

 <p>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p>	<b>Agenda item: 4</b>		<b>IOPC/OCT09/4/3</b>		
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	1992 Fund Assembly		<b>92A14</b>	•	
	1992 Fund Executive Committee		<b>92EC46</b>		
	Supplementary Fund Assembly		<b>SA5</b>	•	
	1971 Fund Administrative Council		<b>71AC24</b>		

## CONSIDERATION OF THE DEFINITION OF 'SHIP'

### Note by the Director

<b>Summary:</b>	<p>At its October 2008 session the 1992 Fund Executive Committee considered the definition of 'ship' in connection with the <i>Slops</i> incident and, after discussion, instructed the Director to further examine the 1992 Fund's policy regarding that definition and to present a document for consideration by the 1992 Fund Assembly at its October 2009 session.</p> <p>As instructed by the 1992 Fund Executive Committee, the Director has further examined the 1992 Fund's policy on the definition of 'ship', in particular in relation to FSUs such as the <i>Slops</i>, with a view to determining whether there was a serious risk of unequal treatment as a result of courts in some, but not all, Member States applying the definition of 'ship' in accordance with the 1992 Fund's policy. He also examined whether, if that were the case, the choice of another, wider policy on the definition of 'ship' would diminish that risk. To provide the Assembly with a complete overview, the Director has reviewed the relevant policy considerations and decisions taken within the Organisation over the years.</p> <p>The consequences of such a policy change were further examined, not only in respect of contributions to the Funds, but also in respect of the shipowner and Member States in the context of the 1992 Civil Liability Convention (1992 CLC).</p> <p>The Director concludes that, in view of the complexity of the issues involved and since such a policy change would be potentially far-reaching, any further work on this issue would need strong support from, and involvement of, Member States as well as the relevant industries in order to secure a reasonable chance of success.</p>
<b>Action to be taken:</b>	<p><u>1992 Fund Assembly:</u></p> <p>Decide whether to undertake work towards a change regarding the interpretation of the definition of 'ship', in particular in connection with the question as to whether pollution damage caused by FSUs such as the <i>Slops</i> should be covered under the 1992 Conventions.</p> <p><u>Supplementary Fund Assembly:</u></p> <p>Information to be noted.</p>

### 1 Introduction

- 1.1 At its 42nd session, held in October 2008, the 1992 Fund Executive Committee considered the definition of 'ship' in connection with the *Slops* incident. The Committee noted that in the Director's

view, there was potential for unequal treatment as a result of courts in some Member States applying the definition of 'ship' in accordance with the 1992 Fund's policy, whereas in other Member States courts would apply a wider definition of 'ship', as the Greek Supreme Court had done.

- 1.2 A number of delegations stated that the 1992 Fund should not change its policy regarding the definition of 'ship' since that policy had been adopted by the 1992 Fund Assembly in October 1999 following a recommendation by the 2nd intersessional Working Group and that that policy was in their view appropriate. These delegations pointed out that to change the Fund's policy would not guarantee that courts in all Member States would apply the new policy and that it would not be appropriate to change it as a result of an occasional judgment issued by a court in a Contracting State. It was pointed out that for a change in the definition of 'ship' to be taken into account by national courts it would have to be as a modification of the text of the 1992 Conventions since national courts are only bound by the Conventions themselves.
- 1.3 Most delegations however recalled that, when discussing the definition of 'ship', the 1992 Fund 2nd intersessional Working Group, established by the 1992 Fund Assembly at its 3rd session in October 1998, had been split in its views. These delegations stated that the Fund's policy should evolve and that the decision of the Greek Supreme Court was a precedent, which was not in agreement with the 1992 Fund's policy. These delegations added that in their opinion the 1992 Fund should take the decisions of national courts into account.
- 1.4 The 1992 Fund Executive Committee instructed the Director to further examine the 1992 Fund's policy of the definition of 'ship' and to present a document for consideration by the Assembly at its October 2009 session (document 92FUND/EXC.42/14, paragraph 3.3.25 and 3.3.32).
- 1.5 As instructed by the Committee, the Director has further examined the 1992 Fund's policy on the definition of 'ship', in particular in relation to FSUs such as the *Slops*, with a view to determining whether there was a serious risk of unequal treatment as a result of courts in some Member States applying the definition of 'ship' in accordance with the 1992 Fund's policy, and courts in other Member States applying a wider definition of 'ship' and, if that were the case, whether the choice of another policy on the definition of 'ship' would diminish that risk. To that end, the Director has reviewed the policy considerations and decisions taken within the Organisation over the years regarding the definition of the 'ship', in particular in relation to floating storage units (FSUs).

