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GUIDANCE FOR MEMBER STATES

Consideration of the definition of ‘ship’

Note by Secretariat

Summary:

At its October 2015 session, the 1992 Fund Administrative Council, decided to accept the recommendations of the seventh intersessional Working Group regarding the illustrative list of vessels falling clearly within or outside the definition of ‘ship’ under Article I(1) of the 1992 Civil Liability Convention (1992 CLC), and which forms the first part of the hybrid approach discussed within the Working Group. The Administrative Council also decided to adopt the concept of the maritime transport chain, as an interpretive tool, to address those situations or ‘grey areas’ on a case-by-case basis, where it was not clear whether a vessel fell within the definition of ‘ship’, and which forms the second part of the hybrid approach.

The Administrative Council further decided to instruct the Secretariat to produce a succinct guidance document reflecting the conclusions of the Working Group to be considered by the 1992 Fund Assembly at its April 2016 session.

The draft guidance document is contained in Annex I to this document for consideration by the 1992 Fund Assembly. Annex II contains examples of when the maritime transport chain commences and concludes. Should the Assembly approve the proposed text of both annexes, the guidance document will be published electronically in a similar format to other IOPC Funds’ publications.

Action to be taken:

1992 Fund Assembly

The 1992 Fund Assembly is invited to:

- (a) take note of the information contained in this document; and
- (b) decide whether to approve the Guidance for Member States in respect of the consideration of ‘ship’ as contained in Annexes I and II.

Supplementary Fund Assembly

Information to be noted.

1 Background

- 1.1 The 1992 Fund seventh intersessional Working Group met on four occasions, in April 2012, April 2013, May 2014 and April 2015. In addition, a consultation group, established by the Working Group, held a meeting in October 2013.

- 1.2 In October 2015, the Working Group presented its final report to the 1992 Fund Administrative Council (documents [IOPC/OCT15/4/2](#) and IOPC/OCT15/4/2/WP.1). After a number of delegations made suggestions to the text of document IOPC/OCT15/4/2/WP.1, the Administrative Council decided to instruct the Secretariat to produce a succinct guidance document reflecting the conclusions of the Working Group.
- 1.3 The guidance document is intended to provide clarity to governments and a range of maritime entities including Flag States, shipowners, insurers, operators of offshore craft and the national courts of Member States, specifically on the issue of whether a vessel clearly falls within, or outside, of the definition of 'ship' pursuant to Article I(1) of the 1992 CLC. The document also provides information regarding the maritime transport chain, which is to be used as an interpretive tool to address those situations or 'grey areas', on a case-by-case basis, where it is not clear whether a vessel falls within the definition of 'ship'.
- 1.4 The draft guidance document is contained in Annex I to this document for consideration by the 1992 Fund Assembly. Annex II contains examples of when the maritime transport chain commences and concludes.
- 1.5 Should the 1992 Fund Assembly decide to approve the draft text of the guidance document, the Secretariat would publish electronically the document in a similar format to other IOPC Funds' publications, which can be found under the publications section of the website (www.iopcfunds.org).

2 Action to be taken

1992 Fund Assembly

- 2.1 The 1992 Fund Assembly is invited:
 - (a) to take note of the information contained in this document; and
 - (b) to decide whether to approve the Guidance for Member States in respect of the consideration of 'ship' as contained in Annexes I and II.

Supplementary Fund Assembly

- 2.2 The Supplementary Fund Assembly is invited to take note of the information provided.

ANNEX I

[Draft]

GUIDANCE DOCUMENT FOR MEMBER STATES

CONSIDERATION OF THE DEFINITION OF 'SHIP'

PREFACE

This guidance document provides a general guide to the consideration of the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (1992 CLC).

This document may assist in determining whether compensation should, in principle, be paid following an oil spill incident.

