



INCIDENTS INVOLVING THE 1992 FUND

SLOPS

Note by the Director

Objective of document:	To inform the Executive Committee of the latest developments regarding this incident and to decide whether to bring a recourse action against the Greek State.
Summary of the incident so far:	<p>The <i>Slops</i> suffered a fire and explosion whilst at anchor in the port of Piraeus (Greece). At its July 2000 session the Executive Committee decided that the <i>Slops</i> should not be considered a 'ship' for the purpose of the 1992 Civil Liability and Fund Conventions and that these Conventions did not apply to this incident.</p> <p>Two companies submitted claims for costs of clean-up operations and preventive measures totalling € 323 360 (£1.8 million)^{<1>} and took legal action against the Fund. Another claim for a sum of US\$985 000 (£784 000), submitted in August 2007 by a third company, is time-barred.</p> <p>After lengthy court proceedings, the Greek Supreme Court ultimately held that the <i>Slops</i> should be regarded a 'ship' as defined in the 1992 Conventions and referred the case back to the Court of Appeal to examine the merits of the claims.</p> <p>In February 2008 the Court of Appeal rendered its judgement confirming the judgement of the Court of first instance, which awarded the claimants the claimed amount, ie € 323 360 (£1.8 million) plus legal interests and costs.</p>
Recent developments:	<p>In July 2008 the 1992 Fund paid €4 022 099 (£3.2 million) to the claimants as principal, legal interests and costs in accordance with the judgement by the Court of Appeal.</p> <p>Following the instruction by the Executive Committee in June 2008 to the Director to further examine a possible recourse action by the 1992 Fund against the Greek State, taking into account all the policy implications, in particular the earlier decisions by the 1992 Fund governing bodies regarding the definition of 'ship', the Director has obtained a further legal opinion from</p>

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In this document conversion of currencies has been made on the basis of the exchange rate as at 16 September 2008 (€1 = £0.7959, US\$1 = £0.5636 and 1 SDR= £0.8717) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

the 1992 Fund's Greek lawyer. In his legal opinion, attached in the Annex, the Fund's Greek lawyer concludes that, in accordance with Greek law, the 1992 Fund would be entitled to bring a recourse action against the Greek State for the amounts paid to claimants.

The Director has also analysed the issue of a possible recourse action against the Greek State, taking into account the further legal advice obtained from the 1992 Fund's Greek lawyer, the IOPC Fund's policy in respect of recourse actions and the IOPC Fund's policy in respect of the definition of 'ship'. In this document he proposes a solution which aims at respecting both policies.

In view of the wider policy implications of this case, the Director also suggests that the governing bodies consider whether it would be advisable to revise the IOPC Fund's policy on the definition of 'ship'.

Action to be taken:

- (a) to decide whether to adopt the interpretation of the Fund's policy regarding the taking of recourse action as proposed by the Director (paragraph 8.12);
- (b) to decide whether to instruct the Director to bring a recourse action against the Greek State (paragraphs 8.8, 8.11 and 8.13); and
- (c) to decide whether to consider revising the 1992 Fund's policy on the definition of 'ship' (paragraph 8.18).

1 Summary of incident

Ship (see notes)	<i>Slops</i>
Date of incident	15.06.00
Place of incident	Piraeus, Greece
Cause of incident	Fire and explosion
Quantity of oil spilled	Approximately 5 000 tonnes of oily water
Area affected	Piraeus, Greece
Flag State of ship	Greece
Gross tonnage (GT)	10 815 GT
P&I insurer	None
CLC Limit	8.2 million SDR (£6.8 million) (estimated)
Compensation	Two claims paid totalling €4 022 099 (£3.2 million). One claim for US\$985 000 (£784 000) submitted in August 2007 (time-barred). There are no other claims arising from this incident.
Notes:	The Executive Committee decided in 2000 that the <i>Slops</i> should not be considered a 'ship' for the purpose of the 1992 Conventions and that therefore these Conventions did not apply to this incident. However, the Greek Supreme Court ultimately decided that the <i>Slops</i> was a 'ship' as defined in the 1992 Conventions.

