



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUNDS

Agenda item: 4	IOPC/OCT13/4/3 IOPC/APR13/7/5	
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1992 Fund Assembly	92A18	•
1992 Fund Executive Committee	92EC59	
Supplementary Fund Assembly	SA9	
1971 Fund Administrative Council	71AC31	
1992 Fund Working Group 6	92WG6/5	
1992 Fund Working Group 7	92WG7/2	•

## REPORT ON THE SECOND MEETING OF THE SEVENTH INTERSESSIONAL WORKING GROUP

### Note by the Secretariat

**Summary:**

The Working Group's second meeting focused on examples of situations where doubt might exist as to the coverage of the 1992 Conventions in respect of the definition of 'ship'. Lengthy discussions took place and the Working Group reached agreement on three of the five questions asked of the Group at its first meeting. In the continued absence of agreement on the remaining two questions, the Chairman proposed the establishment of a Consultation Group, which would meet for the first time on 28 October 2013, ahead of the next meeting of the Working Group, with the aim of reaching a convergence of opinions. The group would consist of the delegations of Australia, Netherlands, Japan, Norway, the International Group of P&I Associations, the International Chamber of Shipping and any other delegations who wished to contribute. If possible the group would present more concrete proposals to the next meeting of the Working Group, possibly in the form of a guidance document or criteria that the IOPC Funds and Member States could follow.

The conclusion of the meeting was to therefore recommend that the 1992 Fund Assembly amend the Terms of Reference of the Working Group to continue its work and hold further meetings as required.

**Action to be taken:**

1992 Fund Assembly

- (a) Consider revising the Terms of Reference of the Working Group to enable the Group to continue its work and hold further meetings as required;
- (b) Decide whether to approve the establishment of a Consultation Group with the aim of reaching a convergence of opinions in respect of the two unresolved questions asked of the Working Group; and
- (c) Report any relevant decisions made in respect of the definition of 'ship' under the 1992 Conventions to the International Maritime Organization (IMO) Legal Committee for its information.

1992 Fund seventh intersessional Working Group

Information to be noted.

## 1 Introduction/Background Information

- 1.1 In October 2010 the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, instructed the Director to provide a legal analysis of the extent to which the interpretation of the definition of ‘ship’ within Article I.1 of the 1992 Civil Liability Convention (1992 CLC) might include floating storage units (FSUs), and to consider whether to levy contributions for oil carried by ‘mother’ vessels as described in paragraphs 5.1 to 5.3 of document [IOPC/OCT10/4/3/1](#), submitted by the delegation of Denmark.
- 1.2 In accordance with the 1992 Fund Administrative Council’s instructions, the Director engaged Professor Vaughan Lowe QC, a practising lawyer and leading academic at the University of Oxford with many years’ experience dealing with international treaties and conventions, to carry out the study. At the 16th session of the 1992 Fund Assembly held in October 2011, the Director presented Professor Lowe’s legal analysis regarding the interpretation of the definition of ‘ship’. Based on that legal analysis, the Director made a number of proposals to the 1992 Fund Assembly, contained in section 7 of document [IOPC/OCT11/4/4](#).
- 1.3 At that session, the 1992 Fund Assembly decided to establish a Working Group to consider the implications of the proposals contained within section 7 of document [IOPC/OCT11/4/4](#), and to report back to the 1992 Fund Assembly at its next session. Terms of reference were agreed and are set out in Annex III to document [IOPC/OCT11/11/1](#) (see section 3 below).
- 1.4 The Group held its first meeting on 26 April 2012 (document [IOPC/APR12/11/2](#)). Views were expressed on each of the questions raised. However, the majority of delegations who took the floor requested further information from representatives of industry before a full debate could take place. Many participants needed more time to consider the issues and the consequences and stressed that there was a need to consider both the contribution and compensation aspects. A number of industry representatives from organisations with observer status to the 1992 Fund offered to assist in carrying out further research and obtaining further specific data in advance of the next meeting of the Working Group in spring 2013. Member States also agreed to look into national practices.
- 1.5 The Chairman established a Consultation Group to ensure that some discussion could take place and progress could be made before the next meeting in 2013.

