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INCIDENTS INVOLVING THE 1992 FUND

SLOPS AND INCIDENT IN SWEDEN

Note by the Director

Summary:	*Slops*: The *Slops* 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 *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that these Conventions did not apply to this incident. Two companies that carried out clean-up operations took legal action against the 1992 Fund. At its July 2002 session the Executive Committee decided that the companies had not provided any information which would modify its position that the *Slops* should not be considered a 'ship' and instructed the Director to oppose the action. The Court of first instance held that the *Slops* fell within the definition of 'ship'. The 1992 Fund appealed against the judgement. The Court of Appeal overturned the judgement of the Court of first instance and held that the *Slops* did not meet the criteria required by the Conventions and therefore could not be considered a 'ship'. The claims against the Fund were therefore rejected. The claimants appealed against this judgement to the Supreme Court, which is expected to render its judgement in late 2005 or early 2006. *Incident in Sweden*: Several Swedish islands in the Baltic Sea were polluted in September 2000. Subsequent investigations by the Swedish authorities indicated that the oil could have been discharged from the tanker *Alambra* during a ballast voyage to Tallinn, Estonia. The owner of the *Alambra* and his insurer maintain that the oil did not originate from that ship. The Swedish Government has taken legal action against the shipowner and the insurer claiming compensation for clean-up costs totalling SEK5.2 million (£385 000). The Government has also taken legal action against the 1992 Fund maintaining that the Fund would be liable to compensate the Swedish Government if neither the shipowner nor his insurer were held liable to pay compensation. The shipowner and his insurer have submitted scientific evidence, which in their view shows that the pollution could not have originated from the *Alambra*. The Swedish authorities have also submitted scientific evidence, which, in the Director's view, demonstrates that the

	Alambra was most likely the source of the pollution. The Swedish Court of first instance has not yet rendered its judgement.
Action to be taken:	Information to be noted.

1 *Slops*

The Incident

1.1 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 1000 – 2 000m³ 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.

1.2 The *Slops* had no liability insurance in accordance with Article VII.1 of the 1992 Civil Liability Convention.

1.3 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.

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

1.4 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 the conversion the *Slops* appeared to have remained permanently at anchor at its present location and had been used exclusively as a waste oil storage and processing unit. The local Port Authority confirmed that the *Slops* had been permanently at anchor since May 1995 without propulsive equipment. It was understood that the oil residues recovered from the processed slops were sold as low-grade fuel oil.

1.5 In July 2000 the Executive Committee considered the question of whether the *Slops* fell within the definition of 'ship' under the 1992 Civil Liability Convention and the 1992 Fund Convention. The Committee recalled that the 1992 Fund Assembly had decided that offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs), should be regarded as ships 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. The Committee noted that this decision had been taken on the basis of the conclusions of an Intersessional Working Group that had been set up by the Assembly to study this issue. The Committee also noted that although the Working Group had mainly considered the applicability of the 1992 Conventions in respect of craft in the offshore oil industry, there was no significant difference between the storage and processing of crude oil in the offshore industry and the storage and processing of waste oils derived from shipping. It was further noted that the Working Group had taken the view that in order to be regarded as a 'ship' under the 1992 Conventions, an offshore craft should *inter alia* have persistent oil on board as cargo or as bunkers (document 92FUND/A.4/21, paragraph 7.4.2).

1.6 A number of delegations expressed the view that since the *Slops* was not engaged in the carriage of oil in bulk as cargo it could not be regarded as a 'ship' for the purpose of the 1992 Conventions. One delegation pointed out that this was supported by the fact that the Greek authorities had exempted the craft from the need to carry liability insurance in accordance with Article VII.1 of the 1992 Civil Liability Convention.

1.7 The Committee decided that, for the reasons set out above, the *Slops* should not be considered as a 'ship' for the purpose of the 1992 Civil Liability Convention and 1992 Fund Convention and that therefore these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

Proceedings before the Court of first instance

1.8 In February 2002 two Greek companies took legal actions in the Court of first instance in Piraeus against the registered owner of the *Slops* and the 1992 Fund claiming compensation for costs of clean-up operations and preventive measures for €1 536 528 (£1.0 million) and €786 832 (£530 000) (plus interest), respectively. 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.

1.9 In their pleadings the companies stated that the *Slops* was constructed exclusively to carry oil by sea (ie was constructed as a tanker), that it had a nationality certificate as a vessel and that it was still registered as a tanker with the Piraeus Ships' Registry. They also maintained that even when the *Slops* operated as an oil separation unit (a slops handling unit), it floated at sea and that its only purpose was to carry oil in its hull. They mentioned that the *Slops* did not have any liability insurance under the 1992 Civil Liability Convention. 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 for their costs from the 1992 Fund.

