



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ASSEMBLY
8th session
Agenda item 7

92FUND/A.8/4/1
29 August 2003
Original: ENGLISH

INTERNATIONAL CONFERENCE ON THE ESTABLISHMENT OF A SUPPLEMENTARY FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE

PREPARATIONS FOR SETTING UP THE SUPPLEMENTARY FUND

Note by the Director

Summary:

The International Conference referred to in document 92FUND/A.8/4 adopted a Resolution on the Establishment of the International Oil Pollution Compensation Supplementary Fund which requests the Assembly to authorise and instruct the Director to carry out certain tasks necessary for the setting up of the Supplementary Fund. This document deals with a number of issues which will have to be considered in this regard, eg location of the Supplementary Fund's Headquarters, Secretariat functions, handling of claims for compensation, levying of contributions and various other financial matters.

Action to be taken:

Give the Director instructions in respect of the preparations for the setting up of the Supplementary Fund.

1 Introduction

The International Conference which adopted the Protocol Establishing the International Oil Pollution Compensation Supplementary Fund 2003 also adopted a Resolution on the Establishment of International Oil Pollution Compensation Supplementary Fund (document 92FUND/A.8/4, Annex III) which requests the Assembly of the 1992 Fund to authorise and instruct the Director, on the basis that all costs and expenses that may be incurred will be reimbursed, with interest in due course, by the Supplementary Fund:

- (a) to perform, in addition to the Director's functions under the 1992 Fund Convention, the administrative tasks necessary for setting up the Supplementary Fund in accordance with the provisions of the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, provided that the interests of Contracting States to the 1992 Fund Convention are not unduly affected;

- (b) to provide all necessary assistance for the setting up of the Supplementary Fund;
- (c) to make the necessary preparations for the first session of the Assembly of the Supplementary Fund, which is to be convened by the Secretary-General of IMO, in accordance with Article 22 of the Protocol;
- (d) to enter into negotiations with IMO with a view to enabling the Supplementary Fund to reach agreements, as soon as possible, regarding appropriate administrative arrangements;
- (e) to enter into negotiations with the Supplementary Fund at the appropriate time with a view to reaching a mutually advantageous arrangement enabling the 1992 Fund and the Supplementary Fund to share a single Secretariat, headed, if appropriate, by the same Director.

2 Conditions for the entry into force of the Supplementary Fund Protocol

- 2.1 The 2003 Supplementary Fund Protocol shall under Article 21 enter into force three months following the date on which the following requirements are fulfilled:
- (i) at least eight States have signed the Protocol without reservation as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General; and
 - (ii) the Secretary-General of IMO has received information from the Director of the 1992 Fund that those persons who would be liable to contribute pursuant to Article 10 have received during the preceding calendar year a total quantity of at least 450 million tons of contributing oil, including the quantities referred to in Article 14, paragraph 1.
- 2.2 The Protocol was opened for signature on 31 July 2003. As at 29 August 2003, no States had signed the Protocol or acceded to it.

3 Questions to be considered by the first Supplementary Fund Assembly

- 3.1 The first Assembly of the Supplementary Fund will have to take decisions on a number of issues, *inter alia*:
- (a) Location of the Supplementary Fund's Headquarters
 - (b) Secretariat of the Supplementary Fund
 - (c) Handling of claims for compensation
 - (d) Contributions
 - (e) Accounts, budget and audit
- 3.2 The Supplementary Fund Assembly will have to adopt several documents setting out the framework for the operation of the Supplementary Fund, for example:
- (a) Headquarters Agreement
 - (b) Agreement with the International Maritime Organization (IMO)
 - (c) Rules of Procedure for the Assembly and subsidiary bodies, if any
 - (d) Internal Regulations and Financial Regulations
 - (e) Guidelines for granting Observer Status to intergovernmental and international non-governmental organisations

4 The Supplementary Fund's Headquarters and its Secretariat

- 4.1 The Assembly of the Supplementary Fund will have to decide, at its first session, where the Supplementary Fund's headquarters should be located. In the above-mentioned Resolution the

International Conference expressed its preference for the 1992 Fund and the Supplementary Fund to share a single Secretariat headed, if appropriate, by the same Director. An arrangement under which the Supplementary Fund and the 1992 Fund share a Secretariat headed by the same Director has, in the Director's view, great practical and financial advantages, as already demonstrated by the 1971 and 1992 Fund joint Secretariat.