2 The incident

- 2.1 On 15 June 2000, the Greek-registered waste oil reception facility *Slops* (10 815 GT), laden with some 5 000m³ of oily water, of which 1 000 – 2 500m³ was believed to be oil, suffered an explosion and caught fire at an anchorage in the port of Piraeus (Greece). An unknown but substantial quantity of oil was spilled from the *Slops*, some of which burned in the ensuing fire.
- 2.2 The *Slops* had no liability insurance in accordance with Article VII.1 of the 1992 Civil Liability Convention (1992 CLC).
- 2.3 Port berths, dry docks and repair yards to the north of the anchorage were impacted before the oil moved southwards out of the port area and stranded on a number of islands. A local contractor carried out clean-up operations at sea and on shore.

3 Applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention

- 3.1 The *Slops*, which was registered with the Piraeus Ships Registry in 1994, was originally designed and constructed for the carriage of oil in bulk as cargo. In 1995 it underwent a major conversion in the course of which its propeller was removed and its engine was deactivated and officially sealed. It was indicated that the purpose of the sealing of the engine and the removal of the propeller was to convert the status of the craft from a ship to a floating oily waste receiving and processing facility. Since its conversion, the *Slops* appeared to have remained permanently at anchor at the location where the incident took place and had been used exclusively as a waste oil storage and processing unit. It was understood that the oil residues recovered from the processed *Slops* were sold as low-grade fuel oil.
- 3.2 In July 2000 the Executive Committee decided that the *Slops* should not be considered a 'ship' for the purpose of the 1992 CLC and 1992 Fund Convention and that therefore these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

4 Claims for compensation

- 4.1 In October 2000 two Greek companies submitted claims for costs of clean-up operations and preventive measures for €1 536 528 (£1.2 million) and €786 832 (£626 000) plus interest, respectively. The companies stated that they had requested the owner of the *Slops* to pay the above-mentioned costs but that he had failed to do so.
- 4.2 In August 2007, the Fund received a letter from a third Greek company requesting compensation for a sum of US\$985 000 (£784 000) in respect of preventive measures carried out in response to the incident. Since the incident had occurred in 2000, ie more than six years since the date of the incident and the claimant had not commenced legal action against the 1992 Fund during that time to prevent his right to compensation becoming time-barred (Article 6 of the 1992 Fund Convention), it was communicated to him that his claim was time-barred.

5 Legal actions

5.1 Legal proceedings against the owner of the *Slops*

- 5.1.1 In September 2001 the two companies referred to in paragraph 4.1 took legal action against the registered owner of the *Slops* in the Court of first instance in Piraeus. The companies alleged that they had been instructed by the owner of the *Slops* to carry out clean-up operations and to take preventive measures in response to the oil spill. The companies stated that they had requested the owner of the *Slops* to pay the above-mentioned costs but that he had failed to do so.
- 5.1.2 A hearing took place in October 2002. The owner of the *Slops* did not appear at the court hearing and the Court rendered judgement by default against him on 13 December 2002 for the amounts claimed plus interest.
- 5.1.3 The owner of the *Slops* appealed against the judgement alleging that the assessment of the claims was arbitrary, unilateral and unfair. However, he withdrew his appeal in October 2007.

5.2 Legal proceedings against the 1992 Fund

- 5.2.1 In February 2002 the two companies took a separate legal action against the 1992 Fund in the same Court as above. The companies stated that the registered owner had no assets apart from the *Slops*, which had been destroyed by fire and did not even have scrap value. They argued that they had taken all reasonable measures against the owner of the *Slops*, namely legal action against the owner, investigation into the owner's financial situation, requesting the court to arrest the assets belonging to the owner, and that the owner should be declared bankrupt. They maintained that, since the owner was manifestly incapable of satisfying their claims, they were entitled to compensation from the 1992 Fund.
- 5.2.2 The 1992 Fund pleaded in its defence that the *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability and Fund Conventions.
- 5.2.3 This action was dealt with by the Court at the same hearing of October 2002 (cf paragraph 5.1.2), as above. The Court also rendered its judgement on 13 December 2002.

