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FINAL REPORT OF THE SEVENTH INTERSESSIONAL WORKING GROUP

CONSIDERATION OF THE DEFINITION OF 'SHIP'

Note by the Secretariat

Summary:

The seventh intersessional Working Group, under the chairmanship of Mrs Birgit Sølling Olsen (Denmark), focused on the proposals designed to conclude the outstanding matters previously discussed by the 1992 Fund seventh intersessional Working Group, relating to the issue of the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (1992 CLC).

The Working Group met on four occasions, in April 2012, April 2013, May 2014 and April 2015. In addition, a consultation group held a meeting in October 2013.

At its first meeting held in April 2012, the Chairman of the Working Group presented document [IOPC/APR12/11/1](#) which identified five key issues which had been raised by Professor Vaughan Lowe QC in document [IOPC/OCT11/4/4](#), and which were used to focus the Working Group's discussions in subsequent meetings.

At its second meeting in April 2013, several key issues were identified for further discussion. These issues were considered in detail in October 2013 by the Consultation Group which was established by the Chairman at the Working Group's second meeting. The Consultation Group also considered a number of documents submitted by the Chairman and by the delegations of Spain, Japan, the International Group of P&I Associations, the Republic of Korea and the International Chamber of Shipping.

At its third meeting in May 2014, the Working Group considered document [IOPC/MAY14/8/1](#) submitted by the Chairman, which summarised the discussions of the Consultation Group. It also considered document [IOPC/MAY14/8/2](#) submitted by the Australian delegation, and focused in particular on the proposal to consider criteria to be applied by Member States when considering an issue involving the definition of 'ship' under Article I(1) of the 1992 CLC.

The fourth meeting in April 2015, which was the final meeting of the Working Group, focused on the discussion of document [IOPC/APR15/8/1](#) which contained the draft of an illustrative list of vessels, and which invited Member States to consider whether these were clearly within or outside the definition of 'ship' under Article I(1) of the 1992 CLC.

The Working Group also considered the proposal to use a 'hybrid approach' using

the concept of the maritime transport chain as an interpretive tool for those vessels or scenarios where it is not clear whether they fall within the definition of ‘ship’.

The Working Group further considered the question of whether oil received from vessels ‘permanently or semi-permanently at anchor’ should count as received for the purposes of Article 10.1 of the 1992 Fund Convention.

Action to be taken: 1992 Fund Assembly

- i) Decide whether to accept the recommendations of the Working Group regarding;
 - 1) The illustrative list of vessels clearly within or outside the definition of ‘ship’ under Article I(1) of the 1992 CLC;
 - 2) The hybrid approach using the maritime transport chain for those ‘grey’ areas where it is not clear whether the vessel falls within or outside the definition of ‘ship’; and
 - 3) The issue of contributions from vessels performing ship-to-ship (STS) operations whilst ‘permanently or semi-permanently at anchor’, under Article 10.1 of the 1992 Fund Convention
- ii) Decide whether to instruct the Secretariat to produce a guidance document reflecting the conclusions of the Working Group, to be presented for consideration at the Spring 2016 session of the 1992 Fund Assembly.

1 Introduction/Background Information

- 1.1 In October 2011 the Director presented document [IOPC/OCT11/4/4](#), containing the legal analysis conducted by Professor Vaughan Lowe QC of the interpretation of the definition of ‘ship’ under the 1992 Civil Liability Convention (1992 CLC). The discussion of this document led to the establishment by the 1992 Fund Assembly of the seventh intersessional Working Group to consider further the issues relating to the definition of ‘ship’. The terms of reference of the Working Group as originally defined, are in document [IOPC/OCT11/11/1](#), Annex III.

First meeting of the seventh intersessional Working Group (April 2012)

- 1.2 At its first meeting held in April 2012, the Chairman of the Working Group presented document [IOPC/APR12/11/1](#) which identified five key issues which had been raised by Professor Vaughan Lowe QC and which were used to focus the Working Group’s discussions in subsequent meetings.

Second meeting of the seventh intersessional Working Group (April 2013)

- 1.3 At the Working Group’s second meeting held in April 2013, document [IOPC/APR13/7/1/Rev.1](#) submitted by the Netherlands, documents [IOPC/APR13/7/2](#) and [IOPC/APR13/7/3](#) submitted by Australia and document [IOPC/APR13/7/4](#) submitted by the International Chamber of Shipping (ICS) and the International Group of P&I Associations (International Group) were presented for discussion by the Working Group. As a result of the discussions of those documents, the Chairman proposed the establishment of a Consultation Group consisting of the delegations of Australia, Japan, Netherlands, Norway, the International Group, ICS and any other delegations who wished to contribute, with the aim of presenting more solid proposals to the Working Group’s next meeting, possibly in the form of a guidance document or criteria that the IOPC Funds and Member States could follow.

- 1.4 In preparation for the meeting of the Consultation Group on 28 October 2013, and prior to the third meeting of the Working Group in May 2014, the Consultation Group was invited to consider and discuss the possibility of agreeing criteria to be used to assist the 1992 Fund Assembly in respect of future incidents where consideration of the definition of ‘ship’ might be an issue, as defined in sections 3 and 4 of document [IOPC/OCT13/4/3/1](#).

Meeting of Consultation Group (28 October 2013)

- 1.5 The Consultation Group considered the documents prepared by the delegations of Spain (document [IOPC/OCT13/4/3/2](#)), Japan (document [IOPC/OCT13/4/3/3](#)), the International Group (document [IOPC/OCT13/4/3/4](#)), the Republic of Korea (document [IOPC/OCT13/4/3/5](#)) and the International Group and ICS (document [IOPC/OCT13/4/3/6](#)).
- 1.6 At the meeting on 28 October 2013, the Consultation Group considered in detail the concept of the ‘maritime transport chain’ introduced by the Spanish delegation, and also discussed the issue of contributions, particularly with reference to the discharge of oil into FSUs and/or floating storage and offloading units (FSOs) located in the territorial waters of the State Party to the Convention, and discharge into tankers remaining at the same position for a long period of time performing ship-to-ship (STS) operations.

Third meeting of the seventh intersessional Working Group (May 2014)

- 1.7 At the Working Group’s third meeting held in May 2014, the Chairman submitted document [IOPC/MAY14/8/1](#) which summarised the discussions of the Consultation Group and invited the Working Group to consider two possible approaches to the definition of ‘ship’ and to consider further contribution issues in relation to STS transfer operations. In addition, the Australian delegation submitted document [IOPC/MAY14/8/2](#) for discussion.

Report of the Chairman of the Working Group to the 1992 Fund Assembly (October 2014)

- 1.8 In October 2014, the Chairman of the Working Group presented document [IOPC/OCT14/4/2/Rev.1](#) which summarised the discussions and conclusions of the third meeting of the seventh intersessional Working Group held in May 2014.
- 1.9 The Chairman stated that the document she intended to issue for the next meeting of the Working Group would summarise those areas where consensus had previously been reached and would focus on those issues which had not yet been resolved. All delegations who took the floor supported the proposal by the Chairman to revise the Group’s Terms of Reference to enable one further meeting of the Working Group, so that it could end its work in Spring 2015 and report its conclusions to the 1992 Fund Assembly in October 2015.

Fourth meeting of the seventh intersessional Working Group (April 2015)

- 1.10 In April 2015, the Working Group considered document [IOPC/APR15/8/1](#) submitted by the Chairman and document submitted by the Republic of Korea (document [IOPC/APR15/8/1/1](#)). The Chairman noted that it appeared that there was broad agreement with a number of issues discussed in previous meetings, but that there were also a number of important issues where no consensus had, to date been agreed, and upon which the Working Group was encouraged to focus in order to conclude its work.

2 Terms of Reference

- 2.1 The 1992 Fund seventh intersessional Working Group was established by the 1992 Fund Assembly at its October 2011 session. It adopted Terms of Reference for the Group (revised in 2013) as contained in document [IOPC/OCT13/11/1](#), Annex II. At its meeting in May 2014, the Working Group proposed that its Terms of Reference should be extended to enable the Group to hold one further meeting in spring 2015 and present a final report to the October 2015 session of the 1992 Fund Assembly.

2.2 The revised Terms of Reference of the Working Group as determined by the 1992 Fund Assembly at its 19th session in October 2014, covered the following themes:

- (a) The need to find solutions without changing the current Conventions;
- (b) The need to analyse the consequences that different interpretations outlined in document [IOPC/OCT11/4/4](#) and other related documents might or could have on the coverage and contributions of the international compensation regimes;
- (c) A request to recommend to the Assembly a uniform approach to the interpretation of the definition of ‘ship’ under Article I(1) of the 1992 CLC and Article 10 of the 1992 Fund Convention;
- (d) To report its findings and/or recommendations to each session of the 1992 Fund Assembly, with a view to terminating its work and presenting a final report to the October 2015 session of the 1992 Fund Assembly.

The terms of reference also state as decided by the 1992 Fund Assembly that the Working Group shall have as its Chairman, Mrs Birgit Sølling Olsen (Denmark).