This document reflects the decision taken by Member States of the International Oil Pollution Compensation Fund, 1992 (1992 Fund) at the October 2015 session of the 1992 Fund Administrative Council (document [IOPC/OCT15/11/1](#), paragraph 4.3.23), and should not be seen as an authoritative interpretation of the relevant international Conventions.

THE DEFINITION OF ‘SHIP’

1 What has been agreed in respect of the issue regarding the definition of ‘ship’

- 1.1 In October 2015, the 1992 Fund Administrative Council, agreed to accept the recommendations of the seventh intersessional Working Group regarding the illustrative list of vessels which fall clearly within or outside the definition of ‘ship’ under Article I(1) of the 1992 Civil Liability Convention (1992 CLC).
- 1.2 The Administrative Council noted that the Working Group had emphasised that the list is not exhaustive and is only indicative of the craft which clearly fall within the definition of ‘ship’ or clearly fall outside the definition, and that other craft with similar characteristics may fall within or outside the definition depending on the circumstances, which are to be considered on a case-by-case basis.

2 The ‘hybrid approach’

- 2.1 Due to the difficulties that might arise in attempting to classify certain categories of vessels or scenarios as within or outside the definition of ‘ship’ under Article I(1) of the 1992 CLC, the 1992 Fund Administrative Council decided to adopt a ‘hybrid approach’ whereby Member States would rely on the agreed illustrative list of vessels which fall clearly within or outside the definitions where possible, and use the concept of the ‘maritime transport chain’ as an interpretive tool for addressing those ‘grey areas’ or situations where it was not clear if the craft was a ‘ship’ or not.

3 Illustrative list of vessels falling clearly within or outside the definition of ‘ship’

- 3.1 The list of vessels which fall clearly within the definition of ‘ship’ is as follows:
- 1) A seagoing vessel or seaborne craft constructed or adapted for the carriage of oil in bulk as cargo when it is actually carrying oil in bulk as cargo;
 - 2) A seagoing vessel or seaborne craft in ballast following a voyage carrying oil with residue of oil onboard;
 - 3) A craft^{<1>} carrying oil in bulk as cargo being towed (or temporarily at anchor for purposes incidental to ordinary navigation or force majeure or distress);
 - 4) A ship capable of carrying oil and other cargoes (i.e. an Oil Bulk Ore carrier (OBO)) 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;
 - 5) Offshore craft^{<2>} that have their own independent motive power, steering equipment for seagoing navigation and seafarer onboard so as to be employed either as storage units or carriage of oil in bulk as cargo and that have the element of carriage of oil and undertaking a voyage; and
 - 6) Craft that are originally constructed or adapted (or capable of being operated) as vessels for carriage of oil, but later converted to FSOs, with capacity to navigate at

<1> This could be a barge or an offshore craft.

<2> The term ‘offshore craft’ could be a Floating Drilling Production Storage and Offloading unit (FDPSO), Floating Production Storage and Offloading unit (FPSO), Floating Storage and Offloading unit (FSO) or Floating Storage Unit (FSU) whether purpose-built, or converted or adapted from seagoing vessels constructed for the carriage of oil.

sea under their own power and steering retained and with seafarer onboard and that have the element of carriage of oil and undertaking a voyage.

3.2 The owner of a vessel which falls clearly within the definition of 'ship', and which carries more than 2 000 tons of oil in bulk as cargo, is required to maintain insurance or other financial security, to cover his liability for pollution damage under the 1992 CLC, in accordance with Article VII(1) of the 1992 CLC.

3.3 Similarly, a Contracting State must issue a certificate to vessels falling within the definition of 'ship' in accordance with Article VII(2) of the 1992 CLC.

