



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

ASSEMBLY
16th session
Agenda item 27

FUND/A.16/24
26 July 1993

Original: ENGLISH

APPLICATION OF THE CONTRIBUTION SYSTEM LAID DOWN IN THE FUND CONVENTION TO OIL PASSING THROUGH THE SUMED PIPELINE

Note by the Director

1 Introduction

1.1 At the 15th session of the IOPC Fund Assembly in October 1992, the Arab Republic of Egypt was granted observer status with the IOPC Fund. In its request for observer status, the Government of Egypt mentioned that it was considering accession to the Fund Convention but that it had some concerns regarding the application of the contribution system laid down in the Fund Convention to the activities of the Arab Petroleum Pipelines Co (SUMED). The Assembly decided to invite the Director to examine this problem and to submit the matter for consideration at its 16th session, to be held in October 1993 (document FUND/A.15/28, paragraph 29.1).

1.2 As requested by the Assembly, the Director has made a study of this issue, the result of which is set out below. The study has been carried out in consultation with the Government of Egypt.

2 SUMED Pipeline

2.1 The SUMED pipeline, which started its operations in 1977, runs from the Ain Suhna terminal on the Gulf of Suez to Sidi Kerir close to Alexandria on the Mediterranean, a distance of 320 kilometres. The pipeline has at present a capacity of transferring 80 million tonnes of crude oil per year. During 1994 the capacity will be increased to 117 million tonnes.

2.2 Oil is discharged via storage tanks at the Ain Suhna terminal from tankers coming from the Gulf area which are too big to pass through the Suez Canal. After discharge, it takes about 50 hours for the oil to pass through the pipeline to the Sidi Kerir terminal on the Mediterranean. The time for transfer will be reduced to approximately 35 hours by the end of 1994. The oil is then

loaded at Sidi Kerir via storage tanks into tankers owned or chartered by the same company that discharged the oil into the pipeline.

2.3 Most of the crude oil passing through the SUMED pipeline in recent years has been bound for ports on the Mediterranean (75%) and in north west Europe, mainly Rotterdam (20%). About 5% of the oil has been shipped to ports on the east coast of the United States.

2.4 The offshore facilities at Ain Sukhna on the Gulf of Suez can receive vessels up to 500 000 dwt with a maximum length of 1 345 feet and a maximum draft of 100 feet. The terminal can receive, simultaneously and with complete segregation, three broad grades of crude oil. Some 400 tankers discharge oil at this terminal every year.

2.5 The Sidi Kerir terminal, located offshore, is capable of accommodating fully laden vessels up to 325 000 dwt with a maximum length of 1 150 feet and maximum draft of 75 feet. Annually approximately 700 tankers load crude oil at this terminal.

2.6 The SUMED pipeline has been described by SUMED as a sea-to-sea closed pipeline system for transit of oil from tankers at the Ain Sukhna terminal on the Gulf of Suez for redelivery to tankers at the Sidi Kerir terminal on the Mediterranean. SUMED has emphasised that the storage tanks at the two terminals are designed as an integral part of the system; the oil passes through the storage tanks as stages in the transportation process. At Ain Sukhna it is necessary, according to SUMED, to have the oil pass through a storage tank in order to obtain an accurate measurement of the quantity received from each ship and to make it possible to segregate different kinds of crude oil which may be carried or discharged from the same tanker. SUMED has also stated that it is necessary to use storage tanks at the Sidi Kerir terminal in order to facilitate the loading of oil on various tankers.

3 Contribution System under the 1971 Fund Convention

3.1 Under Article 10.1 of the Fund Convention, contributions to the IOPC Fund shall be made in respect of each Member State by any person who, in the relevant calendar year, has received in the ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations. Each Member State shall communicate to the Director the name and address of any person who in respect of that State is liable to pay contributions, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year.

3.2 Article 10.1 reads as follows:

"1 Contributions to the Fund shall be made in respect of each Contracting State by any person who, in the calendar year referred to in Article 11, paragraph 1, as regards initial contributions and in Article 12, paragraphs 2 (a) or (b), as regards annual contributions, has received in total quantities exceeding 150 000 tons:

- (a) in the ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations; and
- (b) in any installations situated in the territory of that Contracting State contributing oil which has been carried by sea and discharged in a port or terminal installation of a non-Contracting State, provided that contributing oil shall only be taken into account by virtue of this sub-paragraph on first receipt in a Contracting State after its discharge in that non-Contracting State."