## 2 Participation

- 2.1 The following Member States were represented at the Working Group’s second meeting:

Algeria	Germany	Panama
Angola	Ghana	Philippines
Argentina	Greece	Poland
Australia	Grenada	Qatar
Bahamas	India	Republic of Korea
Belgium	Islamic Republic of Iran	Russian Federation
Bulgaria	Italy	Saint Kitts and Nevis
Cameroon	Japan	Singapore
Canada	Kenya	Spain
China <sup>&lt;1&gt;</sup>	Liberia	Sweden
Colombia	Malaysia	Tunisia
Cyprus	Marshall Islands	Turkey
Denmark	Mexico	United Kingdom
Dominican Republic	Morocco	Uruguay
Ecuador	Netherlands	Vanuatu
Estonia	New Zealand	Venezuela (Bolivarian
Fiji	Nigeria	Republic of)

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

Finland  
France

Norway  
Oman

2.2 Seven non-Member States, Chile, Côte d'Ivoire, Guatemala, Indonesia, Peru, Saudi Arabia and Ukraine, were represented as observers at the meeting.

2.3 The following intergovernmental and international non-governmental organisations participated in the Working Group's meeting 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 Regions (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 Tanker Owners Pollution Federation Limited (ITOPF)

Oil Companies International Marine Forum (OCIMF)

World Liquid Petroleum Gas Association (WLPGA)

### **3 Terms of Reference**

3.1 The terms of reference of the Working Group, as determined by the Assembly at its 16th session in October 2011 (document [IOPC/OCT11/11/1](#), Annex III) cover 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 may or could have on the coverage of and contributions to the international regimes; and

(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 to Article 10 of the 1992 Fund Convention.

3.2 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).

### **4 Documents considered by the Working Group**

The following documents were considered by the Working Group:

IOPC/APR13/7/1/Rev.1 Definition of 'ship' under the 1992 Civil Liability and 1992 Fund Conventions, submitted by the Netherlands

IOPC/APR13/7/2 Consideration of the definition of 'ship', submitted by Australia

IOPC/APR13/7/3 Drifting barges and the definition of 'ship', submitted by Australia

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

## **5 Chairman’s introduction**

5.1 In opening the Working Group’s second meeting, the Chairman reminded the Working Group that at its first meeting it had considered a number of questions, set out by the Chairman in document [IOPC/APR12/11/1](#). The Secretariat’s document [IOPC/OCT11/4/4](#), containing Professor Lowe’s legal analysis regarding the interpretation of the definition of ‘ship’, had been considered the ‘base document’ for the work of the Group and was made available again at the April 2013 meeting.

5.2 The Chairman reminded delegations that the aim of the Working Group was to find solutions within the existing framework of the international liability and compensation regime and that the Working Group was due to report to the 1992 Fund Assembly in October 2013. She thanked those delegations who had submitted documents for consideration and proposed that, following the presentation of those documents, the Working Group should again work through the questions listed in paragraph 5.3 below, with the aim of reaching agreement on concrete recommendations on the subject of the definition of ‘ship’ and also on the consequences of such recommendations on the contribution system.

### **5.3 Issues to be considered by the Working Group**

- (a) whether floating storage and offloading units (FSOs) and floating storage units (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 ship-to-ship (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 on board them qualifies as ‘received’ for the purposes of Article 10 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.

## **6 Overview of documents for consideration**

### **6.1 Document IOPC/APR13/7/1/Rev.1, submitted by the Netherlands**

6.1.1 The delegation of the Netherlands introduced document IOPC/APR13/7/1/Rev.1, emphasising the importance of the discussions on the definition of ‘ship’ to the Netherlands, given that a large number of tankers, offshore craft and STS operations all pass or take place close to the Dutch coast. The delegation of the Netherlands had identified in their document various special ships and activities that they considered of importance for the discussion of the definition of ‘ship’ under the 1992 Conventions. The Netherlands proposed for these special ships and activities an interpretation

for coverage of and contribution to the international compensation regime. The specific proposals of the Netherlands are set out under the individual related questions in section 7 below and are summarised in the following table:

