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Agenda item 4

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INCIDENTS INVOLVING THE 1992 FUND

SANTA ANNA

Summary:	The unladen tanker <i>Santa Anna</i> grounded on rocks and was refloated without any bunkers being spilled. Several legal questions have arisen, namely whether the occurrence falls within the definition of 'incident', whether the <i>Santa Anna</i> was a ship for the purpose of the 1992 Conventions and whether in this case the 1992 Civil Liability Convention can be applied in respect of a ship flying the flag of a non-Contracting State.
Action to be taken:	Decide on the applicability of the 1992 Conventions on these points.

1 Sequence of events

1.1 On 1 January 1998 the Panamanian tanker *Santa Anna* (17 134 GRT) dragged her anchor in heavy weather and grounded on rocks on the Devon (United Kingdom) coast. The ship was refloated the same day by an emergency towing vessel under contract with the United Kingdom Government. As a result of the grounding, several of the ship's cargo tanks were punctured.

1.2 The *Santa Anna* was in ballast, but had some 270 tonnes of heavy fuel oil and 10 tonnes of diesel oil in bunker tanks. No oil was spilled as a result of the grounding and the refloating operation.

1.3 The Marine Pollution Control Unit (MPCU) of the United Kingdom Maritime and Coastguard Agency (MCA) mobilised oil combatting equipment and surveillance aircraft.

1.4 The *Santa Anna* was entered with the West of England Ship Owner's Mutual Protection and Indemnity Association Ltd (West of England Club).

2 Claim for compensation

2.1 The United Kingdom Government notified the IOPC Funds of the incident. In its notification the Government stated that it appeared that no claim was possible under the 1969 and 1971 Conventions, since these Conventions did not cover pre-spill preventive measures. The Government also stated that it did not seem possible to present claims for compensation against the shipowner, since the ship was registered in Panama, which was Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention.

2.2 The MPCU has submitted a claim for £30 000 relating to the cost of mobilising resources to respond to the possible escape of persistent bunker oil.

2.3 It is estimated that the liability limit of the *Santa Anna* under the 1992 Civil Liability Convention, if applicable, would be 10 196 280 SDR (£8.5 million).

3 Applicability of the 1992 Conventions

3.1 This incident gives rise to three important questions as to the applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention.

Definition of 'incident'

3.2 The first question is whether the grounding and subsequent refloating constitute an 'incident' as defined in the 1992 Conventions. The definition of 'incident' in Article I.8 of the 1992 Civil Liability Convention reads:

'Incident' means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

3.3 In the Director's view, there existed a grave and imminent threat of pollution damage. He considers that the 1992 Conventions would therefore apply to the cost of pre-spill preventive measures or pure threat removal measures, ie measures taken to prevent or minimise pollution damage although no spill occurred. In this case, such measures might include mobilising oil combatting equipment and refloating the ship. The usual criteria for admissibility would apply, ie that the measures were reasonable from an objective technical point of view.

Definition of 'ship'

3.4 The second question is whether the *Santa Anna* falls within the definition of 'ship' laid down in Article I.1 of the 1992 Civil Liability Convention, which reads:

'Ship' means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

3.5 The *Santa Anna* is obviously constructed or adapted for the carriage of oil in bulk as cargo. The point to be considered is, in the Director's view, how to interpret the proviso in Article I.1, ie that "a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in

bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard".

3.6 The shipowner and the West of England Club have taken the view that the 1992 Civil Liability Convention is not applicable to the incident. The Club has stated that there is no suggestion that the shipowner would not meet his legal obligation under the United Kingdom legislation applying to ships falling outside the scope of application of the 1992 Civil Liability Convention.

3.7 The shipowner and the Club have argued that the purpose of the 1992 Civil Liability Convention was to cover spills of persistent oil from persistent oil tankers. They have pointed out that the distinction drawn by the Convention is between persistent oil and all other cargoes, whether they are non-persistent oil, other liquids or bulk solids. For this reason they take the view that a vessel does not fall within the definition of 'ship' unless it is actually carrying persistent oil in bulk as cargo or is on the ballast voyage immediately following the carriage of persistent oil in bulk as cargo. They have stated that, in respect of such a ballast voyage, the shipowner may prove that there were no residues of the persistent cargo remaining on board during the subsequent ballast voyage.