## **2 Applicability of the 1992 Conventions to the *Slops***

- 2.1 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.

### *Decision by the Executive Committee*

- 2.2 In July 2000 the 1992 Fund Executive Committee, applying the policy of the 1992 Fund regarding the applicability of the 1992 Conventions to offshore craft, outlined in paragraph 3.9 below (cf document 92FUND/A.4/32, paragraphs 24.3 and 24.10), decided that the *Slops* should not be considered 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).

*Judgement by the Greek Supreme Court*

- 2.3 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 an 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).

3 **Previous policy considerations and decisions regarding the definition of the 'ship' in relation to FSUs**

*Considerations and decisions as regards FSUs*

- 3.1 In October 1998 the 1992 Fund Assembly established the 2nd intersessional Working Group to study *inter alia* whether, and if so to what extent, the 1992 Conventions applied to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).
- 3.2 The definition of 'ship' in Article I.1 of the 1992 Civil Liability Convention reads:
- 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.
- 3.3 This definition is incorporated by reference in the 1992 Fund Convention (Article 1.2)
- 3.4 As regards FSUs and FPSOs, the Director in April 1999 submitted document 92FUND/WGR.2/2 to the 2nd intersessional Working Group, which considered the applicability of the 1992 Conventions to offshore craft.
- 3.5 In that document the Director concluded, on the basis of an analysis of the preparatory works of both the Diplomatic Conference that brought the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention into existence, and the Diplomatic Conference at which the 1992 Protocols to the 1969 Civil Liability and the 1971 Fund Convention were adopted, that it appeared that the issue of the applicability of the 1984 Protocols to FSUs and FPSOs was not discussed at the 1984 Diplomatic Conference, that the considerations of the 1984 Diplomatic Conference were focused on unladen tankers and combination carriers, and that the issue was not considered at all at the 1992 Diplomatic Conference. For this reason the Director concluded that it was not possible, in his view, to make any assumption as to whether the authors of what later became the 1992 Protocols had intended the definition of 'ship' to cover FSUs and FPSOs.
- 3.6 The Director also pointed out that if FSUs and FPSOs contained oil, they did in fact constitute a risk of oil pollution and that in view of the purpose of the 1992 Conventions, ie to provide compensation to victims of oil pollution, it could be argued that there were reasons to include them within the scope of the Conventions. He added, however, that it should be recalled that the 1992 Conventions were drafted with a view to covering maritime carriage of oil (cf the preamble to the 1969 Civil Liability Convention).
- 3.7 The Director further stated that, in his view, in order to be covered by the 1992 Conventions, a craft should fulfil two criteria. Firstly, it should fall within the definition of 'ship', ie it should be 'constructed or adapted for the carriage of oil in bulk as cargo'. Secondly, the craft should have 'oil' on board, namely persistent hydrocarbon mineral oil on board as cargo or in the bunkers.