Type of vessel	Ship	Contributing cargo
A loaded tanker, at the same position, during a long period of time	YES	NO
A tanker, at the same position during a long period of time performing STS operations	YES	YES
Offshore craft	YES	YES
Floating waste oil reception facility	YES	YES

6.1.2 In general, the Netherlands were in agreement with the conclusions of Professor Lowe but considered that an even broader definition of ‘ship’ should be adopted in relation to the 1992 Conventions bringing it in line with other IMO Conventions, such as MARPOL Annex I. The delegation of the Netherlands referred to the discussions within the recent IMO Legal Committee meetings concerning liabilities and compensation for oil pollution damage resulting from offshore oil exploration and exploitation and suggested that the 1992 Fund should inform the Legal Committee of possible 1992 Fund decisions or interpretations of the definition of ‘ship’ in relation to offshore craft to avoid duplications or gaps in the compensation regimes for offshore craft.

6.2 Document IOPC/APR13/7/2, submitted by Australia

6.2.1 The delegation of Australia introduced document IOPC/APR13/7/2, explaining that since the presentation of Professor Lowe’s legal opinion and other documents at previous meetings, Australia had examined the implications of decisions that might be taken by the IOPC Funds, focussing on the administration of the contributions system and the enforcement of the requirement to carry a CLC certificate at a tankers port of arrival or departure. Australia also provided information on its policy with regard to blue cards and CLC certificates for floating, production, storage and offloading vessels in the context of what was understood to be the 1992 Fund’s policy.

6.2.2 The analysis by Australia had led it to conclude that the simple statement that FSOs are not ships was not satisfactory and that it was unhappy with setting a fixed period beyond which a ship may be considered semi-permanently or permanently at anchor. Australia suggested that such an approach would not be sufficiently flexible to adapt to evolving technology and modes of operation, nor would it accurately reflect risk or therefore lead to a sensible position on contributions. The Australian delegation expressed dissatisfaction with the terminology used throughout the discussions, particularly the use of FSO. It was suggested that the use of that term should be avoided in any policy as, having established a definition of ‘ship’, it would be highly undesirable to then embark on defining the term ‘FSO’.

6.2.3 Australia expressed its preference to see interpretative criteria along the lines set lines set out by Professor Lowe in document [IOPC/OCT11/4/4](#), Annex I, paragraphs 113-130. These criteria include:

- (i) A vessel connected to a subsea or land-based pipeline is not a ‘ship’.
- (ii) A vessel that has no independent motive power for sea-going navigation and/or no steering equipment should not be regarded as a ship, unless under tow (however, see Australia’s other submission to this session on barges, document IOPC/APR13/7/3).
- (iii) Craft originally constructed and operated as vessels for the transportation of oil, but later converted into a storage vessel that does not retain the capacity to navigate at sea under their own motive power are not ‘ships’ as long as they remain ‘disabled’, but could regain ‘ship’ status if such capacity to navigate and engage in voyages is reinstated.

- (iv) Purpose-built storage vessels that have their own independent motive power and steering equipment for sea-going navigation; tankers or combination carriers that have not undergone conversion; and craft originally constructed as vessels for the transportation of oil, but later converted to storage vessels that do retain the capacity to navigate under their own power, are to be regarded as ships.

6.2.4 Australia suggested, however, that the following criteria also be considered:

- (v) A vessel which is normally connected to a subsea or land-based pipeline and which moves temporarily to a different location to avoid bad weather or for maintenance is not a 'ship' providing that it returns to the original position without having offloaded any oil at any point during the disconnected time.
- (vi) 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 oil received by this vessel should be considered 'received'. If it does both, this vessel should be treated as an oil terminal and any receipts should attract liability to pay contributions to the IOPC Funds.

6.3 Document IOPC/APR13/7/4, submitted by the International Chamber of Shipping and the International Group of P&I Associations

6.3.1 The first meeting of the seventh intersessional Working Group in April 2012 requested information and statistics from the industry observer delegations on the issues to be considered by the Working Group. The International Chamber of Shipping (ICS) and the International Group of P&I Associations (International Group) therefore submitted data and information on:

- (a) the number of FSOs/FSUs that have been issued with a CLC Blue Card by an International Group P&I Club and/or a CLC State Certificate; and
- (b) the typical period of time that a 'ship' might be at anchor with cargo on board.