4 Examples of craft which clearly fall outside the definition of 'ship'

4.1 The list of vessels which clearly do not fall within the definition of 'ship' is as follows:

- 1) Barges certified or classed only for use on inland water ways;
- 2) Vessels which are not constructed or adapted for the carriage of oil in bulk as cargo. Such categories include 'non-tanker' vessels, such as:
 - (a) Container vessels;
 - (b) Cruise Ships;
 - (c) Tugs;
 - (d) Dredgers;
 - (e) General cargo vessels;
 - (f) Diving support vessels;
 - (g) Bulk carriers;
 - (h) Passenger vessels;
 - (i) Car carriers;
 - (j) Fishing vessels; and
 - (k) Ferries.
- 3) Vessels or craft involved in:
 - (a) Exploration, for example jack-up rigs or Mobile Offshore Production Units (a jack-up platform whether or not it carries oil, gas and water separation equipment); or
 - (b) The production or processing of oil, for example Drill-ships, FDPSOs, and FPSOs, including separation of water and gas, and its management.

4.2 Vessels or craft which do not fall within the definition of 'ship', are not required to maintain insurance or other financial security, to cover liability for pollution damage under the 1992 CLC, in accordance with Article VII(1) of the 1992 CLC.

4.3 Similarly, there is no requirement for the Contracting State to issue a certificate attesting that insurance or other financial security is in place in accordance with the provisions of the 1992 CLC, in respect of those vessel types which clearly do not fall within the definition of 'ship'.

5 Maritime Transport Chain

5.1 Where in a situation it is not clear whether a vessel falls within the definition of 'ship' from the list above, the situation will be solved by the decision of the 1992 Fund governing bodies on a case-by-case basis, using the maritime transport chain, as an interpretive tool.

- 5.2 The concept of the maritime transport chain is designed to reflect the realisation by the maritime community of the dangers of pollution created by the international maritime carriage of oil in bulk as cargo.
- 5.3 The maritime transport chain commences after the loading of oil and concludes when the oil is finally discharged into a port or terminal installation as defined in Article 1.8 of the 1992 Fund Convention. This maritime transport chain includes maritime operations or transportation of oil. Maritime operations include ship-to-ship (STS) operations; periods of waiting; storage (excluding those without navigational capability)^{<3>}; and anchoring pending final delivery to a port, terminal installation or final consumer/recipient^{<4>}.
- 5.4 Examples of the maritime transport chain appear at Annex II.

* * *

<3> The maritime transport chain terminates at storage facilities without navigational capability and another maritime transport chain begins when the oil is loaded from such storage facilities to a vessel.

<4> It could be fuel oil delivered from a ship that is storing it for transfer to a ship that will use it for its engines. In this case, the maritime transport chain would finalise when the oil is transferred to the ship that uses it.

ANNEX II

EXAMPLES OF WHEN THE MARITIME TRANSPORT CHAIN COMMENCES AND CONCLUDES (to be included as Annex to the final guidance document)

Example 1- loading oil from an onshore source

- 1.1 In the case of oil produced on land, the maritime transport chain commences when the oil is loaded as bulk cargo into a seagoing or seaborne craft and ends when the oil is discharged in a port or terminal installation in the territory of a Member State.
- 1.2 If that oil was then to be reloaded into another vessel for transportation, either internally (cabotage) within the Member State's territorial waters or exclusive economic zone (or equivalent), or outside of the territorial waters or exclusive economic zone (or equivalent), this would amount to a new maritime transport chain.

Example 2 – loading oil from a unit which received oil from an offshore source

- 1.3 A logical explanation of when the maritime transport chain commences for scenarios where oil is produced offshore, is when oil is loaded into a vessel other than the one which received the oil directly from the subsea well to which it was connected.
- 1.4 Typically, such scenarios would include:

A seagoing vessel or seaborne craft loading oil from:
 - (i) Another seagoing or seaborne craft in a typical ship-to-ship (STS) transfer operation (This item would only belong in this list if the seagoing/seaborne craft that was discharging oil had received that oil directly from a well) ;
 - (ii) FPSO;
 - (iii) FDPSO;
 - (iv) Jack-up rigs;
 - (v) Mobile offshore production units; or
 - (vi) FSO