- 4.2 For this reason, the Director proposes that the Assembly should instruct him to base his preparatory work on the assumption that the Supplementary Fund will have its Headquarters in London and that the IOPC Funds and the Supplementary Fund will be administered by a joint Secretariat headed by a single Director ^{<1>}.
- 4.3 Article 17.2 of the Protocol provides that if the Secretariat and the Director of the 1992 Fund also perform the function of the Secretariat and Director of the Supplementary Fund, the Supplementary Fund shall be represented, in cases of conflict of interests between the 1992 Fund and the Supplementary Fund, by the Chairman of the Assembly.
- 4.4 Since the 1992 Fund would probably have a wider membership and would be involved in significantly more incidents than the Supplementary Fund, the Director considers that the most practical solution would be for the 1992 Fund Secretariat to administer also the Supplementary Fund.

5 Handling of claims for compensation

- 5.1 The provisions relating to the organisation and administration of the 1992 Fund set out in Articles 17 to 20 and 28 to 33 of the 1992 Fund Convention shall apply to the Assembly, Secretariat and Director of the Supplementary Fund (Article 16.2 of the Supplementary Fund Protocol). Under Article 18.9 of the 1992 Fund Convention, the Assembly may establish temporary or permanent subsidiary bodies. On the basis of that provision, the 1992 Fund Assembly has established an Executive Committee whose main task is to deal with claims for compensation.
- 5.2 The Supplementary Fund will not make its own examination of claims for compensation but pay compensation for 'established claims', ie claims which have been recognised by the 1992 Fund or have been accepted as admissible by decision of a competent court binding on the 1992 Fund (Article 4.4 of the Supplementary Fund Protocol). The Supplementary Fund will make such payments to the extent that the total pollution damage arising from a particular incident exceeds, or there is a risk that it will exceed, the amount of compensation available under the 1992 Fund Convention. For this reason, in the view of the Director, there would be no need for a subsidiary body to deal with claims for compensation.

6 Levy of contributions

- 6.1 The provisions on the levy of contributions are in principle the same in the Supplementary Fund Protocol as in the 1992 Fund Convention. However, the basis of assessment will not be the same for the two Organisations mainly because the Contracting Parties to the two instruments will not be the same. There will therefore be a number of the contributors to the 1992 Fund which will not be contributors to the Supplementary Fund. The Director intends to study whether this difference between the groups of contributors will cause any practical difficulties.

<1> It is possible that the 1971 Fund will have been wound up when the Supplementary Fund Protocol enters into force. In that case the present IOPC Funds' Secretariat would be the Secretariat of the 1992 Fund only. At its 1st session, held in May 2003, the 1992 Fund Administrative Council instructed the Director to continue the preparatory work for the setting up of the Hazardous and Noxious Substances Fund on the assumption that the HNS Fund would have a joint Secretariat with the IOPC Funds and would be based in London (document 92FUND/AC.1/A.ES.7/7, paragraph 6.8). If the HNS Fund has been set up by this time, the present Secretariat may therefore also be administering that Fund.

- 6.2 In addition, the Supplementary Fund Protocol contains in Article 14 provisions which do not exist in the 1992 Fund Convention. Under that Article there shall be deemed to be a minimum receipt of 1 million tonnes of contributing oil in each Contracting State. When the aggregate quantity of contributing oil received in a Contracting State is less than 1 million tonnes, the Contracting State shall assume the obligations that would be incumbent under this Protocol on any person who would be liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State in so far as no liable person exists for the aggregated quantity of oil received. The implementation of these provisions will have to be considered.