6.3.2 The International Group had previously informed the Working Group that over 60 FSOs/FSUs had been issued with CLC Blue Cards by International Group P&I Clubs. The International Group had collected further data on the number of Blue Cards and State Certificates issued in respect of FSUs/FSOs and discovered what appears to be common practice in 11 jurisdictions in which CLC State Certificates are issued for FSOs/FSUs. While not every State that was asked to provide input to this exercise had done so, it was confirmed that 41 FSOs/FSUs had been issued with CLC State Certificates.

6.3.3 ICS and the International Group were unable to provide clarification as to the reasons why some States had issued CLC Certificates (or requested them), but the fact that 11 had confirmed this practice suggested that a number of States Parties already consider FSOs/FSUs to be included in the definition of 'ship' and would therefore apply the 1992 CLC/Fund regime in the event of a persistent oil spill from such vessels.

## **7 Issues considered by the Working Group**

7.1 Do FSOs and FSUs fall within the definition of 'ship' within Article I.1 of the 1992 CLC?

7.1.1 In his legal opinion Professor Lowe concluded that FSOs and FSUs should not fall within the definition of 'ship' except for the following three categories (document [IOPC/OCT11/4/4](#), paragraph 3.10):

- (a) Barges being towed by ships navigating 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 sea-going 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.

- 7.1.2 At the first meeting of the Working Group, many of the delegations which spoke in response to this question expressed a strong preference for a broad interpretation to be taken in respect of the definition of 'ship'. Concern was expressed that excluding FSOs and FSUs from the coverage of the international compensation regime would defeat the object of the regime and potentially leave victims of oil pollution damage open to great risks.
- 7.1.3 In its document presented to the Working Group's second meeting, Australia confirmed that it did not support a blanket statement that 'FSOs are not ships'. Instead, it supported the development of interpretive criteria along the lines suggested by Professor Lowe with the addition of two further criteria, which, it was suggested, would help assess the circumstances of each case in a consistent yet adaptable way (see paragraphs 6.2.3-6.2.4 above).
- 7.1.4 In its document presented to the Working Group's second meeting, the Netherlands also agreed with the categories set out in paragraph 7.1.1 (a)-(c) and considered that a loaded tanker, at the same position for a long period of time, a tanker, at the same position for a long period of time performing STS operations, offshore craft and a floating waste oil reception facility should all be included in the definition of 'ship' under the 1992 Conventions. The Netherlands did express the view, however, that the definition should be broader still and more in line with other IMO Conventions.
- 7.1.5 In document IOPC/APR13/7/4, submitted by ICS and the International Group, Professor Lowe's categories of FSOs, set out in paragraph 7.1.1 (a)-(c), were also considered. The authors stated that in these categories the criteria 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. They added that the plain language of the definition of 'ship' and the Travaux Préparatoires of the 1984 Protocols clearly indicated a FSO was a 'ship' within the meaning of the CLC and that the concept of 'carriage' in the main part of the definition does not necessarily require movement from A to B. In their opinion oil 'stored' in a ship was a 'carriage' by the ship.
- 7.1.6 The authors suggested that if the Working Group agreed with this reasoning then the question of application of the Conventions to FSOs/FSUs became less complex than previously envisaged and that the remaining question would be to consider whether a recommendation should be made to the 1992 Fund Assembly that FSOs/FSUs should be included within the scope of the 1992 CLC while performing the storage function. The authors drew the Working Group's attention to the current policy and/or practice in 11 States which required FSUs/FSOs to have CLC Blue Cards and issue or request State Certificates attesting that insurance is in place. It was pointed out that these States presumably apply such requirements on the understanding that if there was a spill from FSOs/FSUs, the 1992 CLC would apply, triggering the rights and obligations established in the Convention including the channelling provisions, strict liability of the owner, the right of claimants to take direct action against the owner and insurer, and a guarantee that eligible claims would be admissible under the Conventions. If the 1992 CLC did not apply to FSOs/FSUs, such rights would be unavailable and States should not expect these vessels to be issued with CLC Blue Cards nor should States issue State Certificates.
- 7.1.7 A lengthy debate took place, taking into account the proposals contained in the three documents submitted to the meeting on this issue, as well as the original legal opinion of Professor Lowe. No delegation disagreed with the three categories set out in paragraph 7.1.1 (a)-(c), which Professor Lowe had suggested should be included within the definition of 'ship'. However, there remained a divergence of opinions in relation to whether the definition of 'ship' should, with the exception of the three specified categories, exclude FSOs or whether a much broader understanding should be adopted.