Judgement by the Court of first instance in Piraeus

- 5.2.4 In its judgement, the First Instance Court in Piraeus held that the *Slops* fell within the definition of 'ship' laid down in the 1992 CLC and the 1992 Fund Convention. The Court considered that the owner of the *Slops* did not have any assets and that, in view of the financial incapacity of the owner of the *Slops*, the claimants were entitled to claim from the 1992 Fund. The Court ordered the 1992 Fund to pay the companies €1 536 528 (£1.2 million) and €786 832 (£626 000) respectively, ie the amounts claimed, plus legal interest from the date of service of the writ (12 February 2002) to the date of payment, and costs of €93 000 (£74 000). The Fund appealed against this decision to the Court of Appeal.

Judgement by the Court of Appeal in Piraeus

- 5.2.5 The Court of Appeal rendered its judgement in February 2004. The Court held that the *Slops* did not meet the criteria required by the 1992 CLC and the 1992 Fund Convention and rejected the claims. The Court interpreted the word 'ship' as defined in Article I.1 of the 1992 CLC as a seaborne unit which carries oil from place A to place B. The claimants appealed against this decision to the Greek Supreme Court.

Judgement by the Supreme Court

- 5.2.6 The Supreme Court issued its judgement in June 2006. The majority of the judges held that the Court of Appeal had contravened the substantive law provisions of the 1992 Conventions pertaining to the definition of 'ship'. Consequently, the majority held that at the time of the incident, the *Slops* should be regarded as a 'ship' as defined in the 1992 Conventions as it had the character of a seaborne craft which, following its modification into a floating storage unit (FSU), stored oil products in bulk and, furthermore, it had the ability to move by being towed with a consequent pollution risk without it being necessary for an incident to take place during the carriage of the oil in bulk (cf document 92FUND/EXC.38/6, paragraph 2.6).
- 5.2.7 The Supreme Court, having decided that the 1992 Conventions were applicable to the incident, held that the Court of Appeal's judgement should be set aside and the case be referred back to that Court to examine the merits of the case, ie the quantum of the claim etc, taking into account the decision of the Supreme Court.

Judgement by the Court of Appeal on the merits of the claims

- 5.2.8 In February 2008 the Court of Appeal rendered its judgement confirming the judgement of the Court of first instance which awarded the claimants the claimed amount, ie € 323 360 (£1.8 million) plus legal interest from the date of service of the writ (12 February 2002) to the date of payment and costs of €93 000 (£74 000).
- 5.2.9 The judgement by the Court of Appeal was final (ie is a final decision as meant in Article 8 of the 1992 Fund Convention) and therefore it was enforceable against the 1992 Fund.
- 5.2.10 In July 2008 the 1992 Fund paid €4 022 099 (£3.2 million) to the two companies as principal, legal interests and costs.

6 Considerations of the Executive Committee at its June 2008 session

- 6.1 In June 2008 the Executive Committee considered whether the 1992 Fund should take recourse action against the Greek State to recover the amounts the Fund would have to pay in execution of the judgement as a result of this incident.
- 6.2 The Committee noted that the *Slops* was registered in Greece, a Contracting State to the 1992 Conventions. It was also noted that the *Slops* was laden with some 5 000m³ of oily water, of which 1 000-2 500m³ was believed to be oil and that, therefore, according to the highest estimation, the *Slops* was, at the time of the incident, carrying more than 2 000 tonnes of oil. It was noted that in any event, although Article VII.1 required that the ship be insured at any time when it was actually carrying more than 2 000 tonnes of oil in bulk as cargo, the capacity of the ship should also be taken into account, since in practice a ship would be insured to cover its capacity to carry rather than to cover what it was actually carrying at any given moment. It was noted that since the *Slops*, with 10 815 GT, was capable of carrying up to some 5 800 tonnes of oil as cargo, the fact that at least half the contents were reportedly water would not necessarily have a bearing on the obligation to carry insurance and that it could therefore be argued that the *Slops* should have carried insurance for oil pollution liability in accordance with the 1992 CLC.
- 6.3 It was also noted that the Director had considered that it followed from Article VII of the 1992 CLC, as interpreted by the Greek Supreme Court, that the Greek authorities should have ensured that the *Slops* carried insurance as required under that Convention but that the Greek authorities had

permitted the *Slops* to trade without a certificate of insurance in contravention of Article VII.10. It was further noted that, for that reason, the Director was of the opinion that the Greek State was in breach of its obligations under the 1992 CLC.