7 Accounts, Budget and Audit

- 7.1 Since the 1992 Fund and the Supplementary Fund will be separate legal entities, each of the Organisations will have its own accounts and its own budget. In view of the close link that will exist between the Organisations, co-ordination of the respective accounts and budgets would however in the Director's view be essential.
- 7.2 If, as proposed above, the Organisations were to have a joint Secretariat, agreement would need to be reached between the Organisations on a formula for sharing the costs of running the Secretariat. In the Director's view it is important to find a simple formula for this purpose. The arrangement used for sharing of such costs between the 1992 Fund and 1971 Fund on a percentage basis or a management fee may be considered in this context. It would also be necessary to make provisions for the sharing of the costs incurred in the handling of incidents, eg fees of lawyers, surveyors and other experts. The Director intends to study these issues further.
- 7.3 The Director takes the view that the IOPC Funds and the Supplementary Fund should, if possible, have the same External Auditor.
- 7.4 The 1992 Fund has an Audit Body and an Investment Advisory Body. In the Director's view, the same arrangements should be made in respect of the Supplementary Fund.

8 Headquarters Agreement

The relationship between the Host State and the 1992 Fund is governed by a Headquarters Agreement concluded in 1996 between the United Kingdom Government and the 1992 Fund. This Agreement, which sets out the privileges and immunities of the 1992 Fund, of delegates to Fund meetings and of staff members, is based on the Headquarters Agreement applicable to the 1971 Fund concluded in 1979 which was to some extent based on the Headquarters Agreement between the United Kingdom Government and IMO as worded at that time. Subject to any instructions which the Assembly may give him, the Director intends to enter into consultations with the United Kingdom Government on these issues. It would also be appropriate to consider with the Government of the United Kingdom whether the 1992 Fund Headquarters Agreement should be revised in the light of developments.

9 Agreement with IMO

- 9.1 Under the Resolution on the Establishment of the Supplementary Fund adopted by the Conference the Director should enter into negotiations with IMO to enable the Supplementary Fund to reach agreements regarding appropriate administrative arrangements.
- 9.2 The IOPC Funds have agreements with IMO in respect of the meetings and offices of the IOPC Funds in the IMO Headquarters. On the assumption that the 1992 Fund and the Supplementary Fund would be administered by the 1992 Fund Secretariat, the Agreements would have to be amended in order to cover also the activities of the Supplementary Fund.

10 Sessions of the Supplementary Fund Assembly and Rules of Procedure

- 10.1 In view of the very close links that will exist between the 1992 Fund and the Supplementary Fund, it is important that close coordination is ensured between the decisions of the governing bodies of the 1992 Fund and those of the Assembly of the Supplementary Fund. This would be facilitated if the sessions of the 1992 Fund bodies and the Supplementary Fund Assembly were to be held, as far as is practicable, during the same period and at the same place.
- 10.2 The Director believes that the 1992 Fund Assembly and the Supplementary Fund Assembly should apply the same Rules of Procedures. The Director intends to make a thorough examination of the present Rules of Procedure of the 1992 Fund Assembly in order to establish whether any amendments would be necessary as regards the Supplementary Fund, in the light of experience or in view of the specific character of the Supplementary Fund.

11 Internal Regulations and Financial Regulations

- 11.1 The 1992 Fund Assembly adopted, at its first session, Internal Regulations governing a number of aspects of the administration of the 1992 Fund. They deal, in particular, with reporting of contributing oil, payment of contributions, filing of claims, settlement of claims, intervention in legal proceedings, assistance to states in emergency situations and the extension of credit facilities in respect of preventive measures. These Regulations have also been amended from time to time.
- 11.2 The Financial Regulations were also adopted by the 1992 Fund Assembly at its first session. They deal with various aspects of the 1992 Fund's finances, in particular in respect of accounts and investments. These regulations also have been amended from time to time.
- 11.3 In the view of the Director, it would be an advantage if, to the extent possible, the same Internal Regulations and Financial Regulations were to apply in respect of the 1992 Fund and the Supplementary Fund. The Director intends to examine the two sets of Regulations in order to establish the modifications that would be necessary in their application to the Supplementary Fund. He will also take the opportunity to suggest such amendments to these Regulations as may be appropriate in the light of experience. The examination of the Financial Regulations will be carried out in consultation with the External Auditor.