4 Discussions at the 1971 Diplomatic Conference

4.1 The issue of whether oil transported through the projected SUMED pipeline should be taken into account for the purposes of contributions was discussed at the 1971 Diplomatic Conference

which adopted the 1971 Fund Convention. As mentioned above, the SUMED pipeline was only put into operation in 1977, ie several years after the Conference. At the Conference, the delegations of Egypt, Iraq, Libya and Syria submitted a document containing the following proposal to amend Article 10 of the draft Convention (document LEG/CONF.2/WP.2):

"Insert the word 'ultimate' between the word 'or' and the word 'terminal' in sub-paragraph (a) of paragraph 1 of Article 10 in the first and last line of that sub-paragraph.

Sub-paragraph (a) of paragraph 1 of Article 10 will then read as follows:

'(a) in the ports or ultimate terminal installations in the territory of that State contributing oil carried by sea to such ports or ultimate terminal installations'.

Comments:

In some cases, the maritime carriage of oil is interrupted due to technical reasons. Some of these technical reasons such as the oil being in transit or if a tanker carrying oil is in distress, or if the oil is discharged in some installations with a view to re-load it again to the final port or ultimate terminal installation.

It is a widely accepted principle in the concept of accounting and taxation that the same taxes would not be levied twice on the same item of goods.

Accordingly the same oil should not be subject to contribution to the Compensation Fund for more than one time.

If we try to apply any contrary conception there will be a great distortion in the relationship between the level of contribution and the national consumption of the oil in many Contracting States.

We ought to take in consideration many important, urgent and vital factors in this connection:

One of these factors is that unacceptable differences in competition of the transportation of oil would be created, and insurmountable difficulties will encounter the transportation of oil by speedy or more technically advanced means.

The second factor which we ought to take into consideration also is that despite being apparently unfair and irrational to urge the oil in transit to contribute to the Fund, this will create an awkward situation which is likely to entail unforeseen complications.

In conclusion, it may be argued that the percentage of contribution of the oil to the Fund would be rather low. This argument may be viable now but it may prove invalid with constantly increasing amounts of oil being transported by sea and subsequently the ever-growing dangers of oil pollution."

4.2 The proposal was discussed in the plenary of the Conference, and the discussion is reflected in the Official Summary Records, published by IMO, as follows (pages 679-680):

"Mr Issa (Egypt), introducing the amendments contained in document LEG/CONF.2/WP.2 on behalf of the sponsors, said that the supporting arguments set out in the paper were clear and valid. In some cases, the maritime carriage of oil had to be interrupted due to technical reasons. A case in point that was of importance in so far as his own country was concerned was that where oil

transported from the Persian Gulf by supertankers had to be discharged at an Egyptian Gulf port for trans-shipment by pipeline to Alexandria and subsequent reloading in tankers there. The present wording of Article 10 was somewhat vague and ambiguous in that no clear statement was made whether a contribution should be levied only once in respect to such oil or twice. In other words, in the case he had cited, would Egypt be liable to contribute or would the liability lie with the country of final destination only?

If the first interpretation was correct, the situation would be illogical and irrational and indeed the provision would be in flagrant contradiction with the principles of equity and equality. It might be argued that the double carriage by sea presented two separate risks of pollution. On the other hand, a double contribution would be discriminatory as compared with requirements respecting supertankers travelling by the Cape route.

Apart from the basic purposes of providing for compensation to innocent victims and relief of the burden imposed on the shipowner by the 1969 Liability Convention, the draft convention should also take into consideration the interest of the oil consumer. Indeed, adoption of the double contribution system would be tantamount to subsidizing the shipowner at the expense of the oil industry and oil consumers. And the end result would be to hamper world progress and discourage adhesion to the convention. It was to be hoped therefore that a constructive approach would be adopted, either exonerating oil in transit completely or assessing the contribution in its respect at a very low rate.

Lastly, the amendments proposed were of a purely drafting nature and hence would not require a qualified vote for their adoption.