2.3 The revised terms of reference of the Working Group are at Annex I.

3 **Participation**

3.1 The following Member States were represented at one or more of the Working Group or Consultation Group meetings:

Algeria	Grenada	Portugal
Angola	India	Qatar
Antigua and Barbuda	Ireland	Republic of Korea
Argentina	Islamic Republic of Iran	Russian Federation
Australia	Japan	Saint Kitts and Nevis
Bahamas	Kenya	Saint Lucia
Belgium	Latvia	Singapore
Bulgaria	Liberia	South Africa
China ^{<1>}	Malaysia	Spain
Cameroon	Malta	Sri Lanka
Canada	Marshall Islands	Sweden
Colombia	Mexico	Syrian Arab Republic
Côte d’Ivoire	Monaco	Trinidad and Tobago
Cyprus	Morocco	Tunisia
Denmark	Mozambique	Turkey
Dominica	Namibia	United Arab Emirates
Dominican Republic	Netherlands	United Kingdom
Ecuador	New Zealand	United Republic of Tanzania
Estonia	Nigeria	Uruguay
Fiji	Norway	Vanuatu
Finland	Oman	Venezuela (Bolivarian
France	Panama	Republic of)
Germany	Papua New Guinea	
Ghana	Philippines	
Greece	Poland	

^{<1>} The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

- 3.2 Nine non-Member States - Brazil, Chile, Côte d'Ivoire, Guatemala, Indonesia, Peru, Saudi Arabia, Thailand, and Ukraine were represented as observers at one or more of the meetings.
- 3.3 The following intergovernmental and international non-governmental organisations participated in one or more of the Working Group or Consultation Group meetings as observers:

Intergovernmental organisations:

European Commission

International Maritime Organization (IMO)

Maritime Organisation of West and Central Africa (MOWCA)

International non-governmental organisations

BIMCO

Comité Maritime International (CMI)

Conference of Peripheral Maritime Organisations (CPMR)

International Association of Classification Societies Ltd (IACS)

International Association of Independent Tanker Owners (INTERTANKO)

International Chamber of Shipping (ICS)

International Group of P&I Associations

International Spill Control Organization (ISCO)

International Tanker Owners Pollution Federation Ltd (ITOPF)

International Union of Marine Insurers (IUMI)

Oil Companies International Marine Forum (OCIMF)

World Liquid Petroleum Gas Association (WLPGA)

4 **Documents considered by the Working Group**

The following documents were considered by the Working Group:

- 4 First meeting of the seventh intersessional Working Group (April 2012)

[IOPC OCT11/4/4](#) &
[IOPC/APR12/11/1](#)

Consideration of the definition of 'ship' – note by the Chairman

Following the presentation of document [IOPC/OCT11/4/4](#) in October 2011 containing the legal analysis conducted by Professor Vaughan Lowe QC of the interpretation of the definition of 'ship' under the 1992 Civil Liability Convention (1992 CLC), document [IOPC/APR12/11/1](#) invited the Working Group to consider the following issues, bearing in mind the implications these proposals could have for the international compensation regime in terms of liability, compensation and contributions:

- (a) Whether FSOs and FSUs fall within the definition of 'ship' within Article I(1) of the 1992 CLC;
- (b) Whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under Article I(1) of the 1992 CLC and whether the decision should be made in the light of the particular circumstances of the case;
- (c) Whether the 1992 Fund Assembly should confirm its decision, taken in October 2006, that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS oil transfer operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention;

- (d) Whether the 1992 Fund Assembly should decide that since the ‘mother’ vessels described in paragraphs 5.1 to 5.3 of document [IOPC/OCT10/4/3/1](#), are not ‘permanently or semi-permanently’ at anchor, the oil onboard them qualifies as ‘received’ for the purposes of Article 10.1 of the 1992 Fund Convention; and
- (e) Whether one year is a reasonable time period beyond which a vessel should be considered ‘permanently or semi-permanently’ at anchor, and therefore whether oil received in such vessels should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention and whether the decision should be made in the light of the particular circumstances of the case.

4.2 Second meeting of the seventh intersessional Working Group (April 2013)

[IOPC/APR13/7/1/Rev.1](#) *Definition of ‘ship’ under the 1992 Civil Liability and 1992 Fund Conventions - submitted by the Netherlands*

The Netherlands delegation submitted document [IOPC/APR13/7/1/Rev.1](#) which identified various ships and activities, and proposed an interpretation for coverage of and contribution to the international compensation regime.

The Netherlands delegation identified the following ships and activities:

- i. A loaded tanker, at the same position for a long time;
- ii. A tanker, at the same position, for a long period of time, performing STS operations;
- iii. An offshore craft; and
- iv. A floating waste oil reception facility.

[IOPC/APR13/7/2](#) *Consideration of the definition of ‘ship’ - submitted by Australia*

The Australian delegation submitted document [IOPC/APR13/7/2](#) which proposed the development of interpretive criteria along the lines suggested by Professor Vaughan Lowe QC in document [IOPC/OCT11/4/4](#), Annex I, paragraphs 113-130, and also suggested additional criteria and comments for consideration by the Working Group.

[IOPC/APR13/7/3](#) *Drifting barges and the definition of ‘ship’ - submitted by Australia*

Document [IOPC/APR13/7/3](#) submitted by the Australian delegation, raised for consideration by the Working Group, the scenario of a barge which had lost its tow line, and questioned whether under such circumstances the barge would lose its status as a ‘ship’ under Article I(1) of the 1992 CLC.

[IOPC/APR13/7/4](#) *Consideration of the definition of ‘ship’ under Article I(1) of the 1992 Civil Liability Convention and Article 1.2 of the 1992 Fund Convention – Submitted by the International Chamber of Shipping and the International Group of P&I Associations*

The industry observer delegations which authored document [IOPC/APR13/7/4](#), submitted information and statistics to assist the deliberations of the Working Group. Those statistics indicated that 11 Member States had previously issued CLC State Certificates in respect of 41 FSOs/FSUs.

4.3 Meeting of the Consultation Group (October 2013)[IOPC/OCT13/4/3/1](#)*Consideration of the Definition of 'ship' – Note by the Chairman*

The Chairman's paper presented the decisions of the Working Group regarding the five issues considered in document [IOPC/APR12/11/1](#), and also proposed draft general criteria for consideration by the Working Group, with the intention that such criteria could be considered by the governing bodies of the 1992 Fund on a case by case basis, to decide whether the vessel in question was a 'ship' under Article I(1) of the 1992 CLC.

[IOPC/OCT13/4/3/2](#)*Definition of 'ship' – submitted by Spain*

The Spanish delegation submitted document [IOPC/OCT13/4/3/2](#), which proposed that the definition of 'ship', was centred on the capacity to carry oil in the maritime transport chain, and which included those maritime transport activities which involved a risk of pollution damage from persistent mineral oil, including containment or storage, whilst excluding matters such as damage resulting from any activity of production or processing of oil, including separation of water and gas and its management, or activities other than containment so that oil can be transported from its origin to its final destination.

In the opinion of the author of the document, the maritime transport chain started from the moment when the oil left the production, processing or treatment plant, whether land or off-shore, until it was delivered to its final destination, whilst noting that the transport chain only covered carriage by sea under the 1992 CLC.

[IOPC/OCT13/4/3/3](#)*Definition of 'ship' – submitted by Japan*

The Japanese delegation, by submitting document [IOPC/OCT13/4/3/3](#), sought to provide clarification on the interpretation of the definition of 'ship', by referring to the drafting history of the Conventions and Protocols, and the past discussion and decisions of the governing bodies of the IOPC Fund, including specifically, the decisions of the 1971 Fund Assembly and 1992 Fund Assembly on floating tank and 'dead ship' respectively.

In the opinion of the authors of the document, it was neither appropriate nor justifiable to change the delicate balance among the interests of shipowners/insurers, oil receivers and potential victims of oil spills, by extending the scope of coverage of the Conventions to include vessels that did not actually carry oil in bulk as cargo.

[IOPC/OCT13/4/3/4](#)*Consideration of the definition of 'ship' – Submitted by the International Group of P&I Associations*

The International Group of P&I Associations submitted document [IOPC/OCT13/4/3/4](#), in response to the Chairman's previous invitation to attempt to identify any FSOs that were being used exclusively for waste oil storage and if so, to ascertain whether any such FSOs were issued with a CLC Blue Card, and/or whether a CLC State Party had issued a State Certificate. The authors stated that it was not possible to provide further

clarification on the issue, which required a depth of detail that could not be established by the P&I Associations.

[IOPC/OCT13/4/3/5](#)

Definition of 'ship' – submitted by the Republic of Korea

Document [IOPC/OCT13/4/3/5](#) submitted by the delegation of the Republic of Korea, commented on the decisions made previously by the 1992 Fund Assembly, and also stated that in its opinion, 'permanently or semi-permanently' anchored vessels were to be considered FSUs operating as an offshore base terminal, and accordingly, those vessels engaged in STS transfer operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention.

[IOPC/OCT13/4/3/6](#)

Consideration of the definition of 'ship' – submitted by the International Group of P&I Associations and the International Chamber of Shipping

The authors of document [IOPC/OCT13/4/3/6](#), raised their concerns regarding the proposed application of discretionary criteria on a case-by-case basis retrospectively, submitting that this could lead to a fragmented application in law of the 1992 Conventions and inadvertently give national courts greater flexibility to determine the admissibility of certain types of vessel to the 1992 Civil Liability and Fund Conventions. The authors also provided comments on the criteria proposed by the Chairman in document [IOPC/OCT13/4/3/1](#) and submitted additional criteria for consideration by the Working Group.

4.4 Third meeting of the seventh intersessional Working Group (May 2014)

[IOPC/MAY14/8/1](#)

Consideration of the definition of 'ship' – Note by the Chairman

The Chairman's document summarised the discussions of the Consultation Group established to discuss several key issues identified at the April 2013 meeting of the seventh intersessional Working Group and included a summary of the debate which followed the submission of the documents detailed above.