- 7.1.8 A number of delegations considered that the transportation of oil in bulk as cargo was an essential element when considering whether a vessel should be considered a ship, suggesting that it was a requirement that the vessel be on a voyage. This being the case, those delegations therefore concluded that vessels that held oil but never navigated should not be considered 'ships'.
- 7.1.9 A large number of delegations, however, disagreed with that opinion and instead suggested that, as proposed by ICS and the International Group, the carriage of oil was the essential element in defining whether a vessel should be considered a ship. One delegation suggested that a ship or a floating unit that stores oils which are subject to contributions under the 1992 Fund Convention, forms part of the transport chain, and, provided it is not the final destination of the cargo, should be considered a 'ship'. Other delegations referred to the spirit of the Convention, suggesting that the victims of oil pollution damage should be the main concern and that where possible gaps in coverage should be closed.
- 7.1.10 Wide support was given from both sides to developing interpretive criteria and practical solutions, which could assist in defining ships under the 1992 Conventions on a case by case basis. In the continued absence of agreement on the matter, the Chairman therefore proposed the establishment of a Consultation Group, consisting of Australia, Netherlands, Japan, Norway, the International Group and ICS and any other delegations who wished to contribute. This group, which included delegations with differing views, would meet ahead of the next meeting of the Working Group with the aim of reaching a convergence of opinions and if possible presenting more concrete proposals, possibly in the form of a guidance document or criteria that the IOPC Funds and Member States could follow.

7.2 Is one year 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?

All delegations which spoke in response to this question at the Working Group's second meeting were against setting a fixed period of one year. The Chairman noted the comments made and also referred to the discussions at the Working Group's first meeting, concluding that, having fully considered this issue, the Working Group did not support the proposal that a fixed time period could be agreed which would 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.

7.3 Should the 1992 Fund Assembly confirm its 2006 decision 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?

- 7.3.1 The delegation of the Netherlands suggested in document IOPC/APR13/7/1/Rev.1, section 3, that a tanker at the same position for a long time performing STS operations was a familiar situation. The document explained that oil tankers could carry huge amounts of oil which must be unloaded in different ports. These tankers were massive in size and often could not berth in ports or transport oil in shallow waters. These huge tankers often stayed in the same position for weeks, months or even years, and transferred their oil to smaller, more manoeuvrable feeder tankers for transport to the ports of destination.
- 7.3.2 Another situation described in the document was that where crude oil was shipped from inland sources by small feeder tankers to a location at sea where a vessel remained permanently at anchor and received these cargoes for storage and consolidation before subsequently discharging the consolidated cargo to other tankers which transport the crude oil to its final destination.
- 7.3.3 The delegation of the Netherlands and one other delegation referred to the higher risk of oil spills posed by STS operations such as the scenarios described and stated that given that they were clearly adapted for the carriage of oil in bulk as cargo, such tankers should be considered 'ships' and should be covered by the 1992 Conventions. In section 3.3 of their document, the Netherlands referred to the reasoning behind the decisions taken by the 1992 Fund Assembly in 2006 and in line with those decisions, the Netherlands considered a tanker at the same position during a long period of time as semi-permanently anchored and therefore the oil received as contributing oil.