Mr Aljaibaji (Iraq) and Mr Loutfi (Syrian Arab Republic) endorsed the statement just made. In the case cited the transport constituted a single journey and under international transport rules such successive carriage was treated as a single journey.

Mr Massey (USA) said that the problem raised by Egypt had been discussed thoroughly in the IMCO Legal Committee but, since it was recognized that the risks of pollution damage were more directly related to entry and exit from harbour areas and that it was not always easy to ascertain the exact terminal destination of the oil with consequent accounting difficulties, the Committee had come to the conclusion that there was merit in requiring a double contribution in the case of a single journey involving double port entry and exit.

As to the financial burden involved, contributions to be levied on oil movements for purposes of the Fund were going to be at an absolutely minimal rate, at most one-tenth of a cent per ton. The total cost of one ton of oil delivered in the United States was about \$22. The additional burden represented by one-tenth of a cent was not big enough to warrant the proposed change. His delegation would therefore prefer that the present text be maintained.

Mr Jeannel (France) said that France had some common interest with Egypt in the matter since a project for transporting oil by rail was now under way in his country. He therefore fully sympathized with the concern expressed. On the other hand, the draft convention, linked as it was to the 1969 Convention on Liability, related to shipping and only indirectly to transport matters. The whole system in fact was based on shipping and it would therefore be most difficult to change the concept at that stage. He would therefore suggest as a possible way out that the Conference adopt a resolution requesting IMCO to study the matter further with a view to finding an equitable solution to the problem.

The Acting President called for a vote on the proposal submitted by the delegations of Egypt, Iraq, the Libyan Arab Republic and the Syrian Arab Republic (LEG/CONF.2/WP.2)

That proposal was rejected by 15 votes to 15, with 14 abstentions."

5 Considerations Within the IOPC Fund of Related Issues

5.1 The question of in what circumstances contributing oil has to be considered as "received" was examined by the IOPC Fund Assembly at its first extraordinary session held in 1980. The Assembly approved the following interpretation of Article 10.1 of the Fund Convention in this regard (document FUND/A/ES.1/13, paragraph 10):

- (a) Discharge of oil into a floating tank within the territorial waters of a Contracting State (including its ports) constitutes a receipt of oil irrespective of whether the tank is connected with on-shore installations via pipeline or not. Ships are considered to be floating tanks in this connection only if they are "dead" ships, ie if they are not ready to sail.
- (b) Traffic within a port area shall not be considered as carriage by sea.
- (c) Ship-to-ship transfer shall not be considered as receipt, irrespective of where this transfer takes place (ie within a port area or outside the port but within territorial waters) and whether it is done solely by using the ships' equipment or by means of a pipeline passing over land. This applies for a transfer between two sea-going vessels as well as for a transfer between a sea-going vessel and an internal waterway vessel and irrespective of whether the transfer takes place within or outside a port area. When the oil, after having been transferred in this way from a sea-going vessel to another vessel has been carried by the latter to an on-shore installation situated in the same Contracting State or in another Contracting State, the receipt in that installation shall be considered as a receipt of oil carried by sea. However, if the case where the oil passes through a storage tank before being loaded to the other ship it has to be reported as oil received at that tank in that Contracting State.

5.2 The Assembly also considered, at its 1st extraordinary session, the question of which person had to be included in the oil reports as the "receiver" of oil. The Assembly agreed that, within the scope of Article 10 of the Fund Convention, Contracting States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and the local circumstances of a particular country. The Assembly emphasised that, failing payment by persons reported other than the physical receivers, the physical receivers should ultimately be liable for contributions irrespective of whether the persons reported had their place of business or residence in a Member State or not (document FUND/A/ES.1/13, paragraph 10, pages 7-8). This position was confirmed by the Assembly at its 15th session (document FUND/A.15/28, paragraph 21).

6 Contributions to CRISTAL

6.1 The voluntary industry scheme, CRISTAL, operates a contribution system very similar to that set up under the Fund Convention. Contributions are thus calculated on the basis of quantities of crude oil and heavy fuel oil received after sea transport by oil companies parties to the CRISTAL agreement.