The document also invited the Working Group to:

- (a) Consider the two approaches that had been debated within the Consultation Group, namely:
 - i. Any situation where a vessel carries or stores oil on board and which can be considered as being part of the maritime transport chain should be included in the scope of the Convention, subject to the clarification of what constituted maritime carriage of oil and its limits.
 - ii. To develop a list of vessel types or scenarios which are clearly within or outside the Convention's definition in order to have a set of interpretive criteria aimed at assisting the governing bodies of the 1992 Fund to decide on a case by case basis, whether the vessel in question was a 'ship' under Article I(1) of the 1992 CLC.
- (b) And decide which approach should be adopted, subject to further development and subsequently presented to the 1992 Fund Assembly for approval at a future session.

[IOPC/MAY14/8/2](#)

Consideration of the definition of ‘ship’, comments on the note by the Chairman of the Consultation Group – submitted by Australia

The Australian delegation submitted document [IOPC/MAY14/8/2](#), which indicated that its authors preferred the first of the two approaches that had been discussed by the Consultation Group, subject to suitable clarification on the limits of the ‘maritime transport chain’. The authors also proposed a suggestion for clarifying the limits along with comments on the issues of the definition of ‘ship’ and contributions.

4.5 Fourth (final) meeting of the seventh intersessional Working Group (April 2015)

The following two documents were considered by the Working Group at its fourth meeting:

[IOPC/APR15/8/1](#)

Consideration of the definition of ‘ship’, submitted by the Chairman^{<2>}

[IOPC/APR15/8/1/1](#)

Definition of ‘Ship’ and ‘Receipt’, submitted by the Republic of Korea^{<3>}

5 Preliminary considerations of the Working Group in respect of the definition of ‘ship’ (April 2012 and April 2013)

5.1 The Working Group worked through the questions raised in Professor Lowe’s legal analysis, which continued to form the ‘base document’ for the work of the Working Group, with the aim of reaching agreement in order to make recommendations to the 1992 Fund Assembly on the subject of the definition of ‘ship’, and also on the consequences of such recommendations on the contribution system.

5.2 Following the Working Group’s second meeting, it appeared that there was broad agreement that the following three scenarios fell within the definition of ‘ship’:

- (a) Barges being towed on sea voyages (or temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress);
- (b) Purpose-built FSOs that have their own independent motive power and steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo; and
- (c) Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained.

5.3 The two issues raised in Professor Lowe’s legal analysis relating to the definition of ‘ship’, and considered subsequently by the Working Group at its third session in May 2014, were:

- 1) Whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a ‘ship’ under Article I(1) of the 1992 CLC and whether the decision should be made in light of the particular circumstances of the case; and
- 2) Whether FSOs and FSUs fall within the definition of ‘ship’ under Article I(1) of the 1992 CLC.

5.4 In respect of the above two questions the Working Group agreed on the following:

<2> see paragraph 12.1

<3> see paragraph 12.2

Issues where consensus has been reached

- 1) Whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under Article I(1) of the 1992 CLC and whether the decision should be made in light of the particular circumstances of the case?

The Working Group did not support the proposal for any fixed time period for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under Article I(1) of the 1992 CLC.

- 2) The Working Group considered that the scenarios described under paragraph 5.2 above fell within the definition of 'ship'.

Issues which have not been resolved

- 3) Whether FSOs and FSUs, besides the situations under paragraph 5.2 above, fall within the definition of 'ship' under Article I(1) of the 1992 CLC.

- 5.5 Wide support was given by the Working Group to developing interpretive criteria and practical solutions, which could assist in defining a 'ship' under the 1992 Conventions, on a case-by-case basis. The Chairman established a Consultation Group to meet ahead of the next meeting of the Working Group in April 2013 with the aim of reaching a convergence of opinions and if possible, presenting more solid proposals, possibly in the form of a guidance document or criteria that the IOPC Funds and Member States could follow.

6 Preliminary considerations of the Working Group in respect of the issue of contributions (April 2012 and April 2013)

- 6.1 The three issues raised in Professor Lowe's legal analysis relating to the question of contributions and oil discharged into 'permanently or semi-permanently' anchored vessels and which were considered by the Working Group at its first and second sessions, were:

- 1) Since the 'mother' vessels described in paragraphs 3.2 to 3.5 of document [IOPC/OCT10/4/3/1](#) are not 'permanently or semi-permanently' at anchor, should the oil on board them qualify as 'received' for the purposes of Article 10 of the 1992 Fund Convention?
- 2) Is one year a reasonable time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor, and should oil received in such vessels therefore qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?
- 3) Should the 1992 Fund Assembly confirm its 2006 decision that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?

- 6.2 In respect of the above questions concerning contributions the Working Group agreed on the following:

Issues where consensus has been reached

- 1) Since the 'mother' vessels described in paragraphs 3.2 to 3.5 of document [IOPC/OCT10/4/3/1](#) are not 'permanently or semi-permanently' at anchor, should the oil on board them qualify as 'received' for the purposes of Article 10 of the 1992 Fund Convention?

The Working Group supported the proposal that the oil on board these ‘mother’ vessels should not be considered contributing oil^{<4>}.

- 2) Is one year a reasonable time period beyond which a vessel should be considered ‘permanently or semi-permanently’ at anchor, and should oil received in such vessels therefore qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?

The Working Group supported the argument that the oil carried on board did not fall under the definition of contributing oil. As for the one year period the Working Group did not support the proposal for any fixed time period for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a ‘ship’ under Article I(1) of the 1992 CLC.

Issues which have not been resolved

- 3) Should the 1992 Fund Assembly confirm its 2006 decision that oil discharged into ‘permanently or semi-permanently’ anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?

Despite recognition of the practical difficulties posed by the Assembly’s 2006 decision, the Working Group remained divided on this question, and as a result, the Chairman suggested that this issue should also be addressed by the Consultation Group^{<5>}.

7 Considerations of the Consultation Group in respect of the definition of ‘ship’ (October 2013)

- 7.1 The majority of the delegations that took the floor during the Consultation Group’s discussions in October 2013, spoke in general support of the document submitted by Spain (document [IOPC/OCT13/4/3/2](#)), which proposed that any stage of carriage, containment or storage beginning with the oil being removed from the production, processing or treatment unit and which took place during the maritime transport chain should be included within the Conventions. The Chairman noted, however, that there was not a consensus amongst all Member States, as a number of Member States did not agree with the proposal, stating that the concept needed adjustment and that the concept of both domestic and international transport needed to be considered.
- 7.2 In addition, the Chairman noted that the International Group had highlighted that uniformity of implementation was essential if the 1992 CLC and Fund regime was to be applied in an equitable manner across all State parties to the Conventions. That delegation stated that it had concerns if the 1992 Fund Assembly were to agree to interpretations made post-incident on a case-by-case basis, as this would encourage Member States to seek to retrospectively apply the 1992 CLC to an incident, which would have the effect of imposing a CLC liability upon owners and insurance providers who may not have consented to cover CLC liabilities or to issue blue cards. That delegation requested that there be a very clear policy statement and agreement regarding which vessels were within the regime and should be issued with CLC certificates, and which were not and should not therefore be issued with CLC certificates.
- 7.3 The Chairman also noted that there was a need to consider whether certain scenarios should be excluded, as indicated in paragraph 2.5 of document [IOPC/OCT13/4/3/2](#) concerning production or processing of oil, and that during the Consultation Group meeting, there was discussion regarding whether or not there was a need to develop a list of vessel types or scenarios which were obviously within the Conventions or conversely, clearly outside the Conventions.
- 7.4 The Chairman noted that the majority of delegations that spoke expressed concern that such a list might not be exhaustive, and thus might not provide a definitive answer. Similarly, the Chairman

<4> Document [IOPC/OCT14/4/2/Rev.1](#), paragraph 9.7

<5> Document [IOPC/OCT14/4/2/Rev.1](#), paragraph 10.2

recalled that the majority of delegations that took the floor were not in favour of developing interpretive criteria to apply to vessels, as it was not clear whether such criteria would be exhaustive, or how many criteria needed to be complied with before the Conventions applied.

Chairman's report of the Consultation Group to the Working Group (May 2014)

- 7.5 In document [IOPC/MAY14/8/1](#) which comprised the Chairman's report of the Consultation Group's discussions, the Chairman recommended that in relation to the issue of the definition of 'ship', the Working Group consider the two approaches that had been debated within the Consultation Group as specified in paragraphs 9.1(a) (i) and (ii) of the Chairman's document:
- i. Any situation where a vessel carries or stores oil on board and which can be considered as being part of the maritime transport chain should be included in the scope of the Convention, subject to the clarification of what constituted maritime carriage of oil and its limits; and
 - ii. To develop a list of vessel types or scenarios which are clearly within or outside the Convention's definition in order to have a set of interpretive criteria aimed at assisting the governing bodies of the 1992 Fund to decide on a case-by-case basis, whether the vessel in question was a 'ship' under Article I(1) of the 1992 CLC.
- 7.6 The Working Group was invited to decide which approach should be adopted, subject to further development, and which should be presented to the 1992 Fund Assembly for approval at a future session.

8 Considerations of the Consultation Group in respect of the issue of whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in ship-to-ship oil transfer operations should qualify as contributing oil (October 2013)

- 8.1 In summarising the debate relating to contributing oil and whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention, the Chairman noted that a number of comments were made during the discussions of the Consultation Group, in relation to the point of principle, namely that if oil was received in a Member State's territory, it should be considered as contributing oil, and it was simply a matter of ensuring that Member States legislation and administration was in place. Conversely, a number of delegations expressed views commenting on the difficulties Member States would face attempting to collect contributions in respect of oil transferred during STS operations.
- 8.2 In concluding the debate, the Chairman noted that given the wide range of views, the Member States needed to prepare themselves further to discuss the matters further when the Working Group met in May 2014.

