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International Oil Pollution Compensation Funds

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INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

ALFA I

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary:	On 5 March 2012, the Greek-registered tanker *Alfa I*, laden with 1 800 tonnes of cargo, hit the wreck of the *City of Mykonos* while crossing Elefsis Bay, near Piraeus, Greece and sank, with the escaped oil impacting some 13 kilometres of the shoreline of Elefsis Bay. Clean-up operations were conducted at sea and on the shoreline. Since the tonnage of the *Alfa I* (1 648 GT) is below 5 000 units, the limitation amount applicable under the 1992 Civil Liability Convention (CLC) is SDR 4.51 million (EUR 5.42 million)[<1>]. The tanker had an insurance policy limited to EUR 2 million which stated that only non-persistent mineral oils would be covered. Six claims for compensation, together totalling EUR 16.15 million, were submitted by two clean-up contractors to the shipowner and insurer. The shipowner/insurer also received a claim for clean-up expenses from the Greek State for some EUR 222 000. In May 2015, the Piraeus Court of First Instance awarded the main clean-up contractor the sum of EUR 14.4 million. The 1992 Fund has settled the main contractor's claim for EUR 12 million and is claiming back from the insurer the 1992 CLC limit (SDR 4.51 million or EUR 5.42 million). In February 2018, the Bank of Greece revoked the insurer's license and placed the company in liquidation for failure to maintain the necessary solvency capital requirements under Greek law. In March 2018, the Piraeus Court of Appeal issued its judgment dismissing the insurer's appeals against the first instance judgment originally rendered in May 2015. The judgment held that, since no limitation fund had been established in this case, the insurer was liable for the full amount claimed by the main clean-up contractor, i.e. for EUR 15.8 million. In June 2019, the insurer filed an appeal to the Supreme Court against the March 2018 judgment. The 1992 Fund has also filed an appeal to the Supreme Court supporting the obligatory insurance provisions under Article VII of the 1992 CLC. The appeal was heard in February 2021.

[<1>] Based on the exchange rate as at 30 June 2021 of SDR 1 = EUR 1.2013.

Recent developments:	In July 2021, the Supreme Court issued its judgment, dismissing all of the insurer's grounds of appeal and holding *inter alia* that: 1) The issuance by the State authorities of a certificate (based on the blue card issued by the insurer) signifies that there exists in place an insurance cover entered into in accordance with the CLC 1992 provisions regarding obligatory insurance; 2) The wording of Article VII (1) of CLC 1992 "carrying more than 2 000 tons of oil in bulk as cargo" should be interpreted to mean **capable** of carrying more than 2 000 tons. The Supreme Court linked the obligation of insurance (or other financial security) to the carrying capacity of a vessel, irrespective of the actual quantity carried on board. The 1992 Fund's lawyers advise that the obligation of the insurer to pay is now undisputed. *Claim by second clean-up contractor* In September 2019, the 1992 Fund was served with legal proceedings by the second clean-up contractor, for some EUR 349 400 plus interest. The claim was heard by the Piraeus Court of First Instance in late January 2020. The 1992 Fund defended the claim on the basis that it was time-barred. In September 2020, the Court dismissed the second clean-up contractor's claim on the basis that it was time-barred. The second clean-up contractor appealed the judgment, and a hearing date has been set for the appeal in September 2021. *Insurer's liquidation* When the 1992 Fund was informed that the insurer would be put into liquidation, the 1992 Fund filed applications for prenotated mortgages[<2>] against buildings owned by the insurer and registered its claim with the liquidator, in order to raise the 1992 Fund up the list of creditors of the insurer. After a series of court hearings, the 1992 Fund succeeded with its claims at the Greek Supreme Court and now the right of the 1992 Fund to register prenotated mortgages against the insurer's properties is undisputed. However, in January 2020, the 1992 Fund was informed that the 1992 Fund's claims against the liquidation fund of the insurer had been dismissed by the liquidator. Despite further enquiries made by the 1992 Fund's Greek lawyers, no reason has yet been provided for the dismissal and further details are awaited from the Bank of Greece, the supervising authority of the liquidation. The Fund's lawyers sent the liquidator an extrajudicial declaration requesting the full list of claims and justification for the dismissal of the Fund's claim, but the liquidator refused to provide the list, citing confidentiality reasons under the General Data Protection Regulation (GDPR)[<3>]. The 1992 Fund's lawyers filed an appeal before the Uni Membered Court of First Instance of

[<2>] A prenotated mortgage is a right *in rem*. Upon a final and unappealable judgment being issued, the prenotated mortgage may be rendered into a full mortgage, retroactively as of the date of registration of the prenotated mortgage. Therefore, if the prenotated mortgages are registered, the 1992 Fund's claim for compensation will rank ahead of other unsecured claims.