- 6.4 It was noted that the total amount claimed as a result of this incident, ie € 323 360 (£1.8 million) and US\$985 000 (£784 000), was well below the estimated limit of the *Slops* under Article V of the 1992 CLC, ie some 8.2 million SDR (£7.1 million). It was also noted, however, that it appeared that the owner was financially incapable of meeting his obligations and that, as a result, the 1992 Fund would have to pay compensation which would have otherwise been covered by the *Slops'* insurer and would therefore suffer a loss.
- 6.5 It was noted that in view of the above, the Director recommended that the Executive Committee instruct him to examine further the possibility of bringing a recourse action against the Greek State to recover the sums that the 1992 Fund would have to pay in compensation as a result of this incident and to take all necessary steps to protect the interests of the Fund in the meantime.
- 6.6 The Greek delegation recalled that at the Executive Committee session in October 2007, it had stated that at the time of the *Slops* incident in 2000 there was no requirement under Greek law for FSUs to have compulsory insurance. That delegation added, however, that under Greek legislation which entered into force in 2001, any coastal oil tanker which was actually carrying less than 2 000 tonnes of persistent oil as cargo, as well as any Greek-registered FSUs, permanent or not, within Greek territorial waters, irrespective of the quantity of persistent oil stored in bulk on board, were required to maintain adequate insurance or other financial guarantee for oil pollution damage.
- 6.7 The Greek delegation also recalled that it had stated that the competent Greek authorities had not been called upon to intervene in the legal proceedings which had been initiated by the two Greek anti-pollution companies in 2002 and that the Greek State had no legitimate interest in intervening in such legal proceedings. That delegation recalled that, in its view, the legal uncertainty had been clarified in the legal proceedings which ended with the judgement rendered by the Greek Supreme Court which, according to Article 7.6 of the 1992 Fund Convention, was binding on the parties involved in such proceedings, namely the 1992 Fund and the two anti-pollution companies but not on the Greek Government since it was not a party to these proceedings. It further recalled that it had underlined that, by virtue of Article 6 of the 1992 Fund Convention, no action could be brought after six years from the date of the incident which had caused the damage.
- 6.8 The Greek delegation stated again the points made in October 2007, summarised in paragraphs 6.6 and 6.7 above, and added that, on the basis of those arguments, it believed that the Greek authorities were not in breach of their obligations under the 1992 CLC and that, therefore, there were no solid grounds for bringing a recourse action against the Greek State.
- 6.9 Several delegations expressed doubts as to whether a recourse action was justified in this particular case. These delegations recalled that the Executive Committee had decided in July 2000 that the *Slops* was not a 'ship' under the 1992 Civil Liability and Fund Conventions and that, therefore, those Conventions did not apply to this incident. Those delegations stated that, given the earlier decision adopted by the Committee, it would not be consistent for the 1992 Fund to pursue a recourse action against the Greek State on the grounds that the *Slops* was a 'ship'. It was pointed out that in this case the decision as to whether to take a recourse action against the Greek State had policy implications in that the Committee would have to review its decision regarding the definition of 'ship'.
- 6.10 Some delegations pointed out that at the time of the incident the Greek State could not be blamed for not requiring the *Slops* to carry insurance.
- 6.11 A number of delegations stated that they had not been in agreement with the interpretation of the definition of 'ship' adopted by the Assembly in October 1999, that they welcomed the decision by the Greek Supreme Court and that the definition of 'ship' in the Conventions should be reconsidered to include FSUs not on a voyage.
- 6.12 Most delegations agreed that the Secretariat should further examine the matter before taking a decision as to whether the 1992 Fund should bring a recourse action in this case. The Executive

Committee instructed the Director to further examine this matter, taking into account all the policy implications, in particular the earlier decisions by the 1992 Fund governing bodies regarding the definition of 'ship', and to report to the Committee at its next meeting in October 2008.