- 3.8 In the document, the Director suggested, in connection with the possible applicability of the 1992 Conventions to FSUs and FPSOs, two possible interpretations of the expression 'constructed or adapted for the carriage of oil in bulk as cargo' to the Working Group, namely:
- (i) when a craft is constructed or adapted in such a way that it is *capable* of carrying oil in bulk as cargo; or
  - (ii) only when a craft is constructed or adapted *for the purpose* of carrying oil in bulk as cargo.
- 3.9 The Director in his document also considered the importance of whether the oil on board the craft would in principle be subject to contributions under Article 10 of the 1992 Fund Convention, stating that it could be argued that if the oil in question would be taken into account for the purpose of the assessment of contributions to the 1992 Fund, then the Convention should apply to spills of such oil. He pointed out that the oil contained in FSUs and FPSOs would normally at some stage be brought by ship to a port or terminal installation, which meant that if the reception facility was located in a 1992 Fund Member State, such quantities would be reported as 'receipts ' of 'contributing oil' and would form the basis for levying contributions.
- 3.10 After careful analysis, the Director suggested to the Working Group that, as regards the applicability of the 1992 Conventions to FSUs and FPSOs, a choice could be made between a restrictive and a broader interpretation of the 1992 Conventions, as follows:
- (a) A restrictive interpretation would mean that an offshore craft would fall within the definition only when, after having been disconnected from the exploration or production facility, it carries oil to or from a port or terminal installation.
  - (b) A broader interpretation would extend the definition of 'ship' to include any craft, with or without its own means of propulsion, constructed or adapted so as to make it capable of carrying persistent oil, either in the cargo spaces or as bunkers, provided that the craft is underway (ie disconnected from the exploration or production facility) with persistent oil on board.
- 3.11 The 2nd intersessional Working Group accepted the restrictive interpretation suggested by the Director and drew the following conclusions (document 92FUND/A.4/21, paragraph 8.5):
- (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 field for operational reasons or simply to avoid bad weather.
- 3.12 At its 4th session, held in October 1999, the 1992 Fund Assembly decided to endorse the conclusions of the Working Group regarding the applicability of the 1992 Conventions to offshore craft as set out in paragraph 3.9. The Assembly emphasised that in any event the decision as to whether the 1992 Conventions applied to a specific incident would be taken in the light of the particular circumstances of that case. It was noted that the issue could be reconsidered if new information were to come to light (document 92FUND/A.4/32, paragraph 24.10).

*Considerations and decisions as regards permanently and semi-permanently anchored vessels*

- 3.13 In October 2006 the 1992 Fund Assembly considered the question of whether permanently anchored vessels engaged in ship-to-ship (STS) oil transfer operations fell within the definition of 'ship' under the 1992 Civil Liability and Fund Conventions, as interpreted by the Assembly, and whether contributing oil received by such vessels should be considered as received for the purpose of Article 10.1(a) of the 1992 Fund Convention and therefore be taken into account for the levying of contributions (document 92FUND/A.11/35, paragraph 32.1).

- 3.14 The Assembly took note of the Director's view that when such vessels were engaged in STS operations whilst at anchor they functioned in much the same way as offshore craft, namely as floating storage units (FSUs) and floating production, storage and offloading units (FPSOs) and that therefore he considered that permanently and semi-permanently anchored vessels engaged in STS oil transfer operations should be regarded as 'ships' only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operated (document 92FUND/A.11/35, paragraph 32.8).
- 3.15 The Assembly decided that permanently and semi-permanently anchored vessels engaged in STS oil transfer operations should be regarded as 'ships' only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operated, but that in any event the decision as to whether such a vessel fell within the definition should be decided in the light of the particular circumstances of the case (document 92FUND/A.11/35, paragraph 32.12).