[<3>] The General Data Protection Regulation (EU) 2016/679 (GDPR) is a regulation in EU law on data protection and privacy in the European Union (EU) and the European Economic Area (EEA).

	Athens. The appeal was due to be heard in May 2020, but was delayed due to the outbreak of the COVID-19 pandemic, so the hearing took place in July 2021, with judgment expected by September or October 2021.
Relevant documents:	The online *Alfa I* incident report can be found via the Incidents section of the IOPC Funds' website.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of incident

Ship	*Alfa I*
Date of incident	05.03.2012
Place of incident	Elefsis Bay, Piraeus, Greece
Cause of incident	Collision with submerged wreck of vessel
Quantity of oil spilled	Estimated to be approximately 330 mt
Area affected	Contamination of some 13 km of shoreline of Elefsis Bay near Piraeus, Greece
Flag State of ship	Greece
Gross tonnage	1 648 GT
P&I insurer	Aigaion Insurance Company SA, Greece
CLC limit	SDR 4.51 million (EUR 5.42 million)
STOPIA/TOPIA applicable	Not applicable
CLC + Fund limit	SDR 203 million (EUR 243.87 million)
Legal proceedings	*Legal proceedings:* (a) A claim against the shipowner, insurer and 1992 Fund, by the main clean-up contractor for some EUR 15.8 million which was settled for EUR 12 million; (b) appeal proceedings brought by the shipowner/insurer against the main clean-up contractor and the 1992 Fund. The insurer appealed the March 2018 judgment of the Piraeus Court of Appeal to the Greek Supreme Court. That judgment had distinguished the case of carriage of more than 2 000 tonnes of oil (in which case the 1992 CLC right to limit applies) from the case of carriage of less than 2 000 tonnes of oil but the Court held that, in either case, there was an obligation to insure and a right of direct action against the insurer. The Supreme Court has recently dismissed all of the insurer's grounds of appeal; (c) a claim against the shipowner/insurer by the second clean-up contractor; (d) a claim against the 1992 Fund by the second clean-up contractor for some EUR 349 400 commenced in September 2019, which had become time-barred on 5 March 2018; (e) recourse proceedings brought by the 1992 Fund for prenotated mortgages against the insurer's unencumbered properties for

	recovery of the CLC limit; (f) legal proceedings bought against the insurer for selling a property at an undervalue thereby seeking to defraud creditors; and (g) a claim by the Greek State against the shipowner/insurer. In February 2015, a writ of action was served by the Greek State on the shipowner/insurer for some EUR 222 000 for clean-up expenses. A hearing for directions took place in May 2015. In July 2018, the Greek State registered its claim with the insurer's liquidator.

2 Background information

The background information to this incident is summarised above. Further background information is provided in more detail in the online *Alfa I* incident report.

3 Civil proceedings

Claim by second clean-up contractor

3.1 The second clean-up contractor decided not to accept the 1992 Fund's offer of settlement and commenced legal proceedings against the shipowner/insurer. The Court set a date for hearing the second contractor's claim in October 2017 but this was adjourned until May 2018, in anticipation of the expected judgment of the Court of Appeal in the 1992 Fund's legal action against the insurer. Given that the incident took place on 5 March 2012, this claim became time-barred against the 1992 Fund on 5 March 2018, i.e., six years from the date when the incident occurred (Article 6, 1992 Fund Convention).

3.2 In September 2019, the 1992 Fund was served with legal proceedings for some Euro 349 400 plus interest, by the second clean-up contractor. At a court hearing in late January 2020, the 1992 Fund defended the claim on the basis that the claim was time-barred.

3.3 In September 2020, the Court dismissed the second clean-up contractor's claim on the basis that it was time-barred. The second clean-up contractor appealed the judgment and a hearing date has been set for the appeal in September 2021.

Settlement with the main clean-up contractor

3.4 In October 2016[<4>], the 1992 Fund settled the main clean-up contractor's claim against the shipowner, insurer and the 1992 Fund for EUR 12 million, in consideration of an assignment from the clean-up contractor to the 1992 Fund of an equal part of its claim against the insurer. The main contractor's original claim amounted to some EUR 15.8 million plus interest and costs.