7 Legal opinion by the 1992 Fund's Greek lawyer

The Director has obtained the legal opinion of the 1992 Fund's Greek lawyer on the possibility of bringing a recourse action against the Greek State. The opinion, reproduced at the Annex, can be summarised as follows:

- As a Contracting State to the 1992 Civil Liability and Fund Conventions, the Greek State has been under an obligation to observe and comply with their respective provisions. In the case of the *Slops* this was not adhered to.
- Contrary to the provisions of Article VII (10) of the 1992 CLC, the Greek authorities (Ministry of Mercantile Marine) permitted the *Slops* to trade without maintaining the insurance required under the 1992 CLC.
- The omission on the part of the Greek State to observe compliance with the provisions of the 1992 CLC, combined with the subsequent consequential financial damage it caused to the 1992 Fund, constitutes a tort under Greek law, which attaches a liability to the Greek State.
- The 1992 Fund is entitled to seek compensation in accordance with Greek law. The amount that can be validly claimed is the amount that the insurer would have been liable to pay to the claimants under the provisions of the 1992 CLC if insurance had actually been in place as required under the 1992 CLC.
- In accordance with Greek law, the right to claim compensation for tort is subject to a five-year time bar period, which commences at the end of the calendar year in which the claim arose and may be pursued in court. In the present case, the five-year time bar period did not commence until the date that the Court of Appeal issued its judgment against the 1992 Fund, ie February 2008.

8 Director's considerations

- 8.1 The Director has studied the situation, taking into account the Fund's policy on taking recourse action, the legal opinion by the Fund's Greek lawyer on the possibility of taking recourse action against the Greek State under Greek law and the Fund's policy regarding the definition of 'ship'.
- 8.2 The Director is of the opinion that there are two conflicting approaches to the issue. The first is based on the outcome of the court case in Greece, and therefore on the applicability of the 1992 Conventions to the *Slops* under Greek law. The second is based on the Fund's policy regarding the definition of 'ship', developed by the 2nd Intersessional Working Group and endorsed by the Assembly. In the following paragraphs the Director analyses both approaches and suggests a way forward.

The first approach: the applicability of the 1992 Conventions to the Slops under Greek law as determined by a final court decision, in spite of the established policy of the 1992 Fund regarding the definition of 'ship'.

- 8.3 The IOPC Fund's policy in respect of recourse actions, laid down in April 1995 by the Executive Committee of the 1971 Fund in connection with the *Rio Orinoco* incident, can be summarised as follows:

The policy of the Fund is to take recourse action whenever appropriate and, in each case, consider whether it would be possible to recover any amounts paid to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The Fund's decision should be made on a

case by case basis, in the light of the prospect of success within the legal system in question.' (document FUND/EXC.42/11, paragraph 3.1.4).

- 8.4 Although it has been stated by the Greek delegation that the decision by the Supreme Court has removed an existing legal uncertainty, the Director considers that the Supreme Court has decided what was the legal situation governing a concrete case at the time of the incident. That legal situation clearly was that the *Slops* was a 'ship' as defined in the 1992 Conventions as implemented in Greek law.
- 8.5 Furthermore the Greek delegation itself, at the 8th session of the Executive Committee held in July 2000, expressed the view that there were reasons to consider the *Slops* a 'ship' under the 1992 Conventions (document 92FUND/EXC.8/8, paragraph 4.3.7):

'The Greek delegation expressed the view that the Committee, in taking its decision in respect of the *Slops*, should take into account its decisions in the *Al Jaziah 1* case, and that in that delegation's view it could be argued that there were stronger reasons to consider the *Slops* as a 'ship' for the purpose of the 1992 Conventions than the *Al Jaziah 1*.'

- 8.6 Applying the first approach as set out above, it could therefore be maintained that the Greek State should not have permitted the *Slops* to trade unless a certificate under the 1992 CLC had been issued (Article VII.10). It is clear that the *Slops* in reality was operating without such a certificate at the time of the incident and that, as a consequence, the 1992 Fund had been forced to pay an amount of compensation which otherwise would have been paid by the shipowner's insurer.
- 8.7 The Director has studied the legal opinion from the 1992 Fund's Greek lawyer who concludes that the omission on the part of the Greek State to comply with the provisions of the 1992 CLC, combined with the subsequent consequential financial damage it caused to the 1992 Fund, constitutes a tort under Greek law, which attaches a liability to the Greek State and that as a consequence of that, in accordance with Greek law, the 1992 Fund is entitled to bring a recourse action.
- 8.8 For the reasons set out above (paragraphs 8.3-8.7) the Director takes the view that, should the first approach as outlined above be followed, and should he apply the policy in respect of recourse action adopted by the 1971 Fund in 1995, taking into account the legal opinion from the Fund's Greek lawyer, then the 1992 Fund should take recourse action against the Greek State, unless such action should be considered not 'appropriate'.