- 7.3.4 Several other delegations supported this argument and were happy to confirm the 2006 decision. One delegation suggested that overturning this decision to provide that if the tanker were to bring the oil in to the terminal at land it would be considered contributing oil but if it were transferred from STS it would not be considered contributing oil, would encourage further STS operations, leading to a higher risk of spills.
- 7.3.5 Other delegations did not agree with the 2006 decision and drew the Working Group's attention to a number of practical difficulties experienced by States, including obtaining the required oil reporting forms from such vessels. One delegation referred to the definition of a terminal installation as defined in Article 1.8 of the 1992 Fund Convention, 'any site for the storage of oil in bulk which is capable of receiving oil from water borne transportation, including any facility situated offshore and linked to such sites'. That delegation emphasised that the link to an onshore site was in their opinion a key element in determining whether it was the receiver of the cargo or not. In the absence of a link by pipeline, that delegation did not consider that the oil on board could be considered contributing cargo.
- 7.3.6 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 with the aim of developing possible solutions, either through a resolution or further guidance criteria which could assist the Working Group in finding a way forward.
- 7.4 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?

All delegations which spoke in response to this question supported the proposal, made originally by the Danish delegation in document [IOPC/OCT10/4/3/1](#), that the oil on board these 'mother' vessels should not be considered contributing oil.

- 7.5 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?
- 7.5.1 The Working Group had agreed that no fixed time period could be used to define whether a vessel should be considered 'permanently or semi-permanently' at anchor.
- 7.5.2 With regard to whether the oil on board such vessels should qualify as contributing cargo, the delegation of the Netherlands referred to the scenario it described in document IOPC/APR13/7/1/Rev.1, section 2 and its subsequent proposal in relation to this question. The scenario involved supertankers which had been loaded with oil in, for example, the Persian Gulf and which sailed at low speed south of Africa not knowing their final destination until a much later stage when the oil on board had a confirmed 'buyer'. According to the Dutch delegation these tankers functioned in reality as 'sailing floating storage' and often appeared close to the Dutch coast line. Further, some tankers, as an alternative to sailing slowly, remained anchored for a period of time (days, weeks or months) waiting for an order before proceeding to their destination.
- 7.5.3 In the view of the Netherlands, where a loaded tanker remained at the same position, no oil was received in ports or installations so the oil carried on board did not fall under the definition of contributing oil. This argument was supported by several other delegations.
- 7.6 Other issues
- 7.6.1 At the first meeting of the Working Group the Chairman had stated that Member States were welcome to identify other issues which fell within the mandate of the Working Group for consideration at the Group's next meeting and encouraged delegations to do so in a written submission to the Group.

*Barge*

- 7.6.2 The delegation of Australia introduced document IOPC/APR13/7/3 and described a scenario which had occurred off the coast of Western Australia involving a general cargo barge which had separated from its towing vessel and drifted for several days. It was pointed out that while this particular case did not involve an oil cargo, it had raised the question as to whether the international compensation regime would apply to such a situation.
- 7.6.3 Barges under tow were, in Professor Vaughan Lowe's opinion, 'ships' (document [IOPC/OCT11/4/4](#), Annex I, paragraph 122). However, Australia sought confirmation as to whether a barge would lose its 'ship' status if the tow line were to break, and whether compensation would be payable by the Fund if a drifting barge were to spill oil cargo, since the Fund pays compensation for 'pollution damage', the definition of which is tied to the definition of 'ship'.
- 7.6.4 The delegations which spoke on this issue considered that the status of the barge would not change in this situation and that the 1992 Fund Convention would apply.