3.5 Shortly after the payment was made to the main contractor, the shipowner/insurer filed appeals against the first instance judgment originally rendered in May 2015. The main contractor also filed an appeal against the shipowner/insurer, attempting to increase the figure awarded by the judgment in May 2015 (EUR 14.4 million), to the figure originally claimed (EUR 15.8 million).

[<4>] In April 2016, the 1992 Fund Executive Committee authorised the Director to settle the main clean-up contractor's claim for EUR 12 million and to claim back from the insurer the sum due under the 1992 CLC.

Appeal Court Judgment No. 187/2018

3.6 In March 2018, the Piraeus Court of Appeal issued judgment No. 187/2018 dismissing all the shipowner/insurer's appeals against the first instance judgment originally rendered in May 2015.

3.7 The judgment distinguished the case of carriage of more than 2 000 tonnes of oil (in which case the 1992 Civil Liability Convention (CLC) right to limit would apply) from the case of carriage of less than 2 000 tonnes of oil. However, in either case, the Court held that there was an obligation to insure and a right of direct action against the insurer. Furthermore, since no limitation fund had been established in this case, the Court held that the insurer was liable for the full amount claimed, i.e. for EUR 15.8 million.

3.8 However, in June 2019, the insurer filed an appeal against judgment No. 187/2018, arguing that these were two separate insurable risks (insurance for carriage of cargoes of at least 2 000 tonnes under the 1992 CLC and insurance for carriage of cargoes of less than 2 000 tonnes under article 9 of law 314/1976) and that the Piraeus Court of Appeal had mixed them by accepting a compensation liability under article 9 of law 314/1976 on the basis of a 1992 CLC certificate that was issued for a different risk.

3.9 The 1992 Fund's lawyers filed an appeal to the Supreme Court supporting the obligatory insurance under article VII of the 1992 CLC and the ensuing right of direct action against the insurer, and to further highlight that the blue card was issued by the insurer and subsequently relied upon by the Greek authorities in granting the 1992 CLC certificate. Furthermore, it was the 1992 Fund's lawyers' view that the Conventions should prevail over domestic law as supported by article 28 of the Greek Constitution. The 1992 Fund's lawyers arranged a joint hearing with the insurer's appeal.

Supreme Court judgment 784/2021

3.10 In February 2021, the Court held both appeals, and in July 2021, the Supreme Court issued its judgment, dismissing the insurer's appeal in its entirety.

3.11 The insurer had argued that the application of Article VII(8) of the 1992 CLC was dependent on the existence of an obligatory insurance under Article VII(1) of the 1992 CLC.

Article VII(1) of the 1992 CLC states:

'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, such as the guarantee of a bank or certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention.'

3.12 The insurer had argued that since the *Alfa 1* carried less than 2 000 tons of persistent oil, the existing insurance was not obligatory, and this precluded its obligation to pay, or for there to be a right of direct action against the insurer.

3.13 However, the Supreme Court held:

(1) The issuance by the appropriate authority of a Contracting State, of a certificate (based on the blue card issued by the insurer) signifies that there exists in place an insurance cover, entered into in accordance with the CLC provisions regarding an **obligatory** insurance. Therefore, the mere existence of the certificate, leaves no room for dispute or of the obligation of the insurer to pay;

(2) The wording of the CLC article VII(1) '…carrying more than 2 000 tons..' should be interpreted to mean **capable to carry more than 2 000 tons.** Therefore, the Supreme Court linked the obligation of insurance (or other financial security) to the carrying **capacity** of a vessel (tonnage), irrespective of the actual quantity carried on board. The judgment states that even an empty tanker with a carrying capacity more than 2 000 tons of oil as cargo must maintain insurance, to cover possible pollution by persistent oil used as bunkers.

3.14 The Supreme Court justified the ruling on the following grounds:

a) The definition of 'ship' in Article (I)I of the 1992 CLC, covers all tankers (any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk), **irrespective of the actual carriage of oil** which is of interest for all other (non-tanker) vessels, such as Oil Bulk Ore carriers (OBOs);

b) If, as argued by the insurer, the insurance obligation was dependent on the **actual carriage** of 2 000 tons of oil as cargo, this would leave uninsured, all tankers which sailed in ballast (empty), but whose bunkers may still cause considerable pollution;

c) The carriage **capacity** of a vessel is a stable and not changeable condition, in comparison to the quantity of oil actually carried, which varies from time to time;

d) The carrying capacity of a tanker (tonnage) is also used with respect to calculating the limitation of liability under the 1992 CLC.

e) The carrying capacity of a tanker (tonnage) is easily linked to a specific time for which the insurance cover is valid, which leads to the security of contracts and transactions in general;

f) The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention) also uses the vessel's tonnage as a criterion of obligatory insurance (not the quantity of bunkers carried onboard).

