12, paragraph 1 of the 2003 Supplementary Fund Protocol,

RECOGNISING ALSO that the Funds cannot operate effectively and equitably unless oil reports and contributions are received in a timely manner,

- 1 **ENDORSE** current measures employed by the Director and Secretariat for following up arrears of contributions,
- 2 **CALL ON** all receivers of contributing oil to comply with their obligations under the Conventions,
- 3 **URGE** associations representing receivers of contributing oil to engage proactively in ensuring that obligations by industry members are met and to report to the Director/Secretariat on the measures taken,
- 4 **FURTHER URGE** States Parties to ensure that they have taken all necessary measures to implement effectively their obligations under Article 13, paragraph 2 of the 1992 Fund Convention and Article 12, paragraph 1 of the 2003 Supplementary Fund Protocol, whilst reminding them of the option to make use of Article 14, paragraph 1 of the 1992 Fund Convention and Article 12, paragraph 2 of the 2003 Supplementary Fund Protocol,
- 5 **REQUEST** States Parties to report to the Director the means by which they have implemented their obligations under Article 13, paragraph 2 of the 1992 Fund Convention and Article 12, paragraph 1 of the 2003 Supplementary Fund Protocol, so that, based on the information submitted, the Secretariat, with the assistance of the Audit Body, may summarise such means and report such information to the 1992 Fund Assembly and Supplementary Fund Assembly,
- 6 **CALL SPECIFICALLY ON** States Parties with contributors who are in arrears to report to the Director the means by which they have implemented their obligations under Article 13, paragraph 2 of the 1992 Fund Convention and Article 12, paragraph 1 of the 2003 Supplementary Fund Protocol and on any steps they have taken to ensure payment of the outstanding contributions,
- 7 **ALSO REQUEST** that the Director, in consultation with the State(s) Parties concerned, should consider options for providing, as part of regular reports on outstanding contributions, a list of non-contributing 'persons' (entities) and that such a list be made prominent in reports of the operations of the Funds, subject to any applicable laws,
- 8 **DIRECT** the Audit Body to:
 - (a) monitor the effectiveness of the above actions in respect of outstanding contributions;

- (b) monitor the effectiveness of the new 1992 Fund Policy on Outstanding Oil Reports and Deferment of Compensation Payments, adopted by the 1992 Fund Assembly at its October 2008 session; and
- (c) report to the 1992 Fund Assembly and Supplementary Fund Assembly on its findings, including recommendations for further measures as may be warranted.

* * *

ANNEX III

Document IOPC/OCT11/6/2 (Improving the accuracy and timeliness of submission of oil reports and the collection of contributions – Note by the Audit Body)

4.3 Recommendations

The Audit Body accordingly recommends:

- (a) that the Secretariat be requested to subscribe to the Lloyd's List Intelligence database, together with the introduction of monitoring procedures by the Secretariat using that data, for a period of three years. A review by the Audit Body would take place in 2014 to see whether the new measures result in sufficient improvement to make continuance of them worthwhile. The additional cost of these procedures has been taken into account within the budget which the Secretariat is presenting to the governing bodies (cf document [IOPC/OCT11/9/2/1](#));
- (b) that the 1992 Fund policy on outstanding oil reports and deferment of compensation payments, adopted by the 1992 Fund Assembly at its October 2008 session should continue unchanged;
- (c) that other measures to remedy the situation be considered including:
 - continued efforts by the Secretariat to address situations where some Member States face particular problems; and
 - development of model legislation for the implementation of the 1992 Fund Convention, and assisting with best practices and experiences gained by other Member States.
- (d) that continued evaluation of the policy measure and a regular discussion of the matter should occur;
- (e) that Resolution N°11 on Measures in Respect of Contributions adopted by the 1992 Fund Assembly at its October 2009 session should continue to apply;
- (f) that in accordance with the Resolution, the Audit Body should continue its evaluation of the effectiveness of the Resolution and report to the 1992 Fund Assembly and the Supplementary Fund Assembly on its findings no later than October 2014; and
- (g) that the request for information from Member States and industry organisations set out in the Resolution should be re-iterated and that consideration be given by the Secretariat to issuing a letter asking Member States and industry organisations respectively to provide information in accordance with the Resolution within a given timeframe.