9 Further considerations of the Working Group in respect of the definition of 'ship' (May 2014)

The 'maritime transport chain' proposed by the Spanish delegation and refined by the Australian delegation.

- 9.1 The discussions which had taken place within the Consultation and Working Groups regarding the definition of 'ship', indicated that many delegations supported the concept of the maritime transport chain, as proposed by the Spanish delegation in document [IOPC/OCT13/4/3/2](#), and refined by the Australian delegation in document [IOPC/MAY14/8/2](#).

The proposal of the maritime transport chain submitted by the Spanish delegation

- 9.2 In the view of the Spanish delegation, the maritime transport chain includes those maritime transport activities which involve a risk of pollution damage from persistent oil. Furthermore, in the opinion of

that delegation, the maritime transport chain starts from the moment when oil leaves the production, processing or treatment plant, whether on land or off-shore, until it is delivered to its final destination, bearing in mind that the 1992 Conventions only cover carriage by sea.

- 9.3 That delegation is also of the view that any stage of containment or storage which takes place during the transport chain should be included in the scope of the Conventions, not only because it is part of the maritime transport chain, but because oil is not stored at sea unless it has a final commercial destination.

The Australian delegation's proposal to refine the concept of the maritime transport chain

- 9.4 In document [IOPC/MAY14/8/2](#), the Australian delegation stated that a functional approach based on the concept of the maritime transport chain can be helpful as a broad interpretation of the definition of 'ship', and that as far as possible, the limits of the maritime transport chain should be expressed in Convention terms to minimise the risk of distorting the intention of the Conventions.

- 9.5 The Australian delegation suggested that:

- (a) A 'ship' is engaged in the carriage of oil in bulk as cargo in the maritime transport chain.
- (b) In the case of oil produced offshore, the maritime transport chain begins when the oil is loaded into a vessel other than one which received the oil directly from a subsea well to which it was connected. The end of the maritime transport chain corresponds to the point where oil is discharged in a port or terminal installation, in the territory of a State.
- (c) In the case of either oil produced on land, or having been discharged or delivered previously into a port or terminal installation, the maritime transport chain begins when oil is loaded as bulk cargo into a seagoing vessel or seaborne craft. The maritime transport chain ends when the oil cargo is discharged to a port or terminal installation in the territory of a State.

The 'hybrid' approach

- 9.6 The refinements proposed by the Australian delegation were welcomed by a number of delegations. One delegation proposed adopting a 'hybrid' approach in order to conclude the work of the Working Group by proposing that Member States list those situations where there was consensus on whether a vessel was a 'ship' within Article I(1) of the 1992 CLC, and then use the concept of the 'maritime transport chain', as refined in the Australian delegation's document ([IOPC/MAY14/8/2](#)), as an interpretive tool to address other situations. A large number of other delegations stated that they found the proposed 'hybrid' solution to be of interest to them.

- 9.7 In summarising the issue of the definition of 'ship' the Chairman concluded that the 'hybrid' approach was supported, by which Member States would rely on agreed definitions where possible, and then use the concept of the maritime transport chain, as an interpretive tool to address other situations.

10 Further considerations of the Working Group in respect of the issue of whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in ship-to-ship oil transfer operations should qualify as contributing oil (May 2014)

- 10.1 A large number of delegations that took the floor during the debate spoke in favour of the point of principle that oil received in the territory of a Member State should be considered contributing oil. Some delegations also expressed support for the proposal submitted by the Australian delegation in document [IOPC/APR13/7/2](#), which *inter alia*, stated that a vessel at anchor may receive oil from several vessels before resuming its voyage, or it may arrive laden before discharging to smaller vessels, but if it does both then the oil loaded onto this vessel should be considered 'received'. Further, this vessel should be treated as an offshore terminal and any receipts should attract liability to pay contributions to the IOPC Funds.

- 10.2 The Australian delegation stated that its suggestion had been made to counter those logistic trends which were being designed to avoid contributions, and which was in fact occurring, according to anecdotal evidence it had received. However that delegation, amongst others, recognised that there would be difficulties both from a legal and practical perspective, in attempting to collect contributions from a vessel located offshore.
- 10.3 Other delegations stated that there were clear examples where it was possible to collect contributions from a vessel located offshore performing STS operations, especially where the ship was owned by a company located in that jurisdiction, and/or where the coastal State had the authority or could have the authority depending on where the STS operation was carried out, to impose operative or legal conditions of a foreign flagged vessel receiving oil, or to authorise the operation.
- 10.4 Another delegation stated that one of the current attractions of the contribution system today was its simplicity and expressed concern that if it were changed to include permanently or semi-permanently anchored vessels, this would make matters more complicated, with a lot more administration for Member States but little gain. That delegation also stated that during the discussions of the Consultation Group, a number of Member States had commented on the difficulties of identifying the title-holder of the oil at the time of the STS transfer, and the subsequent difficulties in attempting to levy contributions, even if the titleholder could be identified, due to jurisdictional issues. That delegation further stated that this in turn, could lead to further problems since, under both the 1992 Fund Convention and Supplementary Fund Protocol, if a Member State did not report in accordance with the Convention requirements, then the Member State might be obliged to cover the loss incurred by the 1992 Fund or Supplementary Fund as a result of non-reporting or inaccurate reporting. Similarly, that delegation stated that if an incident occurred in a Supplementary Fund Member State, but the State involved had not fulfilled its reporting obligations as a result of difficulties incurred identifying titleholders of oil involved in STS operations, compensation could be withheld from Member State entities until the reporting obligations were completed, pursuant to Article 15 of the Supplementary Fund Protocol. That delegation stated that in its experience, although there was a risk involved in STS operations, despite the number of transfers taking place on a daily basis, to date the incidents had been minor. This implied that the risk was not so large as to require including oil transferred in STS operations within the contribution regime.
- 10.5 Another delegation stated that it was necessary to investigate further the definition of ‘terminal installation’. In response, the Australian delegation stated that although there was agreement regarding vessels semi-permanently and permanently at anchor, there was a need to consider whether there were any semi-permanently or permanently at anchor vessels which fell inside or outside the definition of ‘terminal installation’.

11 Chairman’s introduction to the fourth meeting of the seventh intersessional Working Group (April 2015)

- 11.1 In document [IOPC/APR15/8/1](#), the Chairman summarised the discussions of the first and second meetings of the Working Group in April 2012 and 2013 respectively, the Consultation Group in October 2013, the third meeting of the Working Group in May 2014, and the discussions at the 1992 Fund Assembly meeting in October 2014.
- 11.2 Noting that it appeared that there was broad agreement with a number of issues discussed in previous meetings, the Chairman also stated that there were a number of important issues where no consensus had, to date been agreed, and upon which the Working Group was encouraged to focus in order to conclude its work.

12 Presentation of documents for consideration at the fourth meeting of the Working Group (April 2015)

12.1 Document [IOPC/APR15/8/1/1](#) submitted by the Republic of Korea

12.1.1 The delegation of the Republic of Korea presented its document, stating that it agreed in principle with the scenarios where a vessel and FSUs would fall under the definition of ‘ship’, as agreed by the Working Group and supported by Professor Lowe’s legal opinion.

12.1.2 The delegation also stated that in order for a vessel or FSU to be considered a ‘ship’ under Article I(1) of the 1992 CLC, certain minimum standards should be maintained so as to ensure a reasonable standard, including on-going maintenance through inspection, the capacity to self-propel, the requirement for on-board display of certificates, confirmation of the maintenance of seaworthiness and construction for the carriage of oil.

12.1.3 The delegation further introduced four scenarios for consideration by the Working Group, which applied the concept of the maritime transportation chain and the hybrid approach to STS operations and to the concept of ‘receipt’ of oil, for the purposes of Article 10.1 of the 1992 Fund Convention. In its view, the concept of ‘received oil’ should be based on the actual function performed by the vessel acting as a storage terminal, regardless of whether or not the vessel was considered to be ‘permanently or semi-permanently’ anchored.

12.1.4 In concluding its submission, that delegation stated that in its view, in order for a vessel which had remained at anchor for a long period of time but later decided to navigate away, it must be inspected within a one-year period to ensure that its main engine, steering and navigation equipment were in order. Furthermore, the delegation was of the view, that an upper ceiling of one year was a reasonable time period during which time a vessel at anchor, must be properly validated and inspected, in order to maintain the ‘ship’ status under Article I(1) of the 1992 CLC.

12.2 Document [IOPC/APR15/8/1](#) submitted by the Chairman

12.2.1 The Chairman introduced her document, stating that the previous meetings of the Working Group and Consultation Group had succeeded in reaching consensus on a number of important issues.

Issues where consensus had been reached

12.2.2 The Chairman noted that the Working Group with the assistance of the Consultation Group had succeeded in reaching consensus on a number of issues, as follows:

(1) There was broad agreement that the following three scenarios fell within the definition of ‘ship’

- a) Barges being towed on sea voyages (or temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress);
- b) Purpose-built FSOs that have their own independent motive power and steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo; and
- c) Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained.

- (2) In relation to the question:

‘Whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a ‘ship’ under Article I(1) of the 1992 CLC and whether the decision should be made in light of the particular circumstances of the case?’

The Working Group did not support the proposal for any fixed time period for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a ‘ship’ under Article I(1) of the 1992 CLC.

- (3) In relation to the question:

‘Since the ‘mother’ vessels described in paragraphs 3.2 to 3.5 of document [IOPC/OCT10/4/3/1](#) are not ‘permanently or semi-permanently’ at anchor, should the oil on board them qualify as ‘received’ for the purposes of Article 10 of the 1992 Fund Convention?’