The second approach: the desirability of adhering to the Fund's policy in respect of the definition of 'ship' in spite of a final legal decision to the contrary in the Member State involved

- 8.9 The decision taken by the Executive Committee in 2000 that the *Slops* was not a 'ship' as defined in the 1992 Conventions was based on the 1992 Fund's policy in respect of the definition of 'ship'. This policy was decided by the Assembly at its 4th session, held in October 1999, upon recommendations made by the 2nd Intersessional Working Group. As regards the application of the 1992 Conventions to offshore craft (FSUs and floating production, storage and offloading units (FPSOs)) it was decided that:
- (i) Offshore craft should be regarded as 'ships' under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate;
 - (ii) Offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather (document 92FUND/A.4/32, paragraph 24.3).
- 8.10 The Director considers that under this policy the *Slops* did not qualify as a 'ship' at the time of the incident and that therefore the Executive Committee took the right decision regarding the application of the 1992 Conventions to the *Slops* incident. He also considers that in accordance with this policy

there was no reason related to the international regime for the Greek State to ensure that the *Slops* had a certificate of insurance at the time of the incident.

- 8.11 For the reasons set out above (paragraphs 8.9-8.10), the Director is of the opinion that, should the second approach be followed, and should the desirability of adhering to the Fund policy in respect of the definition of 'ship' be chosen as the appropriate approach to this issue, it would be contrary to the policy of the Fund to take recourse action, since the Greek State appears to have acted in accordance with that policy.

Proposal for an integrated solution: interpretation of the Fund's policy regarding recourse action

- 8.12 Having studied the situation and taking into account the considerations set out above, the earlier decisions by the governing bodies regarding the definition of 'ship', as well as the views expressed by Member States at the previous sessions of the Executive Committee, the Director proposes that the policy of the 1992 Fund regarding taking recourse action, as laid down in April 1995 by the Executive Committee of the 1971 Fund in connection with the *Rio Orinoco* incident, be maintained, but with the interpretation that it shall not normally be considered 'appropriate' to take recourse action against a Member State where its actions have, in all relevant respects, been in accordance with an established policy of the 1992 Fund.
- 8.13 If the Executive Committee were to adopt such an interpretation of the policy regarding recourse action, it would be for the Executive Committee to decide whether the application of the policy to the *Slops* case would lead to the conclusion that the 1992 Fund should take recourse action against the Greek State. It is the Director's view that, on the basis of the policy with the interpretation proposed by him, the 1992 Fund should not take recourse action against the Greek State.

Wider policy consideration: the definition of 'ship'

- 8.14 The Director would like to note however, that although the solution proposed would resolve the question as to whether the 1992 Fund should take recourse action in the *Slops* case, it would not resolve the potential unequal treatment as a result of the courts in some Member States applying the definition of 'ship' in accordance with the 1992 Fund's policy, whereas in other Member States they would apply the wider definition of 'ship', as was done by the Greek Supreme Court.
- 8.15 In this respect it is illustrative to draw a parallel with the admissibility of claims for pure economic loss. In the Director's view, it is only because the policy of the 1992 Fund in respect of this type of damage is in line with those jurisdictions which allow for the widest admissibility in principle of pure economic loss that the Fund is able to maintain equal treatment of claimants in respect of this type of damage in all Member States. Should the Fund choose a more restrictive policy in respect of the admissibility of pure economic loss, such a policy would in some Member States, where pure economic loss is in principle not admissible, be upheld by the courts, whereas in other Member States, where pure economic loss is admissible in principle, the courts would most likely succeed in finding ways to compensate claimants for pure economic loss as they would do in a case based on national law only. Unequal treatment of claimants would be the result.
- 8.16 Applying this example to the issue at hand, it is the Director's view that, where the 1992 Fund has, in determining its policy in this respect, a choice between a wider and a narrower interpretation of the definition of 'ship', a choice for the narrower interpretation would be comparable to a choice for a more restrictive policy in respect of the admissibility for pure economic loss. Also in this case the most likely result would be that in some Member States the Fund's restrictive policy on the definition of 'ship' would be upheld by the courts, denying cover in certain incidents, whereas in other Member States the courts would take the wider view and consider similar incidents covered by the regime. Since it could be expected that governments of Member States base their requirements regarding insurance, reporting of oil receipts etc, on the 1992 Fund's official policy, such a situation would lead to unequal treatment of claimants as well as unequal treatment of shipowners and oil receivers, depending on the Member State where the damage was suffered, where the ship was operating or where the oil was received, respectively. The *Slops* case is an example of this.