1.10 The Court rendered its judgements on the actions in December 2002.

1.11 As regards the actions against the registered owner of the *Slops*, who did not appear at the court hearing, the Court rendered a default judgement against him for the amounts claimed plus interest.

1.12 Concerning the actions against the 1992 Fund, the Court held in its judgement that the *Slops* fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention. In the Court's opinion, any type of floating unit originally constructed as a sea-going vessel for the purpose of carrying oil was and remained a ship, although it might subsequently be converted into another type of floating unit, such as a floating oil waste receiving and processing facility, and notwithstanding that it might be stationary or that the engine might have been temporarily sealed or the propeller removed. The Court ordered the 1992 Fund to pay the companies €1 536 528 million (£1.0 million) and €786 832 (£530 000) 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 (£63 000).

Proceedings before the Court of Appeal

1.13 In February 2003 the 1992 Fund Executive Committee considered the question of whether to appeal against the judgement. During the discussion a number of delegations pointed out that the decision by the Executive Committee that the *Slops* should not be considered a 'ship' for the purposes of the 1992 Conventions was based on a policy decision by the 1992 Fund Assembly regarding the conditions under which floating storage units should be considered a 'ship' for the purpose of the Conventions, namely only when they were carrying oil in bulk, which implied that they were on a voyage. Those delegations referred to the preamble to the Conventions, which specifically referred to the transportation of oil. The Executive Committee decided that the 1992 Fund should appeal against the judgement (document 92FUND/EXC.20/7, paragraph 3.5.15).

1.14 In its appeal the 1992 Fund argued that the Court of first instance had erroneously considered that the *Slops* was carrying oil at the time of the incident, regarding the mere existence on board of oil residues as 'carriage', ie transportation. It also argued that although the Court had considered that the 2 000m^3 of oil on board was carried in the sense that it was intended to be transported to the oil refineries, there was no evidence that this would be the case. The Fund drew attention to a document issued by the Ministry of Merchant Marine proving beyond doubt that the *Slops*, which constituted a floating industrial unit for the processing of oil residues and separating them from water, had operated continuously as such a unit from 2 May 1995 and had been permanently anchored since that date without any propulsion equipment. The Fund maintained that the *Slops* had not been intended to carry oil residues by sea to oil refineries and had never carried out such operations during the time it served as a floating oil residue processing facility, such carriage having been performed by the use of barges owned by third parties, which went alongside the *Slops* to receive the oil residues and transported them to the refineries for further processing. The Fund further argued that the *Slops* did not have the liability insurance required under Article VII.1 of the 1992 Civil Liability Convention and that this requirement had never been imposed by the Greek authorities upon the *Slops*. It was pointed out that the Greek authorities were obliged under Article VII.10 not to permit a vessel flying the Greek flag to carry out commercial activities without such a certificate of insurance. The Fund concluded that in view of these facts, the *Slops* could not be considered to fall within the definition of 'ship' in the 1992 Conventions.

1.15 At a hearing in November 2003 the claimants argued that any type of marine craft which by construction was intended to carry oil was considered to be a ship, notwithstanding that it had subsequently undergone conversion, that temporarily its engine had been sealed and its propeller removed. They also argued that the fact that the *Slops* was registered at the Piraeus Ships' Registry proved that it was a ship. The claimants maintained that the word 'cargo' was not indicative of the alleged requirement for the ship to be actually carrying oil, as the word was used to distinguish between oil carried as cargo and oil in the ship's tanks. The claimants argued that at the time of the incident the *Slops* actually had waste residue remaining on board from its last journey as a tanker in 1995. The point was made that the existence of insurance was not a condition for the *Slops* to be considered a ship. It was further stated that the United Nations Law of the Sea Convention, the principal objective of which was the protection of the marine environment, provided a framework for the 1969 Civil Liability Convention calling for an interpretation compatible with this principal objective. It was argued by the claimants that they had become aware of the registered owner's poor financial state after the clean-up work had progressed considerably and that in any case they could have been accused of contributing to the damage to the environment had they not completed the clean-up operations. The claimants also argued that the fact that the 1992 Fund had arranged for two technical experts to travel to Greece and to report on the incident had led them to believe that the 1992 Fund was prepared to grant compensation.

1.16 The 1992 Fund drew the Court's attention to Resolution N°8 adopted in May 2003 by the 1992 Fund Administrative Council in which the Council expressed the view that the courts of States Parties to the 1992 Conventions should take into account the decisions of the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of the Conventions

1.17 The Court of Appeal rendered its judgement on 16 February 2004. The Court held that the *Slops* did not meet the criteria required by the 1992 Civil Liability Convention and the 1992 Fund Convention and rejected the claims. The Court interpreted the word 'ship' as defined in Article I.1 of the 1992 Civil Liability Convention as a seaborne unit which carries oil from place A to place B.