#### **4 Considerations by the Director**

- 4.1 The Director first of all considers that the international regime based on the 1992 Conventions has an important role to play in the protection of persons in Member States against the financial consequences of oil pollution incidents in connection with the carriage of oil by sea. For the general public it might be difficult to understand why an FSU such as the *Slops* would not be covered under the 1992 Conventions. It looks just like a ship, it is afloat at sea and it regularly contains significant quantities of persistent oil capable of causing serious pollution damage. When taking a closer look however, there are quite distinct differences in the way FSUs are operated compared to tankers, and these differences need to be taken into account when deciding whether and to what extent their activities should be covered by the 1992 Conventions. It is incumbent upon the States Parties to the international compensation regime to reconcile the two perceptions and make sure that the boundaries of the applicability of the international regime are clear, sensible and defensible.

##### *The likelihood of another incident like the Slops and the implications thereof*

- 4.2 It has been made clear by the *Slops* incident that incidents with FSUs can occur and may cause serious pollution damage. It has also made it clear that there is room for an interpretation regarding the applicability of the 1992 Conventions to FSUs which is different from the restrictive interpretation which was chosen by the 1992 Fund Assembly. It is of course very difficult to determine with a degree of certainty the likelihood that an incident similar to the *Slops* incident will happen again in future. However, on the basis of the information collected by the Director in 2006, it appears that the total annual throughput of STS operations involving permanently or semi-permanently anchored vessels acting as FSUs at the time corresponded to about 2% of the total quantity of contributing oil received in 1992 Fund Member States in 2004. It seems, therefore, possible that an incident similar to that of the *Slops* will happen again in future.
- 4.3 If that were to happen there are two possibilities; either the national courts would follow the 1992 Fund's interpretation or they would not. If the national courts were to follow the 1992 Fund's interpretation of the definition of 'ship' in respect of FSUs, the persons affected by such an incident would not be protected by the 1992 Conventions, since there would neither be strict liability, compulsory insurance and direct action, nor the protection of the 1992 Fund on top of that. If, on the other hand, the national courts were to adopt a wider interpretation, as happened in the *Slops* incident, then the persons affected would be protected by the 1992 Conventions, but the 1992 Fund would most likely end up paying the entire damage since the Member State involved would have followed the 1992 Fund's interpretation and therefore the ship would not be strictly liable and insured under the 1992 CLC.
- 4.4 The first scenario might not be able to count on the understanding and support of the general public and the second is not very desirable from the point of view of the 1992 Fund. Given that there is, as the *Slops* incident has shown, room for interpretation and therefore no guarantee that national courts follow the Fund's interpretation, there is scope for unequal treatment, as persons affected by an incident involving an FSU in a State in which the courts do not follow the Fund's interpretation would

be compensated, by the Fund, whereas persons in a State in which the courts do follow the Fund's interpretation would not be compensated.

- 4.5 If the 1992 Fund were to adopt a wider interpretation, according to which an FSU would be considered a 'ship' under the 1992 Conventions, incidents with FSUs would in principle be covered under the international regime and the compensation to be paid would be shared between the shipowner/insurer and the 1992 Fund in accordance with the 1992 Conventions, as is the normal practice. There would thus be protection by the international regime of persons affected by incidents with FSUs, equal treatment of victims in all Member States and equitable sharing for these incidents between the 'ship side' and the 'cargo side'.
- 4.6 In the view of the Director it is not very likely that a wider interpretation would be challenged by claimants. If that were to happen however, it is not very likely that a national court would decide not to follow such wider interpretation and policy of the 1992 Fund, since the court would in that case have to deny claimants protection under the international regime against a stated policy of the Organisation. Therefore, the risk of unequal treatment would be diminished under a wider interpretation covering pollution damage resulting from incidents involving FSUs such as the *Slops*.