- 8.17 Adopting the wider interpretation of the definition of 'ship' would avoid this situation and put, for insurance, contributions and coverage purposes, shipowners, contributors and claimants in all Member States on a level playing field.
- 8.18 For the reasons set out above, the Director suggests that the governing bodies consider whether it would be advisable to revise the policy of the 1992 Fund on the definition of 'ship'.

9 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
- (b) to decide whether to adopt the interpretation of the Fund's policy regarding taking recourse action as proposed by the Director (paragraph 8.12);
- (c) to decide whether to instruct the Director to bring a recourse action against the Greek State (paragraphs 8.8, 8.11 and 8.13); and
- (d) to decide whether to consider revising the 1992 Fund's policy on the definition of 'ship' (paragraph 8.18).

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OPINION

“The Slops”

**Possible recourse action by the IOPCF against
the Greek State following the issuance of**

- (a) Supreme Court Judgment No. 23/2006 (in Plenary Session)
and
(b) Piraeus Court of Appeal Judgment No. 133/2008**

Relevant provisions:

- 1. Article 105 of the Greek “Introductory Law to the Civil Code”:**

For unlawful acts or omissions on the part of representatives of the State in the conduct of the duties assigned to them, the State shall be liable to compensation, save where the act or omission was made for the benefit of the general interest...

- 2. Article 28 of the Greek Constitution:**

(1) The generally accepted rules of international law and the international conventions, as of their ratification and setting in force in accordance with their respective terms, form an integral part of the internal Greek Law and supersede any contrary legal provision...

- 3. Law 314/1976 (ratification of the 1969 CLC).**

- 4. Law 1638/1986 (ratification of the 1971 Fund Convention).**

- 5. Presidential Decree 197/1995 (ratification of the 1992 CLC Protocol)**

- 6. Presidential Decree 270/1995 (ratification of the 1976 and 1992 Protocols in respect of the Fund Convention)**

7. 1992 CLC – Article VII:

(1) The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security ... to cover his liability for pollution damage under this Convention ...

(2) A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a Contracting State such certificate shall be issued by the appropriate authority of the State of the ship's registry ...

...

(10) A Contracting State shall not permit a ship under its flag to which this Article applies to trade unless a certificate has been issued ...

8. 1992 Fund Convention – Article 9:

...

(2) Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event any right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation has been paid.

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FACTUAL AND LEGAL BASE OF THE CLAIM

As a Contracting State to the 1992 CLC and the 1992 Fund Convention, Greece has been under an obligation to observe and comply with their respective provisions. In the case of the “Slops”, (a vessel registered with the Piraeus Ship Registry but, as of 1995, converted into a floating storage and processing oil residues/waste unit) this was not adhered to.

Indeed: Contrary to the provisions of article VII (10) of the 1992 CLC, the pertinent Greek Authorities (i.e. the Ministry of Mercantile Marine) permitted

the “Slops” to trade, (i.e. to engage in commercial activities in the form of receiving, storing and processing oil waste, which was subsequently sold as a low grade fuel to domestic industries) without maintaining the insurance stipulated by the 1992 CLC. There is clear evidence that the Ministry of Mercantile Marine were fully aware of the nature of these activities, for which an operating license had been issued, but for unspecified reasons, the aforementioned certificate of insurance was never requested from the “Slops” owners.