1.18 The Court of Appeal took into consideration evidence submitted by the Fund, which clearly showed that, at the time of the incident, the *Slops* did not operate as a seagoing vessel or a floating unit for the purpose of transporting persistent oil in its tanks. The Court accepted the Fund's position that the *Slops*, which had originally been built as a tanker, had performed its last voyage

as an oil-carrying vessel in 1994. The Court also noted that the *Slops* had been subsequently sold to Greek interests, who had converted it into a floating waste oil storage and processing unit and to this effect had removed its propeller and sealed its engine and that the Piraeus Central Port Authority had confirmed that the *Slops* had remained permanently at anchor since May 1995 without propulsive equipment. The Court also referred to the fact that the relevant Greek authorities had not required that the *Slops* be insured in accordance with Article VII.1 of the 1992 Civil Liability Convention and that this also indicated that the *Slops* could not be considered as a 'ship' under the 1992 Conventions.

Proceedings before the Supreme Court

1.19 The claimants appealed to the Supreme Court.

1.20 In the pleadings before the Supreme Court, the claimants have argued that the *Slops*, which by its construction had all the characteristics of a vessel carrying oil, was anchored and used as a floating receiving and separating unit of oil products transferred from other vessels. They have also stated that as a result of fire, a large quantity of oil loaded in bulk as cargo in the vessel's cargo tanks was spilled. The claimants have maintained that the Court of Appeal made an incorrect interpretation of the definition of 'ship' in the 1992 Civil Liability Convention. In the claimants' view, it was clear that the wording of the definition and its purpose was not only to prevent pollution but also to compensate victims of oil pollution and those who contribute to prevention of such pollution.

1.21 The claimants have further maintained that the definition of 'ship' covered also a craft which by its construction was designed to carry oil and which at the time of the incident did not perform voyages and (for a brief or longer period of time) was stationary, operating as a receiving and separating unit for oil or oily residues and carrying oil in its cargo tanks. This was in the claimants’ view particularly so when the craft had oily residues from the carriage on board and constituted a high risk of causing pollution in vital areas such as ports. The claimants have also maintained that the Court of Appeal had considered an issue that was not pleaded, holding that it could not support the view that there were oil residues from the *Slops*' last voyage at the time of the incident. They have also argued that the definition of 'ship' introduced a rebuttable presumption that there were residues on board, but that the Fund had not rebutted this presumption.

1.22 In their pleadings to the Supreme Court, the claimants have also suggested that the Court of Appeal judgement lacked proper legal foundation and contained insufficient reasoning.

1.23 The 1992 Fund submitted pleadings to the Supreme Court in May 2005 maintaining that the Court of Appeal had interpreted the definition of 'ship' correctly and that the appeal should be dismissed. In its pleadings before the Supreme Court the Fund put forward largely the same arguments as in the Court of Appeal. The Fund reiterated the point made to the Court of Appeal that it was not possible that the residues from previous voyages had remained onboard in view of the fact that the *Slops* had been converted to a floating oil recovery facility. The Fund also maintained that in any event the alleged rebuttable presumption would not apply in this case. In addition, the Fund drew the Supreme Court's attention to the above-mentioned Resolution N°8.

1.24 The 1992 Fund submitted to the Supreme Court an expert opinion by Dr Thomas A Mensah[<1>] in support of its position. In his opinion Dr Mensah concluded that there was no basis, either in the provisions and terms of the 1992 Civil Liability Convention and the 1992 Fund Convention or in international maritime law or in the rules and principles of international law concerning the interpretation and application of treaties, for suggesting that the *Slops* could be considered as a 'ship' in relation to the incident. He expressed the view that at the time of the incident the *Slops*

<1> Former Assistant Secretary-General of IMO, former President of the International Tribunal for the Law of the Sea in Hamburg (Germany).

did not meet any of the requirements for a ship as defined in Article I.1 of the 1992 Civil Liability Convention because it was not 'a seagoing vessel and seaborne craft… constructed or adapted for the carriage of oil in bulk as cargo' nor was it a ship that was 'actually carrying oil in bulk as cargo' or on 'any voyage following such carriage'. Consequently, in his view, pollution damage resulting from the incident could not be considered as falling within the scope of application of the 1992 Civil Liability Convention. He stated that it followed, therefore, that there could be no obligation on the part of the 1992 Fund in respect of compensation for such pollution damage.

1.25 The Supreme Court held a hearing in May 2005. The Court is expected to issue its judgement in late 2005 or early 2006.