*Floating waste oil reception facility*

- 7.6.5 The delegation of the Netherlands introduced section 5 of document IOPC/APR13/7/1/Rev.1, and described a scenario in which a ship, originally designed and constructed as a tanker, was converted to a floating tank reception facility. The facility was not ready to sail, had no propulsive equipment, and was permanently at anchor. The facility is used for receiving oily waste. Oil residues recovered from this waste are sold. Reference was made to the case of *Slops*, in which its propeller was removed and its engine deactivated and officially sealed.
- 7.6.6 The Netherlands proposed that victims of oil pollution damage caused by such facilities should be compensated under the 1992 Fund Convention and that the oil on board such facilities should be considered contributing oil, although in practice a waste reception facility would likely not receive in excess of 150 000 tonnes of oil.
- 7.6.7 Some delegations disagreed with the Netherlands and considered that such facilities should not be included in the definition of 'ship' under the 1992 Conventions. One delegation expressed the view that waste oil was never intended to be covered by the CLC and Fund regime and referred again to the concept of transportation of oil which they considered fundamental to the debate. That delegation stated that facilities which were anchored and not adapted for navigation and whose primary function was to store waste oil rather than transport it, should not be considered a 'ship'. Some delegations referred to the *Slops* incident and the decision by the 1992 Fund Executive Committee that the vessel was not a ship, a decision which those delegations still supported.
- 7.6.8 Several delegations agreed with the Netherlands that such a facility should fall under the definition of 'ship' under the 1992 Conventions. Some suggested that the name of such a craft was irrelevant and that the important factor was its function, whether the craft fell within the definition of 'ship' and whether the oil on board was persistent.
- 7.6.9 One delegation referred to the waste situation in the Caribbean, explaining that Grenada did not have the capability for processing waste oils in Grenada and that for a number of years processing operations had been carried out in Trinidad. That delegation expressed concern that, based on the interventions of some delegations, compensation might not be payable in the event that pollution damage were to occur if such oils or waste oils were being moved.
- 7.6.10 One delegation highlighted that the aim of the 1992 Conventions was to compensate victims of oil pollution damage and not to establish policies which produced strange results, such as the non-payment of compensation in the example given in paragraph 7.6.9.

- 7.6.11 The delegation of the International Group informed the Working Group that when collating the data provided in document IOPC/APR13/7/4 in relation to blue cards issued to FSOs, FSUs and the state certificates that were issued as a result, it had not taken into account floating waste oil reception facilities. That delegation suggested that it was quite possible that International Group Clubs were issuing blue cards to such facilities in the belief that they did fall under the scope of the CLC and that States were issuing State certificates as well. The International Group offered to carry out research in order to ascertain whether any blue cards and state certificates had been issued and to report to the Consultation Group established by the Chairman. One delegation suggested that the views on this subject had been divided for many years, that the Working Group was unlikely to reach an agreement and that perhaps the item should be removed from the Working Group's mandate.
- 7.6.12 One delegation raised an issue relating to the definition of oil which the Chairman considered fell outside of the mandate of the Working Group. The Chairman invited that delegation to submit a document in writing to the 1992 Fund Assembly for its consideration.
- 7.6.13 Most delegations agreed with the Netherlands that the oil on board floating waste oil reception facilities should be considered contributing oil. Others disagreed and referred to the difficulties discussed under section 7.3, such as obtaining oil reports etc.
- 7.6.14 Taking into account all views expressed, the Chairman noted that there was some overlap with the other questions raised during the meeting and therefore suggested that this particular discussion should be considered by the Consultation Group. The Chairman invited other interested parties to participate in the work of that group in order to seek a way forward on this question. She suggested that there might be some criteria or guidance that could be applied to the ship or facility in order to ensure it would be covered by the 1992 Conventions. The Chairman emphasised that, even if the Working Group were to develop some general standardised guidelines which might assist, in practice, in the event of any incident occurring involving the 1992 Fund, the Executive Committee would continue to look at the individual circumstances of the case in question.

*Compensation for offshore craft*

- 7.6.15 The delegation of the Netherlands referred in paragraph 4.2.7 of document IOPC/APR13/7/1/Rev.1 to recent discussions at meetings of the Legal Committee of IMO, initiated by Indonesia, concerning liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation. That delegation recommended that the 1992 Fund Assembly should inform the Legal Committee of possible 1992 Fund decisions or interpretations of the definition of 'ship' in relation to offshore craft, to avoid duplications or gaps in the compensation regimes for offshore crafts.
- 7.6.16 Some delegations stated that offshore craft used in exploration for the production of oil should not be considered ships under the 1992 Conventions and that such operations did not fall under the scope of the Conventions.
- 7.6.17 The delegation of Indonesia confirmed that the latest position of the Legal Committee in respect of this issue taken at the Committee's 99th meeting, was that it would further analyse the liability and compensation issues connected with the pollution damage resulting from offshore oil exploration activities but that it had not agreed to develop any guidance or model agreements to assist States, as proposed by Indonesia.
- 7.6.18 The Chairman confirmed that the Legal Committee was not developing a new legal instrument on compensation or liability to cover such issues and referred to the report of the Legal Committee's 99th meeting, document LEG 99/14, section 13. The Working Group agreed that the Assembly should inform the Legal Committee of IMO of any decisions taken in respect of the definition of 'ship' which would be relevant to the discussions within the Legal Committee meetings.