*Consequences of a possible policy change*

- 4.7 For the Fund to adopt a policy which would secure the applicability of the 1992 Conventions to FSUs such as the *Slops*, it would be necessary to move away from the notion that coverage of FSUs under the international regime could only exist when they are transporting oil to or from a port or terminal in the territory. It would have to be decided that the requirement of 'carriage' in the definition of 'ship' and that of 'carried' in the definition of 'oil' would not only be fulfilled in the case the FSU was transporting oil (as in moving it from A to B) but also in the case it was merely 'containing' oil. In view of the fact that none of the proposals made in the past for interpretation of the definition of 'ship' in relation to FSUs or otherwise has ever suggested that, and the fact that there seemed to be a clear split in the Executive Committee at its October 2008 meeting, and indeed in meetings of the Assembly in the past where the issue was discussed, as to the desirability to revise the interpretation of the definition of 'ship', the Director is of the view that it will probably be difficult to get sufficient agreement between Member States on such a far-reaching policy change.
- 4.8 Such a policy change in respect of FSUs such as the *Slops* would also give rise to the question as to where the line would have to be drawn next, since there is in practice a variety of offshore craft other than FSUs engaged in operations during which, at some point, they contain significant quantities of persistent oil.
- 4.9 Furthermore, such a policy change would have consequences for the application of the 1992 CLC as well, in that FSUs such as the *Slops* would become subject to strict liability and, in many cases, compulsory insurance. This would have an impact on the shipowner in view of the insurance arrangements for such craft, as well as on Member States in connection with the certification of such craft.
- 4.10 Finally, a decision to widen the applicability of the international regime to FSUs such as the *Slops* would also have far-reaching consequences for the present contribution arrangements, which can be explained as follows. The Assembly of the 1992 Fund decided, at its 11th session, held in October 2006, that all contributing oil received through STS operations by ships permanently or semi-permanently at anchor in the territory, including the territorial sea, of a State Party to the 1992 Fund Convention, should be considered as received for the purpose of Article 10.1 (a) of that Convention and therefore be taken into account for the levying of contributions (cf document 92FUND/A.11/35, paragraphs 32.17 and 32.20). In connection with that decision, the interpretation of (part of) the concept of 'received', ie that discharge into a floating tank within the territorial waters of a Member State (including its ports) constitutes a receipt of contributing oil, irrespective of whether the tank is connected with onshore installations via pipeline or not, was changed in that ships were, from then on, considered to be floating tanks in this connection not only if they are 'dead' ships, ie if they are not ready to sail, but also if they are permanently or semi-permanently at anchor

(cf document 92FUND/A.11/35, paragraph 32.19). It is difficult to see how an FSU could be, at the same time, a ship for the purpose of the liability side of the 1992 Conventions and equal to a port or terminal installation for the purpose of the contribution side. Therefore, an interpretation that would bring FSUs such as the *Slops* under the 1992 Conventions for the purpose of liability and compensation would have to go hand in hand with a change of interpretation on the contribution side.

## **5 Director's conclusions**

For the reasons outlined above, the Director is of the view that making a policy change so that pollution damage caused by FSUs such as the *Slops* would be covered under the international regime, would necessitate in-depth research, both into the way the operations of such craft are carried out in practice and as regards the consequences of such change in practice. Complex legal questions of interpretation concerning these issues would also have to be resolved. Therefore, although, with a view to the aims of the international regime, it could be considered justified to explore the possibility of a policy change regarding the interpretation of the definition of 'ship', such that the 1992 Conventions would cover pollution damage caused by FSUs such as the *Slops*, the Director is of the view that this would need strong support from, and involvement of, the Member States as well as the industries involved in order to secure a reasonable chance of success. Given the divergence of opinions expressed both at the 42nd session of the Executive Committee and at meetings of the 1992 Fund Assembly dealing with this subject in the past, it would be for the 1992 Fund Assembly to make a decision on this point.

## **6 Action to be taken**

### 1992 Fund Assembly:

The 1992 Fund Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to decide whether to undertake work towards a change regarding the interpretation of the definition of 'ship', in particular in connection with the question as to whether pollution damage caused by FSUs such as the *Slops* should be covered under the 1992 Conventions.

### Supplementary Fund Assembly:

The Supplementary Fund Assembly is invited to take note of the information contained in this document.

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