



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

ASSEMBLY
17th session
Agenda item 32

FUND/A.17/29
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REFUND OF INDIRECT TAXES

Note by the Director

Introduction

1 Under Article 34.2 of the Fund Convention, the Governments of Member States shall take, whenever possible, appropriate measures for the remission or refund of indirect taxes and sales taxes paid by the IOPC Fund in the exercise of its official activities. This provision reads as follows:

When the Fund makes substantial purchases of movable or immovable property, or has important work carried out which is necessary for the exercise of its official activities and the cost of which includes indirect taxes or sales taxes, the Governments of Member States shall take, whenever possible, appropriate measures for the remission or refund of the amount of such duties and taxes.

2 At its 15th and 16th sessions, the Assembly considered certain difficulties which the IOPC Fund had encountered in the application of Article 34.2 in respect of fees for the services of lawyers and other experts, as set out in documents presented by the Director (documents FUND/A.15/20 and FUND/A.16/29).

Consideration by the Assembly at its 15th Session

3 The Assembly was informed that in one Member State fees paid by the IOPC Fund to lawyers and other experts had been subject to the payment of VAT and that requests made by the Director for a refund of the amounts thus paid in VAT had not resulted in a refund being granted.

4 The Assembly agreed with the Director that work carried out by lawyers and other experts on behalf of the IOPC Fund in connection with incidents involving the Fund should be considered as fulfilling the criterion of "important work which is necessary for the exercise of its official activities", and that the Governments of Member States were thus under an obligation, pursuant to Article 34.2 of the

Fund Convention, to take appropriate measures for the remission or refund of the amount of indirect taxes or sales taxes included in the cost of such services. The Director was instructed to inform the Governments of States where the IOPC Fund has encountered problems regarding the application of Article 34.2 of the Fund Convention of the position taken by the Assembly and to request a refund of any amounts paid by the IOPC Fund as indirect taxes or sales taxes for services of this kind (document FUND/A.15/28, paragraphs 23.2 and 23.3).

5 In addition, the Assembly invited the Director to examine the possibility of adopting a resolution clarifying the meaning of the notions of "substantial purchases" and "important work" in Article 34.2 of the Fund Convention and to submit this matter to the Assembly for consideration at its 16th session (document FUND/A.15/28, paragraph 23.4).

Consideration by the Assembly at its 16th Session

6 At its 16th session, the Assembly noted that, as it had instructed, the Director had raised this matter with representatives of the Government of the State in which the IOPC Fund had encountered problems regarding the application of Article 34.2 of the Fund Convention but that, so far, no detailed discussions on the subject had been held between the Government concerned and the IOPC Fund. It was also noted that the Director had not been able to finalise the study of the meaning of the notions of "substantial purchases" and "important work" requested by the Assembly. The Assembly instructed the Director to pursue the questions under consideration and submit a report to the Assembly at its 17th session (document FUND/A.16/32, paragraphs 32.2 and 32.3).

Developments Since the 16th Session of the Assembly

7 The Director has discussed this matter with representatives of the Ministry of Finance of the State in question at a meeting held in January 1994. It was stressed by the Director that all Fund Member States were under treaty obligation either to exempt the IOPC Fund from VAT or to reimburse VAT (Article 34.2 of the Fund Convention) and that this obligation existed independent of the content of domestic law. The Director also reminded the representatives that the Fund Convention formed part of the law of that State.

8 At the meeting, the representatives of the Government of the State in question stated that it should be possible to solve the problem for the future but that it would be very difficult to reimburse amounts already paid. They argued that at least some payments were time-barred under the applicable domestic tax law from being reimbursed. The Director maintained that reimbursement under Article 34.2 of the Fund Convention was totally different from the right of a citizen of a State to the reimbursement of taxes. In addition, he pointed out that the matter had been raised by the IOPC Fund in 1986 and again in 1988 in a registered letter to the relevant Ministry, and that the Director had written to the Ambassador of that State on this issue in 1991.

9 The position of the IOPC Fund was set out in some detail by the Director in a letter addressed to that Ministry in April 1994. A further letter was sent in July 1994. So far, no reply has been received. The Director intends to pursue this issue.

10 It should be noted that the payments of VAT in the State in question total some £315 000.

The Notions of "Substantial Purchases" and "Important Work" in Article 34.2

11 At the 1971 Diplomatic Conference which adopted the Fund Convention no attempt was made to define the concepts of "substantial purchases" and "important work". One delegation stated that

the text of draft Article 34.2 was self-explanatory and that the definition was a detail which could only be settled in the light of the customary practice in the host country (Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971, page 442).

12 The experience of past incidents shows that the main expenses incurred by the IOPC Fund outside the Headquarters State relate to fees of lawyers and other experts such as surveyors, claim handlers and university professors. The IOPC Fund has so far not made any substantial purchases. It should be noted that if the IOPC Fund sets up a local claims office, the Fund may incur considerable expenses in respect of office rental, the purchase of office equipment and salaries paid to local staff. In the Director's view, purchases of this kind should be considered as "substantial purchases" of movable property necessary for the exercise of the IOPC Fund's official activities. Payments of VAT or other indirect taxes made by the IOPC Fund on such purchases should therefore be reimbursed.

13 The Director questions whether it would be meaningful to attempt to make any detailed definition of the concepts in question, since situations may vary from one State to another and from one incident to another.

Action to be Taken by the Assembly

14 The Assembly is invited to:

- (a) take note of the information contained in this document;
 - (b) give the Director such instructions in respect of the question relating to the refund of indirect taxes as it may deem appropriate; and
 - (c) decide whether the Director should pursue the study of the concepts of "substantial purchases" and "important work".
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