- 1.5 In the case of the FSO, if it was a purpose-built FSO or craft as mentioned in paragraph 3.1 (5) or (6) of the Guidance document, the question would be whether the FSO or the craft was also carrying oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. If so, the FSO itself would also be classed as a ship under the 1992 Civil Liability Convention (1992 CLC), as well as the receiving vessel. However, the FSO would fall outside the scope of the 1992 Conventions when it leaves the offshore field for operational reasons or simply to avoid bad weather.
- 1.6 For other cases involving such offshore craft, specifically FPSOs and FDPSO units, the vessels are not within the maritime transport chain covered by the compensation regimes, since the activities of exploration, drilling, production or processing, are outside the scope of the compensation regime.

Example 3 – loading oil from a mooring or platform which received oil from an offshore source

- 1.7 There is a second situation where oil is produced offshore, where it could be said that the maritime transport chain commences when the oil is loaded into a seagoing or seaborne craft constructed or adapted for the carriage of oil in bulk. Much of the offshore oil produced is brought to the surface from subsea wells via pipes ('risers') leading from the seabed, up to a fixed mooring buoy or platform, rather than directly to a vessel. The oil is then pumped into a tanker, or series of tankers, FSO or FPSO, which connect to the fixed mooring buoy or platform.

- 1.8 In most cases a vessel, (typically a tanker) would attach to the platform or mooring, load the oil cargo, then depart on its voyage laden with oil, in which case, once the tanker had loaded the cargo, it would fall within the definition of ‘ship’ contained within Article I(1) of the 1992 CLC. It is submitted that if an FSO which has its own independent motive power, steering equipment for seagoing navigation and seafarer with certification of competency on board, attached to the platform or mooring buoy, loaded the oil cargo, then departed on its voyage laden with oil, only once the FSO had loaded the cargo, would it fall within the definition of ‘ship’ contained within Article I(1) of the 1992 CLC.
- 1.9 However, in some cases, an FSO that has its own independent motive power, steering equipment for seagoing navigation and seafarer with certification of competency on board and the appropriate connection device to attach to the platform or mooring, would attach to the mooring buoy or platform, then pump the oil collected onto a vessel (typically a tanker). In this case involving an FSO and a vessel, one maritime transport chain would commence when the oil was transferred onto the vessel, and if the FSO disconnected from the platform or mooring buoy, a separate maritime transport chain would commence in respect of that operation involving such an FSO.

Points to note

- 1.10 In Examples 1-3 above, the maritime transport chain would commence, irrespective of whether or not the cargo had a known destination at the time of loading^{<1>}.
- 1.11 Furthermore, even if the final destination of the oil cargo remains unknown, and as a consequence, the carrying vessel is directed to anchor at a location for an extended period of time, the carrying vessel or seaborne craft nevertheless remains within the maritime transport chain until the cargo is finally delivered.
- 1.12 It is important to note that all the examples are based on the following assumptions:
- (a) the vessel involved is laden with ‘oil’ as defined in Article I(5) of the 1992 CLC; and
 - (b) the ‘maritime transport chain’ includes maritime operations or transportation of oil after loading, until final discharge into a port or terminal installation, as defined in Article 1.8 of the 1992 Fund Convention. These maritime operations include STS operations; periods of waiting; storage (excluding those without navigational capability)^{<2>}; and anchoring pending final delivery to a port, terminal installation or final consumer/recipient^{<3>}.

<1> In some cases, cargoes are laden purely for arbitrage or speculative purposes, awaiting an increase in the oil price, and subsequently the ownership of the oil and its final destination may change many times before final delivery.

<2> The maritime transport chain terminates at storage facilities without navigational capability and another maritime transport chain begins when the oil is loaded from such storage facilities to a vessel.

<3> It could be fuel oil delivered from a ship that is storing it for transfer to a ship that will use it for its engines. In this case, the maritime transport chain would finalise when the oil is transferred to the ship that uses it.