The Working Group supported the proposal that the oil on board these ‘mother’ vessels should not be considered contributing oil.

- (4) In relation to the question:

‘Is one year a reasonable time period beyond which a vessel should be considered ‘permanently or semi-permanently’ at anchor, and should the oil received in such vessels therefore qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?’

The Working Group supported the argument that the oil carried on board did not fall under the definition of contributing oil. As for the one year period, the Working Group did not support the proposal for any fixed time period for a vessel to be considered ‘permanently or semi-permanently’ at anchor.

The maritime transport chain and hybrid approach

- (5) The concept of the maritime transport chain, as proposed by the Spanish delegation in document [IOPC/OCT13/4/3/2](#), and refined by the Australian delegation in document [IOPC/MAY14/8/2](#), was supported by many delegations.
- (6) The proposal to adopt a hybrid approach, whereby Member States agree a list comprising those situations where there was consensus on whether a vessel was a ‘ship’ within Article I(1) of the 1992 CLC, and then use the concept of the ‘maritime transport chain’ as refined in the Australian delegation’s document as an interpretive tool to address other situations, was also supported by a large number of delegations.

Issues where no agreement had been reached

- 12.2.3 The Chairman noted that although there were issues where consensus had been reached, a number of important issues relating both to the definition of ‘ship’ under Article I(1) of the 1992 CLC, and to the issue of contributions under Article 10.1 of the 1992 Fund Convention, had not been resolved, including the following:
- (a) Whether FSOs and FSUs, besides the situations under paragraph 4.2 of document [IOPC/APR15/8/1](#), fall within the definition of ‘ship’ under Article I(1) of the 1992 CLC;
- (b) Should the 1992 Fund Assembly confirm its 2006 decision that oil discharged into ‘permanently or semi-permanently’ anchored vessels engaged in STS operations, should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention?;

- (c) Whether there were any permanently or semi-permanently at anchor vessels which fell inside or outside the definition of 'terminal installation';
- (d) Whether the Working Group could agree a list of illustrative and non-exhaustive examples of vessels which were clearly within or clearly outside the interpretation of the definition of 'ship' under Article I.1 of the 1992 CLC;
- (e) Whether the Working Group could agree definitions of the commencement and conclusion of the maritime transport chain concept, to be used, where it was not clear whether the vessel involved fell within or outside of the definition;

12.2.4 Accordingly, the Chairman encouraged Member States to concentrate their efforts on resolving the outstanding issues in order that a recommendation could be made to the 1992 Fund Assembly at its October 2015 session.

12.2.5 The Chairman stated that she had made a number of considerations and proposals regarding the definition of 'ship', and whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS transfer operations should qualify as contributing oil, which were discussed in sections 10 and 11 of her document.

Chairman's considerations and proposals regarding the issue of the definition of 'ship'

12.2.6 The Chairman noted that the Working Group had agreed that Professor Lowe's report formed the base document for the Working Group. It was also agreed that a number of craft were clearly within the definition of ship under the CLC.

Examples of craft which clearly fall within the definition of 'ship'

12.2.7 In an attempt to list those situations where there was consensus on whether a vessel was a 'ship' within Article I(1) of the 1992 CLC, and then to use the refined concept of the maritime transport chain as an interpretive tool to address other situations, the Chairman considered that the following non-exhaustive, illustrative list provided examples which are clearly within the definition of 'ship' under Article I(1) of the 1992 CLC:

- 1) A seagoing vessel or seaborne craft^{<6>} 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 seagoing barge 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 (ie 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) Purpose-built FSOs 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 transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own

<4>

Typically a tanker

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

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

12.2.8 The Chairman considered that the following (non-exhaustive) illustrative examples, clearly did not fall within the definition of 'ship' under Article I(1) of the 1992 CLC:

- A) Barges certified or classed only for use on inland water ways;
- B) 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.
- C) Vessels or craft involved in:
 - (a) Exploration, for example jack-up rigs^{<7>} 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, Floating Drilling Production Storage and Offloading units (FDPSOs), and Floating Production Storage and Offloading units (FPSOs), including separation of water and gas, and its management;

'Grey areas' to be decided on a case by case basis

12.2.9 The Chairman noted that there were, however, a number of vessel types where it was not clear whether they complied with the definition of 'ship' under Article I(1) of the 1992 CLC. It was proposed that these cases would be decided by the 1992 Fund governing bodies on a case-by-case basis, using the maritime transport chain test as an interpretive tool. It was noted that the hybrid approach involved both the list of examples of ships which clearly fell within the definition of 'ship' or clearly fell outside the definition, and the use of the maritime transportation chain test as an interpretive tool for addressing situations where it was not clear if the structure was a 'ship' or not.

FSOs and FSUs

12.2.10 The Chairman also stated that one of the questions which had not yet been resolved by the Working Group was whether FSOs and FSUs fell within the definition of 'ship' within Article I(1) of the 1992 CLC. In this regard, Professor Lowe QC was of the opinion that the following vessels fell within the definition of 'ship':

<7>

An offshore drilling rig or platform having a floating hull fitted with retractable legs that are lowered to the seabed from the operating platform to elevate the hull above wave level.

- (a) Purpose-built FSOs that have their own independent motive power and steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo; and
- (b) Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained.

12.2.11 In respect of these categories, the Chairman's document noted that the elements of carriage of oil and undertaking a voyage were present, so they could rightly be classed as a 'ship' within Article I(1) of the 1992 CLC.

12.2.12 The legal opinion also stated that, in relation to the question of what distinguishes a 'ship' from a FSO, neither the Conventions, nor any associated agreement or practice, established any criteria to differentiate between them. It was, however, a matter of discretion for Member States to decide on the criteria that would apply, and the legal opinion stated that the main criterion implicit in the CLC definition of ship, was the capacity to navigate at sea, and the interpretive criteria should reflect that fact.

12.2.13 Importantly, the legal analysis stated that a craft that was incapable of navigating at sea could not be regarded as a craft capable of carrying oil in bulk as cargo.

12.2.14 The Chairman also drew the attention of the Working Group to the present position of the IOPC Funds governing bodies with regard to the coverage of offshore craft, in accordance with the decision taken by the 1992 Fund Assembly in October 1999 endorsing the conclusions of the 2nd intersessional Working Group regarding the applicability of the 1992 Conventions to offshore craft. The 1992 Fund Assembly decided that:

- i. Offshore craft should be regarded as 'ships' under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate;
- ii. Offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore field for operational reasons or simply to avoid bad weather.

12.2.15 Consequently, the Working Group was invited to consider how the maritime transport chain concept could be reconciled with the previous decisions taken by the 1992 Fund Assembly.

Examples of when the maritime transport chain commenced and concluded

12.2.16 The Chairman submitted some practical examples to assist in providing clarity regarding the time at which the maritime transport chain could be said to commence and conclude.

12.2.17 The examples provided three different scenarios, as follows:

- i. Example 1 - loading oil from an onshore source*
- ii. Example 2 – loading oil from a unit which receives oil from an offshore source*
- iii. Example 3 – loading oil from a mooring or platform which receives oil from an offshore source*

Example 1 - loading oil from an onshore source

12.2.18 In the case of oil produced on land, the Chairman suggested that the maritime transport chain commenced, when it was loaded as bulk cargo into a seagoing or seaborne craft, and would end, when the oil was discharged in a port or terminal installation, in the territory of a Member State.

12.2.19 If that oil was then to be reloaded into another vessel for transportation, either internally within the Member State's territorial waters, or exclusive economic zone, or outside of the territorial waters, or exclusive economic zone, this would amount to a new maritime transport chain.

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

12.2.20 The Chairman's document also explained that, a logical explanation of when the maritime transport chain commenced for the scenarios where oil was produced offshore, was when oil was loaded into a vessel other than the one which received the oil directly from the subsea well to which it was connected.

12.2.21 Typically, such scenarios would include:

A seagoing vessel or seaborne craft loading oil from:

- i. Another seagoing or seaborne craft in a typical 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; or
- iii. FDPSO;
- iv. Jack-up rigs;
- v. Mobile offshore production units; and
- vi. FSO

12.2.22 In the case of the FSO, if it was a purpose-built FSO or craft as mentioned in paragraph 10.2.3(5) or (6) of document [IOPC/APR15/8/1](#), 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 applying the 1992 Fund Assembly decision of October 1999, then the FSO itself would also be classed as a 'ship' under Article I(1) of the 1992 CLC, as well as the receiving vessel. If however, the transfer involved a FSO which did not fall within the categories mentioned in paragraph 10.2(5) or (6), or a craft which did not fall within the other categories mentioned in paragraph 10.2, it would not be classed as a 'ship' under Article I(1) of the 1992 CLC.

12.2.23 The Chairman submitted that for other cases involving such offshore craft, specifically FPSOs and FDPSO units, the vessels were not within the maritime transport chain covered by the compensation regimes, since the activities of exploration, drilling, production or processing, were outside the scope of the compensation regime.

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

12.2.24 The Chairman's document explained that there was a second situation where oil was produced offshore, where it could be said that the maritime transport chain commenced when the oil was loaded into a seagoing or seaborne craft constructed or adapted for the carriage of oil in bulk. The document noted that much of the offshore oil produced was 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 was then pumped into a tanker, or series of tankers, FSO or FPSO, which connect to the fixed mooring buoy or platform. Typical examples of such scenarios and the method of attachment were provided in Annex 1 to document [IOPC/APR15/8/1](#).

12.2.25 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. The document proposed that if a FSO which had 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.