3.15 The 1992 Fund's lawyers advise that in light of the Supreme Court judgment, the obligation of the insurer to pay, is now undisputable.

3.16 The 1992 Fund's lawyers will now concentrate their efforts on the procedure for rendering the prenotated mortgages on the insurer's properties into full mortgages, in an effort to recover the 1992 CLC limitation fund monies paid on behalf of the insurer.

4 Recourse actions

Recoverability of the 1992 CLC limit from the insurer

4.1 After making payment to the main contractor in October 2016, the 1992 Fund attempted to persuade the insurer to repay the limitation sum due under the 1992 CLC. However, after failing to reach an amicable solution with the insurance company, the 1992 Fund's lawyers advised that in their view, the 1992 Fund's interest would be better safeguarded by securing its claim in respect of the limitation sum due from the insurer under the 1992 CLC, through mortgages obtained over the insurer's assets, including some EUR 10.6 million of unencumbered assets (properties)[<5>].

[<5>] Article 240 of law 4364/2016 (enacting in Greece the Solvency II Directive 2009/138/EC) equips with a privilege, ahead of insurance claims, inter alia, claims on properties encumbered with rights in rem. A prenotated mortgage is a right in rem. Upon a final and unappealable judgment being issued, the prenotated mortgage may be rendered into a full mortgage, retroactively as of the date of registration of the prenotated mortgage. Therefore, if the prenotated mortgages are registered, the 1992 Fund's claim for compensation will rank ahead of other unsecured claims.

4.2 The 1992 Fund instructed its lawyers to immediately file applications at six different Greek land registries in whose jurisdictions the insurer's properties were located, to register prenotated mortgages, in order to secure the 1992 Fund's claim in respect of the sum due from the insurer under the 1992 CLC, which had been paid by the 1992 Fund as part of the main contractor's settlement. However, initially only the land registry in Thessaloniki accepted the 1992 Fund's application and granted the registration of prenotated mortgages on two properties owned by the insurer as security for a proportion of the 1992 Fund's claim amounting to EUR 851 000.

Applications for prenotated mortgages — Thessaloniki

4.3 In July 2017, the insurer submitted a writ of action before the Thessaloniki Court of First Instance, requesting the deletion of the prenotated mortgages recorded on its Thessaloniki properties on the grounds that the first instance judgment of the Court of Piraeus could not be considered a title for the prenotated mortgages since it was issued in 2015. Pleadings for this writ of action were submitted before the Thessaloniki Court of First Instance in November 2017. In late 2018, the Thessaloniki Court of First Instance issued a judgment, dismissing the insurer's request, which the insurer subsequently appealed.

4.4 The hearing of this appeal took place in December 2019 on documents alone, before the Thessaloniki Court of Appeal.

4.5 In 2020, the Court of Appeal dismissed the insurer's appeal.

Applications for prenotated mortgages — Athens

4.6 In early August 2017, the 1992 Fund attended before the Athens Court of Appeal for a hearing date for its appeal against the Athens Court of First Instance judgment that had dismissed the 1992 Fund's application for prenotated mortgages over the insurer's properties in Athens, Koropi, Faliro and Glyfada. The appeal was set for hearing on 9 November 2017. In February 2018, the Athens Court of Appeal dismissed the 1992 Fund's appeal and held that the possibility to record prenotated mortgages by virtue of a first instance judgment existed only for judgments that were issued after 1 January 2016[<6>] and which were declared provisionally enforceable. In November 2018, the 1992 Fund appealed the decision of the Athens Court of Appeal to the Supreme Court.

4.7 The Supreme Court subsequently dismissed the insurer's appeal.

Applications for prenotated mortgages — Piraeus

4.8 The 1992 Fund's application to register prenotated mortgages was initially denied by the Piraeus registry but following a successful appeal, a prenotated mortgage was recorded on a property owned by the insurer in Piraeus. The insurer filed a caveat against the judgment which was accepted by the Court but subsequently appealed by the 1992 Fund and in July 2018, the Piraeus Court of Appeal issued its judgment, finding in favour of the 1992 Fund and accepting the opposite views from those accepted by the Athens Court of Appeal. The insurer (now in liquidation) appealed the decision of the Piraeus Court of Appeal to the Supreme Court and a hearing date was set for 24 February 2020.