It is noteworthy that, after the “Slops” incident, the Piraeus Port Authorities, (which forms a department of the Ministry of Mercantile Marine), ceased issuing operating licenses for activities similar to those performed by the “Slops”, unless an insurance certificate of the type and content referred to in Article VII (1) of the 1992 CLC is produced.

Furthermore, kindly note that:

The core issue of the dispute between the cleaners and the IOPCF, being whether the “Slops” satisfied the 1992 CLC and Fund Conventions’ criteria to be regarded a “ship” thereunder, is irrelevant at this instance. It was indeed the Fund’s opinion that the “Slops” did not meet these criteria and that, consequently, no liability should be attached to the Fund in respect of the claims put forward by the cleaners. After 6 years of litigation, the Greek Supreme Court finally held that the “Slops” did meet those criteria.

On the other hand, the Greek State’s opinion had always been that the “Slops” **did meet** the Conventions’ criteria of a “ship”. This is adequately shown in the records of the Eight Session of the Executive Committee (5-6 July 2000, Document 92FUND/EXC.8/8, paragraph 4.3.7).

In the premises:

(a) The omission on the part of the Greek State to observe compliance with the aforesaid provisions of the 1992 CLC, combined with the subsequent consequential financial damage it caused the IOPCF, constitutes a “tort” under Greek Law, which in turn attaches a liability to the Greek State.

(b) The IOPCF are entitled to seek compensation in accordance with the aforementioned Article 105 of the Greek “Introductory Law to the Civil Code”. The amount that can be validly sought in this regard shall be the amount that the insurer would be liable to pay to the cleaners under the provisions of the 1992 CLC, if an insurance had actually been in place as required thereunder. This effectively means that the amount of compensation that can be recovered may include the principal (together with interest thereon) paid to the cleaners by the IOPCF.

THE ISSUE OF PRESCRIPTION

Relevant provisions:

1. Law 2362/1995 Article 90:

(1) Unless otherwise specified by a general or special provision of law, a claim against the State shall be prescribed after five years...

....

2. Law 2362/1995 Article 91:

(1) Save as otherwise herein specified, the prescription period for any claim whatsoever against the State shall commence at the end of the financial year in which it arose and was feasible to be pursued in Court

....

* * * * *

In accordance with the above Greek Law provisions the right for compensation is subject to a five-year prescription period, which commences at the end of the financial year (which in Greece, coincides with the calendar year) in which the claim arose **and** may be pursued in Court. The Courts in Greece have steadily held that a prescription period shall not be deemed to have begun to run when there exist **legal grounds**, which (temporarily) precluded or impeded the instigation of legal proceedings against the wrong-doer. One such legal ground is the lack of a “*lawful interest*” on the part of the person who suffered the damage. *Lawful interest* does not simply denote the existence of an entitlement or a right attached to the plaintiff, but, in a wider sense, any

interest of a general nature vested upon such plaintiff in a thing, situation or contract, which is subject to protection and preservation.

If a plaintiff in an action cannot show a plausible *lawful interest*, the relevant writ shall be dismissed for want of this key element.

Accordingly, in the present case, up until the Piraeus Court of Appeal issued its judgment by which the IOPCF was found liable to pay the cleaners, the IOPCF lacked a *lawful interest* to take action against the Greek State. Thus, the five-year prescription period did not commence to run until the date that the Piraeus Court of Appeal issued its Judgment against the IOPCF (28th February 2008).

For completeness of this opinion however, I should mention that in a very recent judgment rendered by the Administrative Court of Cassation in a dispute between an individual and a State Agency, in which the plaintiff had waited until an irrevocable judgment had been first issued in separate proceedings (involving him and a third party), whereby he had established a *lawful interest*, before he sued the State Agency, the Court held that it was not necessary for the plaintiff to wait as above, but that he should have sued the State Agency immediately, instead. In giving its reasons, the Court held that the Court to which the plaintiff should have resorted to in the first place would be competent to hear and examine **in an interlocutory manner** the very arguments and assertions, which were put forward in the proceedings between the plaintiff and the third party.

It should be noted that the above judgment did not specifically deal with prescription and it is doubtful that its underlying principle can be applied to determine this issue.

* * * * *

The above outline constitutes the framework of the contemplated recourse action by the IOPCF against the Greek State.

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