12 Observer status of Intergovernmental and International Non-Governmental Organisations

- 12.1 Under the 1992 Fund Convention and the Supplementary Fund Protocol, the respective Assembly determines which non-contracting States and which intergovernmental and international non-governmental organisations should be admitted to take part, without voting rights, in meetings of the Assembly and subsidiary bodies. (Article 18.10 of the 1992 Fund Convention which is also applicable to the Supplementary Fund pursuant to Article 16.2 of the Protocol.)
- 12.2 The Rules of Procedure of the 1992 Fund contain provisions governing the admission of intergovernmental and international non-governmental organisations as observers. At its first session, the Assembly adopted criteria for granting observer status (documents 92FUND/A.1/34, paragraph 4 and 92FUND/A.1/34/1). The Director intends to examine these criteria in order to establish whether they would be appropriate in respect of the Supplementary Fund.
- 12.3 It appears that the 1992 Fund and the Supplementary Fund should be invited as observers at each other's meetings. On the other hand, the Director does not consider it necessary to make the same arrangements as regards the 1971 Fund.

13 Future preparatory work

- 13.1 Under Article 22 of the Supplementary Fund Protocol, the Secretary-General of IMO shall convene the first session of the Assembly. This session shall take place as soon as possible after the entry into force of the Protocol and, in any case, not more than 30 days after such entry into

force. It is possible that the Protocol will enter into force during 2004, and if this were to be correct, the first session of the Supplementary Fund Assembly would have to be held during that year.

- 13.2 It is important that sufficient documentation is submitted to the first session of the Supplementary Fund Assembly to enable it to take decisions on the issues dealt with above so as to ensure that the Supplementary Fund will be operative at an early stage. It is suggested therefore that the Director be instructed to study these issues further and submit draft texts for preliminary examination by the 1992 Fund Assembly at a future session. These texts would be revised in the light of the 1992 Fund Assembly's observations and instructions. The documents would then be submitted to the first session of the Supplementary Fund Assembly which would take the final decisions.
- 13.3 Dependent on the progress made by States towards ratification of the Supplementary Fund Protocol, the 1992 Fund Assembly could be convened to consider these issues during one of the meeting weeks scheduled for the first half of 2004, ie the weeks of 23 February or 24 May.
- 13.4 The Director considers it necessary that the 1992 Fund Assembly holds an extraordinary session during the same period as the first session of the Supplementary Fund Assembly. In this way, it would be possible to coordinate the various decisions that have to be taken and get endorsement of the agreements required between the two Organisations.
- 13.5 The Resolution adopted by the Conference states that the costs incurred by the 1992 Fund in connection with the preparations for the entry into force of the Supplementary Fund Protocol should be reimbursed with interest to the 1992 Fund by the Supplementary Fund when the latter has been set up.

14 Action to be taken by the Assembly

The Assembly is invited to:

- (a) take note of the information contained in this document; and
 - (b) give the Director such instructions in respect of the preparations for the entry into force of the Supplementary Fund Protocol as it may deem appropriate, in particular as regards:
 - (i) location of the Supplementary Fund's Headquarters (paragraph 4);
 - (ii) Secretariat of the Supplementary Fund (paragraph 4);
 - (iii) handling of claims for compensation (paragraph 5);
 - (iv) levy of contributions (paragraph 6);
 - (v) accounts, budget and audit (paragraph 7);
 - (vi) Headquarters Agreement (paragraph 8);
 - (vii) Agreement with IMO (paragraph 9);
 - (viii) Rules of Procedure for the Assembly (paragraph 10);
 - (ix) Internal Regulations and Financial Regulations (paragraph 11);
 - (x) observer status of intergovernmental and international non-governmental organisations (paragraph 12).
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