4.9 At that hearing, the 1992 Fund's lawyers submitted pleadings and a judgment was expected to be issued within the next three to five months, but matters were delayed by the outbreak of the COVID-19 pandemic.

[<6>] The judgment was issued in May 2015.

4.10 In late 2020, the Supreme Court issued judgment 1000/2020 dismissing the insurer's appeal.

4.11 This concluded the dispute of whether the 1992 Fund was entitled to register prenotated mortgages as the 1992 Fund was successful in both appeals before the Supreme Court.

Legal proceedings against the insurer for potentially defrauding creditors

4.12 During the litigation regarding the assets of the insurer and the 1992 Fund's attempts to obtain prenotated mortgages over the insurer's properties, it was discovered that the insurer had sold to third parties, a property in Athens, for a price of EUR 370 000, when the property had, in fact, had an imputed tax value of EUR 1.03 million and a commercial value of EUR 1.5 million. Considering the large difference between the sale price and the commercial value, and after considering the criteria established under the Greek Civil Code, the 1992 Fund's lawyers have advised that they believe that there are reasonable grounds to have the property transfer reversed on the grounds of defrauding a creditor.

4.13 The 1992 Fund's lawyers have advised that if the 1992 Fund's request for the reversal of the property transfer is upheld by the Court, the Fund's lawyers could bring to public auction at least 75.34% of the property (being the ratio between the sale price of EUR 370 000 and the commercial value of EUR 1.5 million), or 64% (being the ratio of the sale price of EUR 370 000 and the imputed tax value of EUR 1.03 million).

Insurer's liquidation

4.14 In February 2018, the Bank of Greece revoked the insurer's license and placed the company into liquidation for failure to maintain the necessary solvency capital requirements under Greek law. The liquidator was appointed shortly afterwards.

4.15 In July 2018, the 1992 Fund registered its claim with the liquidator. The 1992 Fund's lawyers have repeatedly made requests to the liquidator to release the details of the other claims which were lodged against the insurer, but the liquidator has not released the information.

4.16 In January 2020, the 1992 Fund's lawyers reported that the liquidator's website indicated that the claim submitted by the 1992 Fund had been dismissed, without giving any reason. The 1992 Fund's lawyers expressed surprise since the 1992 Fund's appeal had been upheld by the Piraeus Court of Appeal and sent the liquidator a declaration protesting the dismissal of the 1992 Fund's claim and requesting a full list of the admissible claims and the justification for the liquidator's refusal to include the 1992 Fund's claim within the list. However, the liquidator refused to provide the list of other claims, citing the GDPR as a reason not to provide the information.

4.17 The 1992 Fund's lawyers filed an appeal before the Uni Membered Court of First Instance of Athens, which was due to be heard in May 2020, but was delayed due to the outbreak of the COVID-19 pandemic. Subsequent court dates were also frustrated until July 2021, when the 1992 Fund's appeal against the dismissal of the 1992 Fund's claim from the insurance liquidator's list of claims was heard. A judgment is expected by September or October 2021.

4.18 The main clean up contractor (who is working with the 1992 Fund's lawyers in pursuing the balance of its claim from the insurer), did not appeal but submitted before the Piraeus Court of First Instance, a writ of action against the liquidator for a declaratory judgment ruling that the procedure followed by the liquidator is irregular. Pleadings for that writ of action were filed in October 2020 and a court

hearing was set but was frustrated due to the COVID-19 pandemic. The hearing finally took place in July 2021 and a judgment is expected in late 2021[7].

4.19 The 1992 Fund has been successful in recording prenotated mortgages against the insurer's assets and if it can also succeed in reinserting the 1992 Fund's claims back into the liquidator's list of admissible claims, the 1992 Fund's lawyers have advised that they are confident that the 1992 Fund's claim will have a reasonable chance to be given priority over other creditors of the insurance company[8].

5 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.

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[7] The 1992 Fund's lawyers agreed to follow separate courses of action (an appeal by the 1992 Fund and a writ of action by the main clean up contractor) in order to try more than one option. Whichever is successful, will be followed by both parties.

[8] Article 240 of law 4364/2016 (enacting in Greece the Solvency II Directive 2009/138/EC) equips with a privilege, ahead of insurance claims:

(a) the liquidation costs and remuneration;
(b) employees' claims for remuneration (including in-house lawyers' remuneration claims in the last two years before liquidation) and severance pay;
(c) tax due to the State;
(d) social security duties;
(e) claims on properties encumbered with rights *in rem.*