2 <u>Incident in Sweden</u>

The incident

2.1 Between 23 September and early October 2000 persistent oil landed on the shores of Fårö and Gotska sandön, two islands to the north of Gotland in the Baltic Sea, and thereafter on several islands in the Stockholm archipelago. The Swedish Coastguard, the Swedish Rescue Service Agency and local authorities undertook clean-up operations, which resulted in the collection of some 20m³ of oil from the sea and from the shore.

2.2 Investigations by the Swedish authorities indicated that the oil could have been discharged within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra*, which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). According to the Coastguard, analyses of oil samples from the polluted islands matched those of samples taken from the *Alambra*.

2.3 The *Alambra* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club). The shipowner and the insurer have maintained that the oil did not originate from the *Alambra*.

Limitation of liability

2.4 The limitation amount applicable to the *Alambra* under the 1992 Civil Liability Convention is 32 684 760 SDR (£22 million).

Claims for compensation

2.5 The Coastguard incurred costs in respect of clean-up operations totalling SEK 1.1 million (£80 000). The Rescue Service Agency, together with local authorities, incurred clean-up costs totalling SEK 4.1 million (£300 000). The aggregate amount of the claims would therefore fall well below the limitation amount applicable to the *Alambra*.

2.6 The Swedish authorities informed the 1992 Fund that they intended to submit their claims for compensation to the shipowner. The authorities further indicated that if they were to be unsuccessful in obtaining compensation from the shipowner, they would consider claiming against the Fund. However, in order to be able to obtain compensation from the 1992 Fund, the authorities would have to prove that the damage resulted from an incident involving a ship as defined in the 1992 Civil Liability Convention.

2.7 The Swedish authorities have made available to the 1992 Fund the results of analyses carried out by the Swedish Forensic Laboratory of samples of oil carried on board the *Alambra* and of samples of oil found on several Swedish islands. The Fund examined the results of the analyses and concurred with the conclusion of the authorities that the pollution samples matched closely those taken from the *Alambra*.

Imposition of fine on the shipowner

2.8 The Swedish Coastguard imposed a water pollution fine of SEK 439 000 (£32 000) on the owner of the *Alambra* under the 1980 Act on Measures Against Pollution from Ships.

2.9 The shipowner appealed against this decision to the Stockholm District Court. The owner requested that the District Court should annul the Coastguard's decision on the grounds that the Swedish authorities did not have jurisdiction to impose a water fine in this case, since the aleged discharge was made by a foreign vessel and took place in the Swedish Exclusive Economic Zone (EEZ) and the fine was imposed after the *Alambra* had left that zone. The owner requested subsidiarily that the case should be dismissed since there had been no discharge of oil from the *Alambra*.

2.10 In a decision rendered in July 2002 the District Court considered the first ground invoked by the shipowner, namely that the case should be dismissed on the grounds that the Swedish authorities did not have jurisdiction to impose a water fine in respect of the discharge in question. The Court rejected the shipowner's request for dismissal on this ground.

2.11 In September 2002 the Stockholm Court of Appeal upheld the District Court's decision. The shipowner lodged an appeal against this decision and in May 2003 the Supreme Court granted the shipowner the right to bring the matter before it.

2.12 The Supreme Court ruled that the Swedish Coastguard had jurisdiction to impose a water pollution fine on a foreign flag vessel causing pollution in the Swedish EEZ, and that this would be the case even if the vessel in question had not been boarded or detained in the Swedish EEZ or Swedish territorial waters. The Supreme Court further ruled that the exercise of such jurisdiction was not in conflict with Sweden's international obligations.

Legal actions against the shipowner/Club and the Fund

2.13 In September 2003 the Swedish Government took legal action in the Stockholm District Court against the shipowner and the London Club maintaining that the oil in question originated from the *Alambra* and claiming compensation of SEK 5 260 364 (£385 000) for clean-up costs. The Government also took legal action against the 1992 Fund as a protective measure to prevent its claim against the Fund becoming time-barred. The Government invoked the liability of the 1992 Fund to compensate the Government if neither the shipowner nor the London Club were to be held liable to pay compensation.

2.14 The 1992 Fund submitted its response to the Court in October 2003 requesting that the action against the Fund should be suspended until the final judgement had been rendered in respect of the action against the shipowner and his insurer. The Fund informed the Court that it shared the Swedish Government's view that the *Alambra* was the most likely source of the pollution.

2.15 The District Court decided that the action against the Fund should be suspended until the action against the shipowner/London Club had been heard.

2.16 In May 2005 the shipowner and the London Club asked the Court for postponement of the proceedings to give the parties time to negotiate an out-of court settlement. The Court granted the request for postponement.

3 Action to be taken by the Executive Committee

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