6.2 Under Clause VII(A)(2)(i) of the Cristal Agreement, any crude oil which is received solely for transhipment for onward transportation by tanker to an installation or terminal for receipt by an oil company party to the Agreement is excluded from the contributions to the Cristal Fund. It appears that this provision would not require oil discharged at the Ain Sukhna terminal for transport through the SUMED pipeline to be reported by CRISTAL members for contribution purposes, and these

quantities would therefore not affect the payments of contributions to CRISTAL. The quantities transported through the pipeline would, however, be reported to CRISTAL if received after transport from the Sidi Kerir terminal to an installation owned or operated by a CRISTAL member.

7 The Position of the Government of Egypt

7.1 The Government of Egypt has stated that, in its view, the oil received at the Ain Sukhna terminal on the Gulf of Suez for transport through the SUMED pipeline should not be subject to payment of contributions by the Arab Petroleum Pipeline Co. The reasons for the position taken by the Government are set out in document FUND/A.16/24/1.

7.2 The arguments put forward by the Government can be summarised as follows:

The situation of the SUMED pipeline is unique because it is used for transferring oil from one ship to another, due to the fact that the Suez Canal is not capable of allowing large tankers to pass. The storage tanks at both ends of the pipeline are an integral part of a closed transit pipeline system. The oil transported through the pipeline is not owned by the company operating the pipeline but by the users. This oil cannot be considered as received in Egypt since it is only in transit and not actually delivered to Egyptian cargo interests. SUMED acts only as a common carrier of the oil against payment of a fee. Transport through the SUMED pipeline should be considered as ship-to-ship transfer and the quantities received for such transport should therefore not be taken into account for the purpose of levying contributions to the IOPC Fund. The transport of oil through the SUMED pipeline is much safer from an environmental point of view than alternative transport routes.

8 Director's Analysis of the Problem

8.1 The notion of "received" is a basic concept in the contribution system under the Fund Convention, and the Assembly has taken a position as to the interpretation of this concept. The position of the Assembly, as well as the text of the Convention itself, are based on the idea that contributions are paid by the actual (physical) receiver of the oil after sea transport. It also takes as a point of departure that oil is to be taken into account for the purpose of levying contributions each time that the oil is physically received after sea transport in a port or terminal installation located in a State Party to the Fund Convention.

8.2 In view of the position thus taken by the Assembly and the discussions held at the 1971 Diplomatic Conference referred to in paragraph 4 above, it appears that the quantities of oil received at the Ain Sukhna terminal for transport through the SUMED pipeline should be considered as being physically received at that terminal after sea transport. These quantities should therefore be considered as received for the purpose of levying contributions, unless the Assembly were to interpret Article 10.1 of the Fund Convention in such a way that it does not cover oil received in circumstances such as those at the Ain Sukhna terminal.

8.3 The Assembly has decided that ship-to-ship transfer should not be considered as receipt for the purpose of levying contributions, and this is irrespective of whether or not the transfer is effected by means of a pipeline passing over land. The Government of Egypt has maintained that the transfer through the SUMED pipeline should be considered as ship-to-ship transfer. In its interpretive statement referred to in paragraph 5.1 above, however, the Assembly added a qualification in respect of the exception for ship-to-ship transfers. In the case where the oil passes through a storage tank before being loaded to the other ship, the oil has, according to the Assembly, to be reported as received at that tank. The Government of Egypt has in this regard emphasised that the terminal at Ain Sukhna is an integral part of the transportation system and that the oil passes through this storage tank as a stage in the transportation process; the oil has to pass through a storage tank at this terminal in order to obtain an accurate measurement of the quantity received from each ship and

to make it possible to segregate different kinds of crude oil which may be discharged from the same tanker. If this interpretation were to be accepted by the Assembly, the quantities of oil received at the Ain Sukhna terminal should not be taken into account for the purpose of levying contributions to the IOPC Fund. The Assembly may wish to note the emphasis which the Government of Egypt puts on the advantages from an environmental point of view of transporting oil through the SUMED pipeline.

9 Action to be Taken by the Assembly

The Assembly is invited to:

- (a) take note of the information contained in this document; and
 - (b) take a decision on the interpretation of the notion of "received" in Article 10.1 of the Fund Convention in respect of the issue raised by the Government of Egypt.
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