12.2.26 The document also stated however, that in some cases, a FSO that had 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 a 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

12.2.27 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.^{<8>}

12.2.28 Furthermore, even if the final destination of the oil cargo remained unknown, and as a consequence, the carrying vessel was directed to anchor at a location for an extended period of time, nevertheless, the carrying vessel or seaborne craft remained within the maritime transport chain, until the cargo was finally delivered.

All the examples were based on the following assumptions:

- (a) the vessel involved was laden with 'oil' as defined in Article I(5) of the 1992 CLC; and
- (b) the 'maritime transport chain' included 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 included STS operations, periods of waiting, storage (excluding those without navigational capability)^{<9>} and anchoring, pending final delivery to a port, terminal installation or final consumer/recipient^{<10>}.

Chairman's considerations on whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in ship-to-ship oil transfer operations should qualify as contributing oil

12.2.29 The Chairman's document acknowledged that although there was overall agreement with the point of principle that oil received in a Member State's territory should be considered contributing oil, a large number of delegations recognised that there might be difficulties both practically and legally in attempting to identify and recover contributions as a result of STS transfer operations. Furthermore, there was a desire for further consideration of the definition of 'terminal installation' and a need to identify whether there were any 'semi-permanently or permanently at anchor' vessels which fell inside or outside the definition. Accordingly, the Chairman proposed that those aspects be considered in further detail in the debate which followed.

12.2.30 Noting firstly, the text of the Conventions and secondly, the decisions which had been taken previously by the 1971 Fund and 1992 Fund Assemblies, the Chairman focused on the difficulties inherent in discussions upon 'permanently or semi-permanently' anchored vessels.

^{<8>} 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.

^{<9>} 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.

^{<10>} 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.

The difficulties inherent in discussions upon permanently and semi-permanently anchored vessels

12.2.31 The Chairman noted that there were a number of difficult issues encountered when attempting to resolve the outstanding question of whether the 1992 Fund Assembly should confirm its 2006 decision that oil discharged into ‘permanently or semi-permanently’ anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention. Those issues included the following questions:

- i. *How long is ‘permanently or semi-permanently’ at anchor?*
- ii. *What is the difference between vessels conducting STS operations, and vessels conducting STS operation whilst ‘permanently or semi-permanently’ at anchor?*
- iii. *How to collect contributions from vessels engaged in STS operations?*

12.2.32 Furthermore, the Chairman’s document also stated that there were undoubtedly other scenarios where ‘semi-permanently or permanently at anchor’ vessels could conceivably fall within the definition of a ‘terminal installation’. In this regard, delegations were referred to the scenarios raised by the Danish delegation (document [IOPC/OCT10/4/3/1](#)), concerning vessels involved in extended STS operations or floating storage.

12.2.33 The Chairman stated that whilst it appeared that the example detailed in paragraphs 11.12 – 11.13 of document [IOPC/APR15/8/1](#) differed from the examples provided in the Danish document, since in those examples, there was a clear intention for the ‘mother vessels’ involved to continue their voyages once the STS operations had concluded, a further review of that document, appeared to indicate that the argument that the Danish vessels should not be considered ‘semi-permanently at anchor’, was based on the fact that:

- (a) all the vessels concerned were registered as tankers for the carriage of crude oil and products;
- (b) all the vessels had seafarers onboard and ready to sail at any time;
- (c) all were insured for pollution liabilities and equipped with CLC certificates;
- (d) no processing or modification of the oil took place on board; and
- (e) the vessels were constructed for, and operating as, regular oil tankers engaged in the carriage of oil at sea.^{<11>}

12.2.34 The Chairman stated that the question logically arose as to whether those factors alone were sufficient to regard the vessels concerned as not ‘semi-permanently at anchor’, or whether additional criteria should be investigated.

12.2.35 Moreover, in relation to the question as to whether oil carried by the mother vessel should be considered as received for the purpose of Article 10 of the 1992 Fund Convention, the Chairman highlighted that although this aspect was discussed in detail in the legal study subsequently provided by Professor Lowe QC (document [IOPC/OCT11/4/4](#)), the 1992 Fund Assembly had not reached a conclusion on the interpretation of ‘received oil’ in scenarios involving ‘mother vessels’ conducting STS operations, which were at anchor for extended periods of time.

12.2.36 Noting that it appeared that Member States did not wish to use the concept of ‘time’ to differentiate between vessels conducting STS operations, and vessels which were ‘permanently or semi-permanently anchored’ and conducting STS operations, the Chairman suggested that Member States may wish to consider other concepts, perhaps based on the ‘activity involved’ (e.g. receiving and discharging oil) or the ‘intention of the participants’, or consider further the proposals made by the Australian delegation in document [IOPC/APR13/7/2](#) and [IOPC/MAY14/8/2](#) which stated that the maritime transport chain was also a useful approach for considering contributions.

<11> Document [IOPC/OCT10/4/3/1](#), paragraphs 4.24 – 4.25.

Receipt of contributions owed

- 12.2.37 The Chairman also highlighted the practical difficulties of collecting contributions from receivers, if the 1992 Fund Assembly were to confirm its 2006 decision that oil discharged into ‘permanently or semi-permanently’ anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10 of the 1992 Fund Convention.
- 12.2.38 The Chairman noted that there appeared to be a distinction between those receivers with assets in the jurisdiction over and against which, action could be taken by the relevant Member State regarding the collection of contributions, and those receivers whose assets, possibly including the receiving vessel itself, may not be in the jurisdiction of the Member State when contributions were subsequently levied, and that in the latter case, the situation was difficult both legally and practically, when attempting to recover contributions from receivers that were not within the jurisdiction of the Member State where the STS operations took place, since the traditional methods of ensuring payment of contributions might not be available to the Member States.
- 12.2.39 In summarising the work of the Consultation and Working Groups to date, the Chairman noted that even if it were possible to investigate alternative methods of retaining funds from the receiver in preparation for the subsequent levy, for instance, by the provision of a bond or guarantee from which funds could be drawn down to pay the levy, or by paying a licence fee based on previous years’ levies, it was believed that such methods would be unwieldy and may distort the balance of risks shared by the shipping and oil industries.

12.3 Enforceability issues

- 12.3.1 The Chairman also highlighted that whichever interpretations were determined by the Working Group and subsequently adopted by the 1992 Fund Assembly, the question arose as to how to ensure the interpretations were made effective in order that they were applied subsequently by Member States.
- 12.3.2 Noting that it was understood that the national courts of some Member States were more inclined to take decisions of the governing bodies into account than those in other Member States, the Chairman’s document stated that this was regrettable as it could lead to differences between the decisions of a court in one Member State and the decisions of the 1992 Fund Assembly, which may result in many years of costly litigation.

13 Debate of the fourth meeting of the Working Group (April 2015)

- 13.1 Opening the debate to the floor, the Chairman requested the delegations to concentrate on the outstanding issues, highlighted in paragraphs 10-12 of document [IOPC/APR15/8/1](#), in an attempt to reach consensus where possible, and in order that the Working Group could submit its recommendations to the 1992 Fund Assembly at the October 2015 sessions of the governing bodies.

Lists of vessel types clearly within or outside the definition of ‘ship’ under Article I(1) of the 1992 CLC

- 13.2 The Chairman initially sought the views of the delegations to the proposed lists of vessel types which were clearly within the definition of ‘ship’ under Article I(1) of the 1992 CLC, or which were clearly outside the definition. Many delegations supported the proposed lists, although several delegations highlighted that it was important that the lists were described as ‘illustrative’ and ‘indicative’ only, in order to provide the governing bodies the leeway required, to amend the lists in the future should this be necessary.
- 13.3 Several delegations were of the view that a number of conditions detailed in paragraph 4.1.7 of document [IOPC/APR15/8/1/1](#) submitted by the delegation of the Republic of Korea, needed to be complied with in order to satisfy the seaworthiness of a ship, regardless of whether or not the vessel or storage tank was at anchor or on a voyage.