## 8 Conclusions

8.1 The Chairman concluded that the Secretariat's document [IOPC/OCT11/4/4](#), containing Professor Lowe's legal analysis regarding the interpretation of the definition of 'ship', had continued to form the 'base document' for the work of the Group at the April 2013 meeting.

8.2 In respect of the specific questions resulting from Professor Lowe's analysis which were identified at the opening of the second meeting, the Working Group decided as follows:

- (a) Do FSOs and FSUs fall within the definition of 'ship' within Article I.1 of the 1992 CLC?

Wide support was given from both sides to developing interpretive criteria and practical solutions which could assist in defining ships under the 1992 Conventions on a case by case basis. The Chairman established a Consultation Group which would meet ahead of the next meeting of the Working Group 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.

- (b) Is one year 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?

The Working Group did not support the proposal for any fixed time period.

- (c) Should the 1992 Fund Assembly 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?

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.

- (d) Should the 1992 Fund Assembly 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 on board them qualifies 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.

- (e) Is one year a reasonable time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor, and therefore should the oil received in such vessels 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?

The Working Group agreed that no fixed time period could be agreed which could be used to define whether a vessel should be considered 'permanently or semi-permanently' at anchor. It also supported the argument that the oil carried on board did not fall under the definition of contributing oil.

8.3 The additional practical scenarios provided, such as the barge that lost its tow lines and the floating waste oil reception facility (section 7.6) also promoted debate within the Working Group and whilst agreement was reached in respect of the former scenario, the latter remained to be settled and as such was also referred to the Consultation Group.

- 8.4 The Chairman thanked all delegations who had submitted documents for consideration and all who had contributed to the debate during the meeting. During the course of the meeting a number of interventions were made referring to the aim and the spirit of the Conventions, all recognising the importance of the protection of and prompt payment of compensation to victims and many referring to the advantages of closing gaps in compensation. However, some were concerned that taking a broad approach to the definition of ship would extend the application of the Convention beyond that originally intended and could place an unexpected and additional burden on contributors.
- 8.5 One delegation invited delegations to consider ahead of the next meeting whether the Conventions were fixed in time or whether they could be applied to deal with a changing world and issues which might not have been anticipated when the Conventions were originally drafted.
- 8.6 Some delegations expressed concern that broadening the definition of 'ship', was a serious debate and that the IOPC Funds should inform the Legal Committee of the IMO of any significant changes to the current understanding of the term within the 1992 Conventions. The Chairman reassured the Working Group that all recommendations of the Working Group would be developed within the framework of the existing text of the Conventions, but agreed that the 1992 Fund Assembly could be invited to inform the Legal Committee of its decisions in this regard.
- 8.7 The Chairman concluded that, pending authorisation of the Assembly at its October 2013 meeting, the Working Group should revise its terms of reference and hold a third meeting during the spring of 2014. The Consultation Group, consisting of the delegations of Australia, Netherlands, Japan, Norway, the International Group of P&I Associations, the International Chamber of Shipping and any other delegations who wished to contribute, would meet on 28 October 2013 and would, taking into account the discussions at this meeting, aim to develop more solid proposals in the form of criteria or guidelines for consideration of the Working Group.

## 9 **Action to be taken**

### 1992 Fund Assembly

The 1992 Fund Assembly is invited:

- (a) to take note of the information contained in this document;
- (b) to consider revising the Terms of Reference of the Working Group to enable the Group to continue its work and hold further meetings as required;
- (c) to decide whether to approve the establishment of a Consultation Group with the aim of reaching a convergence of opinions in respect of the two unresolved questions asked of the Working Group; and
- (d) to report any relevant decisions made in respect of the definition of 'ship' under the 1992 Conventions to the IMO Legal Committee for its information.

### 1992 Fund seventh intersessional Working Group

The 1992 Fund seventh intersessional Working Group is invited to take note of the information contained in this document.

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