- 13.4 Another delegation suggested that in relation to paragraph 10.2(3) of document [IOPC/APR15/8/1](#) concerning barges at anchor, the reference to being ‘temporarily at anchor for the purposes incidental to ordinary navigation or force majeure or distress’ be deleted, and replaced by the phrase ‘or at anchor’, since the reference to ‘temporarily’ introduced uncertainty. This was supported by some other delegations. However, further discussions revealed that other delegations did not support the proposal, as they were of the view that this would allow barges permanently anchored to be introduced into the definition of ‘ship’. The Chairman indicated that neither view received majority support, so this matter would be left for the 1992 Fund Assembly to resolve.
- 13.5 Many delegations also supported the proposal to use the ‘hybrid’ approach whereby Member States would rely on agreed definitions where possible, to ascertain whether a vessel was a ‘ship’ within Article I(1) of the 1992 CLC, and then use the concept of the maritime transport chain as an interpretive tool to address other situations.
- 13.6 In response to a suggestion by one delegation to amend the wording of paragraph 10.2 of document [IOPC/APR15/8/1](#) to include the wording ‘consistent with the Assembly decision in October 1999’, a number of delegations stated that this aspect had not been discussed by the Working Group, and it was quite a different thing to state that the recent discussions by the Working Group were consistent with a decision taken in October 1999, which many delegations did not agree to. Accordingly, the Chairman simply noted the suggestion made by the delegation, but also noted that there was insufficient support to carry the suggestion.
- 13.7 In relation to paragraphs 10.8 and 10.10 of the Chairman’s document [IOPC/APR15/8/1](#), a number of delegations stated that the references to a craft that was ‘incapable of navigating at sea’, were not found in the 1992 CLC or Fund Conventions, even though they had been referred to, in the base document by Professor Lowe. Those delegations were of the view that the reference to ‘navigation at sea’ confused matters further and therefore that any proposed list of vessels should not refer to that concept.
- 13.8 One delegation stated that in relation to the issue of towed vessels carrying oil, without steering capacity, such as barges, or FSOs or FSUs, there appeared to be little reason not to also include an FPSO under tow, since the production stage had been completed and, if carrying oil, was similar to an FSO / FSU at that stage. The delegation suggested amending the proposed list of vessels, so as to refer to ‘offshore units’, in paragraph 10.2(5), rather than specifically to ‘purpose-built FSOs’, as this allowed a greater degree of flexibility. This suggestion was supported by a number of other delegations. The delegation also suggested that there be some form of reference to the categories of vessels covered by the term ‘offshore craft’ to include reference to FPSOs, FSOs, and FSUs, whether purpose-built or converted, as this would assist in removing a number of other paragraphs in the proposed lists of vessels covered or otherwise, under Article I(1) of the 1992 CLC. That delegation offered to forward wording to the Secretariat for consideration, prior to the preparation of the final report to the 1992 Fund Assembly. The Chairman indicated that although grateful for the offer, she would note that the Secretariat would consider the suggestion, if the 1992 Fund Assembly decided to instruct the Secretariat to draft a guidance document at the October 2015 sessions of the governing bodies. This was done, she indicated, because there were also a number of other amendments which had been suggested, which differed from both the original Convention wording or from Professor Lowe’s report. The wording which was forwarded by the delegation to the Secretariat is provided in the Annex.
- 13.9 The delegation accepted the Chairman’s comments but also stated that it was important to differentiate between FSOs which did have motive power, and the towage of offshore craft, which predominantly, did not have motive power.
- 13.10 In relation to the examples of the maritime transport chain mentioned in paragraph 10.12 of the Chairman’s document, one delegation was of the view that it was the activity carried out by the vessel that was important, and not necessarily the craft involved. That delegation was of the view that, if an FSO was involved in the activity of carrying oil, and that activity was different to that which it was

involved with when receiving oil from the production unit, then it should be covered by the Conventions. That delegation was also of the view that the example mentioned in paragraph 10.12.13(b) of the Chairman's document [IOPC/APR15/8/1](#), involving vessels designed for storing oil, should also be included within the maritime transport chain, independently of whether or not they could steer themselves.

- 13.11 In view of the numerous comments made by delegations concerning the list of vessels detailed in paragraph 10 of the Chairman's document ([IOPC/APR15/8/1](#)), a revised document was drafted (IOPC/APR15/8/1/WP.1) incorporating the comments made by the delegations, which could be used as a basis for further discussions.

Oil discharged into permanently or semi-permanently anchored vessels

- 13.12 The Chairman stated that, the next issue was whether oil discharged into permanently or semi-permanently anchored vessels, should continue to qualify as received oil, and how to recover any contributions which arose as a result of such discharge of oil. These aspects were dealt with in section 11 of the Chairman's document.
- 13.13 One delegation was of the view that the Fund Assembly decision taken in October 2006 regarding 'permanently or semi-permanently at anchor', created confusion, since not only did the definition of 'ship' and 'terminal installation', belong to different Conventions, but also the concept of 'permanently or semi-permanently at anchor' was not to be found in the Conventions. That delegation was in favour of discarding the concept of 'permanently or semi-permanently at anchor'. Other delegations supported this view, adding that it was important that gaps were not introduced into the system, and that the concept of 'permanently or semi-permanently at anchor', placed an administrative burden on Member States.
- 13.14 Another delegation was of the view that the concept of 'semi-permanent or permanently at anchor' had been superseded by the concept of the maritime transport chain, as outlined in paragraph 11.20 of the Chairman's document [IOPC/APR15/8/1](#). That delegation was also of the view, that it was necessary to stick to the wording of the Convention wherever possible, rather than attempting to define a concept such as 'permanently or semi-permanently anchored', which was not defined in the 1992 CLC or Fund Conventions.
- 13.15 One delegation was of the view that oil received in the territory of a Member State should be contributing oil even when there was a ship-to-ship transfer, although it was aware of the practical difficulties of implementing this. That delegation stated that it would be in favour of a clear definition of 'permanently or semi-permanently at anchor', and that in its view, the most obvious possible criterion was the time at anchor, and it was in favour of a one year period at anchor.
- 13.16 The delegation of the Republic of Korea explained the scenarios detailed in its document ([IOPC/APR15/8/1/1](#)) and stated that in its view, oil received in the territory of a Member State should be considered 'received' for the purposes of Article 10 of the 1992 Fund Convention.
- 13.17 In summarising the debate regarding the concept of 'permanently or semi-permanently at anchor', the Chairman noted the differing views, but stated that the majority of delegations that had taken the floor were in favour of discarding the concept of 'permanently or semi-permanently at anchor'. Furthermore, since the delegations were in favour of discarding the concept, it was unnecessary for further consideration of the issue of how to recover contributions arising from vessels 'permanently or semi-permanently at anchor' conducting STS operations.

Recording the conclusions and recommendations of the Working Group and development of guidance by the 1992 Fund Assembly

- 13.18 The Chairman requested the Working Group to indicate how it wished its conclusions and recommendations, to be recorded. One delegation stated that it wished for the recommendations to be recorded only in the Record of Decisions.
- 13.19 Another delegation stated that it wished to see coherent guidance in one location so that regulators of the industry did not have to sift through several sessions of discussions. Many other delegations expressed support for this view, and stated that they preferred the option of the provision of a report of the Working Group, detailing the discussions which had taken place, and the recommendations reached by the Working Group in the Spring 2015 sessions. The delegations also stated that one of the recommendations of the Working Group to the 1992 Fund Assembly, should be for the Secretariat to be instructed to develop a guidance document in line with the recommendations of the Working Group, and that such guidance document could be presented to the Fund Assembly at its Spring 2016 sessions.

14 Conclusions of the Working Group

Conclusions in respect of the definition of 'ship'

- 14.1 The Working Group concluded that it should agree the non-exhaustive, illustrative list of examples of vessels which clearly fell within the definition of 'ship' under Article I(1) of the 1992 CLC, as detailed in the amended version of document IOPC/APR15/8/1/WP.1, which includes the comments of a number of delegations who had suggested improvements to the text. A copy of the revised version of document IOPC/APR15/8/1/WP.1, incorporating the comments agreed by the Working Group, is attached at Annex II.
- 14.2 The Working Group emphasised that the list contained in the document, is not exhaustive, and is only indicative of the craft which clearly fall within the definition of 'ship' and which clearly fall outside the definition of 'ship'. Furthermore, the Working Group also concluded 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.
- 14.3 The Working Group also concluded that 'grey areas' are to be decided by the 1992 Fund governing bodies, on a case-by-case basis using the hybrid approach, which involves the list of examples of ships which clearly fall within the definition of 'ship' or clearly fall outside the definition, and the use of the maritime transport chain test as an interpretive tool for addressing situations where it is not clear if the craft is a 'ship' or not. The Working Group further concluded that even if a craft is not included within either list, the 1992 Fund governing bodies will be able to consider whether it is or is not a 'ship', in light of the circumstances.

Conclusions in respect of the issue of whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in ship-to-ship oil transfer operations should qualify as contributing oil

- 14.4 Although a number of delegations were of the view that all oil received in a Member State's territory should contribute, the majority view of the Working Group was that the concept of 'permanently or semi-permanently at anchor' was not found in the Conventions and was problematic as it introduced uncertainty, and should be discarded. As a consequence it was not necessary to further discuss the issue of contributions arising as a result of vessels performing STS operations whilst permanently or semi-permanently at anchor.

15 Recommendations of the seventh intersessional Working Group*Recommendations regarding the definition of 'ship'*

- 15.1 The Working Group recommends the 1992 Fund Assembly to agree a non-exhaustive, indicative list which illustrates examples of vessels which clearly fall within or outside the definition of 'ship' under Article I(1) of the 1992 CLC, as detailed within the revised version of document IOPC/APR15/8/1/WP.1^{12>}, incorporating the comments agreed by the Working Group. This forms the first part of the 'hybrid' approach favoured by a number of delegations.
- 15.2 The Working Group also recommends the 1992 Fund Assembly to adopt the concept of the maritime transport chain, as an interpretive tool, to address those situations on a case-by-case basis, where it is not clear whether a vessel falls within the definition of 'ship'. This forms the second part of the 'hybrid' approach.
- 15.3 Such an approach is not intended to introduce discretion and flexibility into the international compensation regime, which could lead to different interpretations resulting if different national courts were to decide on the matter, but rather to ensure that, so far as is currently possible, clear guidance is provided for known vessel-types and scenarios, and a process is in place to consider unusual vessel types or scenarios that may arise in the future. The Assembly will then be able to consider whether the craft or type of craft is considered a ship under the conventions in light of the circumstances and activities conducted.
- 15.4 The Working Group further recommends that the 1992 Fund Assembly give further consideration to the issue of when the maritime transport chain commences and concludes.

Recommendations regarding the issue of whether oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS oil transfer operations should qualify as contributing oil

- 15.5 The Working Group recommends that the 1992 Fund Assembly consider discarding the concept of vessels 'permanently or semi-permanently' at anchor, since it introduces uncertainty into the compensation regime and is a concept which is not found in the Conventions.
- 15.6 The Working Group therefore recommends that the 1992 Fund Assembly should reverse its 2006 decision that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10 of the 1992 Fund Convention and should discard the concept of craft 'permanently or semi-permanently at anchor'.

Recommendations regarding enforcement of agreed principles and definitions

- 15.7 The Working Group recommends that the 1992 Fund Assembly instruct the Secretariat to draft a guidance document, based on the discussions of the Working Group, to be presented to the 1992 Fund governing bodies for their consideration in Spring 2016.
- 15.8 The Working Group recommends that the guidance note should record:
- (a) the list of illustrative and non-exhaustive examples of vessels which are clearly within or clearly outside the interpretation of the definition of 'ship' under Article I(1) of the 1992 CLC; and
 - (b) the agreed definitions of the commencement and conclusion of the maritime transport chain concept, to be used for the vessels or scenarios falling into the 'grey areas'.

^{12>} see Annex II

- (c) if so agreed, that the 1992 Fund Assembly has reversed its decision that oil discharged into permanently or semi-permanently anchored vessels engaged in STS operations should qualify as contributing oil for the purposes of Article 10 of the 1992 Fund Convention;
- (d) automatically, any further decisions made by the 1992 Fund Assembly regarding the issue of the definition of 'ship', if and when they are made.

16 Action to be taken

1992 Fund Assembly

The 1992 Fund Assembly is invited to:

- 1) Decide whether to accept the recommendations of the Working Group regarding;
 - (a) The illustrative list of vessels clearly within or outside the definition of 'ship' under Article I(1) of the 1992 CLC;
 - (b) The hybrid approach using the maritime transport chain for those 'grey' areas where it is not clear whether the vessel falls within or outside the definition of 'ship'; and
 - (c) The issue of contributions from vessels performing STS operations whilst 'permanently or semi-permanently at anchor', under Article 10.1 of the 1992 Fund Convention.
- 2) Decide whether to instruct the Secretariat to produce a guidance document reflecting the conclusions of the Working Group, to be considered by the 1992 Fund Assembly at its Spring 2016 session.

* * *

ANNEX I

Working Group on issues related to the definition of 'ship'

REVISED TERMS OF REFERENCE

(Adopted by the 1992 Fund Assembly at its 19th session held in October 2014)

Recognising the importance the definition of 'ship' has for the payment of compensation and for the contribution system,

Taking note of the discussions at sessions of the 1992 Fund Assembly on this issue,

Stressing the need for transparency in the application of the definition of 'ship' and the consequences a decision will have on the scope of the 1992 Civil Liability Convention and 1992 Fund Convention,

Stressing the need to find solutions without changing the current Conventions,

Noting the legal analysis provided in document [IOPC/OCT11/4/4](#) and other related documents,

The Assembly decides to set up the 7th intersessional Working Group of the 1992 Fund with the following mandate:

1. To analyse the consequences that different interpretations outlined in document [IOPC/OCT11/4/4](#) and other related documents may or could have on the coverage and contributions of the international compensation regimes;
2. To recommend to the Assembly a uniform approach to the interpretation of the definition of 'ship' under Article I(1) of the 1992 CLC and to Article 10 of the 1992 Fund Convention; and
3. To present a final report to the October 2015 session of the 1992 Fund Assembly.
4. The Working Group shall have as its Chairman Mrs Birgit Sølling Olsen (Denmark).

* * *

ANNEX II

Proposed list of vessels which clearly fall within or outside the definition of ‘ship’ under Article I.1 of the 1992 CLC and examples of when the maritime transport chain commences and concludes

Considerations

The list of vessels contained in the following document is not exhaustive. It is only indicative and illustrative of the craft which clearly fall within the definition of ‘ship’, and which clearly fall outside the definition of ‘ship’. 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.

It is the overall view of the Working Group that ‘grey areas’ are to be decided on a case-by-case basis using the hybrid approach. The hybrid approach involves the list of examples of ships which clearly fall within the definition of ‘ship’ or clearly fall outside the definition, and the use of the maritime transport chain test as an interpretative tool for addressing situations where it is not clear if the structure is a ‘ship’ or not.

Even if a craft is not included within either list, the 1992 Fund governing bodies will be able to consider whether it is or is not a ‘ship’, in light of the circumstances.

Examples of craft which clearly fall within the definition of ‘ship’

The Working Group proposes that the following non-exhaustive, illustrative list, provides examples which are clearly within the definition of ‘ship’ under Article I(1) of the 1992 CLC: (alternative texts proposed by the delegation of the Bahamas are shown in italics)

- 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 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 (ie 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;

(Alternative text proposed by the delegation of the Bahamas)

(4) A ship capable of carrying oil and other cargoes (ie 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 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. This also includes when an Offshore craft is towed; and

(Alternative text proposed by the delegation of the Bahamas)

For the purposes of the following examples the term “offshore craft” means Floating Drilling Production Storage and Offloading units (FDPSO), Floating Production Storage and Offloading units (FSO) and FSU whether purpose-built, or converted or adapted from seagoing vessels constructed for the transportation of oil.

(5) Offshore craft that have their own independent motive power, power, steering equipment for seagoing navigation and seafarers onboard undertaking a voyage carrying oil in bulk as cargo; and (Alternative text proposed by the delegation of the Bahamas)

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- 6) Craft that are originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at 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.

(Alternative text proposed by the delegation of the Bahamas)

(6) Offshore craft that do not have their own independent motive power, steering equipment for seagoing navigation and seafarers onboard being towed and carrying oil in bulk as cargo.

Note: Existing paragraph (6) is deleted since converted craft are covered by proposed new paragraph (5) and the proposed definition text of the term "offshore craft".

(End of alternative texts proposed by the delegation of the Bahamas)

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

The Working Group considers that the following (non-exhaustive) illustrative examples, clearly do not fall within the definition of 'ship' under Article I(1) of the 1992 CLC:

- A) Barges certified or classed only for use on inland water ways;
- B) 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.
- C) Vessels or craft involved in:
- a) Exploration, for example jack-up rigs^{<13>} 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;

'Grey areas' to be decided on a case by case basis

There are, however, a number of vessel types where it is not clear whether they comply with the definition of 'ship' under Article I(1) of the 1992 CLC. These cases will be decided by the 1992 Fund governing bodies on a case-by-case basis, using the maritime transport chain test (suggested by Spain and refined by the Australian delegation), as an interpretive tool. The hybrid approach involves both the list of examples of ships which clearly fall within the definition of 'ship' or clearly fall outside the definition, and the use of the maritime transportation chain test as an interpretive tool for addressing situations where it is not clear if the structure is a 'ship' or not.

^{<13>} An offshore drilling rig or platform having a floating hull fitted with retractable legs that are lowered to the seabed from the operating platform to elevate the hull above wave level.

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FSOs and FSUs

In addition, one of the questions which has not yet been resolved by the Working Group is whether FSOs and FSUs fall within the definition of ‘ship’ within Article I(1) of the 1992 CLC. In this regard, Professor Lowe QC was of the opinion that the following vessels fell within the definition of ‘ship’:

- i. Purpose-built FSOs that have their own independent motive power and steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo; and
- ii. Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained.

In respect of these categories, the elements of carriage of oil and undertaking a voyage are present, so they can rightly be classed as a ‘ship’ within Article I(1) of the 1992 CLC.

The legal opinion also stated that, in relation to the question of what distinguishes a ‘ship’ from a FSO, neither the Conventions, nor any associated agreement or practice, establish any criteria to differentiate between them. It is, however, a matter of discretion for Member States to decide on the criteria that will apply, and the legal opinion states that the main criterion implicit in the CLC definition of ship, is the capacity to navigate at sea, and the interpretive criteria should reflect that fact.

It is worth noting the present position of the IOPC Funds governing bodies with regard to the coverage of offshore craft, in accordance with the decision taken by the 1992 Fund Assembly in October 1999 endorsing the conclusions of the 2nd intersessional Working Group regarding the applicability of the 1992 Conventions to offshore craft. The 1992 Fund Assembly decided that:

- i. Offshore craft should be regarded as ‘ships’ under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate;
- ii. Offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore field for operational reasons or simply to avoid bad weather.

Examples of when the maritime transport chain commences and concludes

Example 1- loading oil from an onshore source

In the case of oil produced on land, it is submitted that the maritime transport chain commences, when the oil is loaded as bulk cargo into a seagoing or seaborne craft, and ends, when the oil was discharged in a port or terminal installation, in the territory of a Member State.

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

A logical explanation of when the maritime transport chain commences for the 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.

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Typically, such scenarios would include:

A seagoing vessel or seaborne craft loading oil from:

- i. Another seagoing or seaborne craft in a typical 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; or
- iii. FDPSO;
- iv. Jack-up rigs;
- v. Mobile offshore production units; and
- vi. FSO

In the case of the FSO, if it was a purpose-built FSO or craft as mentioned in paragraph 10.2.3(5) or (6) of document [IOPC/APR15/8/1](#), 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 applying the 1992 Fund Assembly decision of October 1999, then the FSO itself would also be classed as a ‘ship’ under Article I(1) of the 1992 CLC, as well as the receiving vessel. If however, the transfer involved a FSO which did not fall within the categories mentioned in paragraph 10.2.3(5) or (6), or a craft which did not fall within the other categories mentioned in paragraph 10.2, it would not be classed as a ‘ship’ under Article I(1) of the 1992 CLC.

It is submitted that 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

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. The document notes that 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. Typical examples of such scenarios and the method of attachment were provided in Annex 1 to document [IOPC/APR15/8/1](#).

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 a 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.

However, in some cases, a 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 a 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.

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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.^{<14>}

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, nevertheless, the carrying vessel or seaborne craft remains within the maritime transport chain, until the cargo is finally delivered.

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)^{<15>} and anchoring, pending final delivery to a port, terminal installation or final consumer/recipient^{<16>}.

^{<14>} 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.

^{<15>} 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.

^{<16>} 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.