3.8 The issue of the definition of 'ship' was discussed at several sessions of the Diplomatic Conference which adopted the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention^{<1>}. In this regard reference could be made to a statement by the Chairman of the Committee of the Whole at its 2nd meeting, summing up the discussion as follows^{<2>}:

The Chairman noted that the Committee was on the whole in favour of extending the application of the 1969 Convention to unladen tankers and combination carriers, subject to a possible cut-off point. The proposals submitted by the delegations of the United Kingdom and the USSR had received less support than the text proposed by the Legal Committee^{<3>}. It also seemed that the majority of delegations were in agreement on the principle of extending the definition to tankers unreservedly and to combination carriers subject to certain conditions. In respect of the burden of proof, the great majority of delegations considered that it should rest with the shipowner.

3.9 The issue was discussed again at the 18th meeting of the Committee of the Whole in relation to proposals made by the USSR and the United Kingdom^{<4>}. The Committee considered whether, according to the USSR proposal, the scope of application of the term 'ship' should be extended to unladen tankers and combi-carriers in certain circumstances. The USSR delegation stated that it believed that the scope of the Convention should only be extended to unladen tankers if these tankers had oil residues on board from a previous voyage, but that a proposal previously made to this effect had not been widely supported. The United Kingdom delegation stated that it was prepared to withdraw its proposal which had not aroused sufficient interest. The delegation of the German Democratic Republic stated that it was able to support the USSR proposal if the burden of proof lay with the shipowner. The USSR delegation stated that it was

<1> This issue was not discussed at the Diplomatic Conference which adopted the 1992 Protocols to these Conventions. The definition of 'ship' in the 1992 Civil Liability Convention is identical to that in the 1984 Protocol.

<2> Official Records of the International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea, 1984 and the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992 - Volume 2, page 336 (paragraphs 41-44); The Chairman's summary was based on the discussion reflected in pages 330-366.

<3> The texts proposed by the Legal Committee, the United Kingdom delegation and the USSR delegation are reproduced in the Annex.

<4> A discussion at the Committee's 4th meeting does not give any guidance on the issue under consideration (Official Records, Volume 2, pages 338-339, paragraphs 1-6).

prepared to join the majority and accept that, unless it was proved that there had not been on board any residues of oil from a previous voyage, the burden of proof lay with the shipowner. The Chairman asked for a show of hands on the USSR proposal. By 24 votes to 6, with 14 abstentions, the proposal was rejected^{<5>}.

3.10 The Committee of the Whole then considered the text proposed by the Legal Committee which had alternative texts of the proviso. The Committee of the Whole approved the proviso in the wording reproduced in paragraph 3.4 above^{<6>}.

3.11 In the Director's view, the word 'oil' in Article I.6 should be interpreted in accordance with the definition of 'oil' in Article I.5, namely "any persistent hydrocarbon mineral oil ...". As mentioned above, the *Santa Anna* was in ballast at the time of the grounding and during the previous voyage she had been carrying low sulphur gas oil loaded in Klaipeda and discharged in Hamburg. Low sulphur gas oil is a non-persistent oil. It has been stated that the *Santa Anna* had, in fact, carried non-persistent oil in all her cargo tanks during six voyages prior to the incident.

3.12 It should be noted that it might be difficult in many cases to prove that there were no residues of a persistent oil cargo on board, since routine tank cleaning would rarely remove every trace of persistent oil residues. The question is whether the fact that the *Santa Anna* during her previous voyages carried non-persistent oil established that she did not have any residues of such carriage of oil in bulk on board when the grounding occurred.

3.13 In the Director's view, the discussions at the 1984 Diplomatic Conference do not, for the purpose of the *Santa Anna* incident, give any clear guidance as to the meaning of the proviso. It is not clear whether the intention was to extend the application to unladen tankers without restrictions and to combination carriers subject to certain conditions, or whether the same conditions should apply to tankers and combination carriers. The discussions at the 2nd meeting of the Committee of the Whole appear to support the former interpretation, whereas the discussions at the 18th meeting seem to give support to the latter interpretation. On balance, the Director believes that the intention of the majority of delegations was, in respect of tankers which carry alternatively persistent oil and non-persistent oil, to restrict the application to voyages where there were still residues of persistent oil on board in the cargo tanks. In his view, the wording of the proviso suggests this interpretation. If this assumption is correct, the *Santa Anna* would not fall within the definition of 'ship' in the 1992 Civil Liability Convention.

Applicability of the 1992 Civil Liability Convention

3.14 Assuming that the grounding and refloating constitutes an 'incident' and that the *Santa Anna* falls within the definition of 'ship', the third question is whether the 1992 Civil Liability Convention can be applied to the *Santa Anna* which was registered in a State Party to the 1969 Civil Liability Convention, but not to the 1992 Civil Liability Convention. Since the occurrence took place before 16 May 1998 (the date when the United Kingdom's denunciation of the 1969 Civil Liability Convention took effect), the United Kingdom was under a treaty obligation to respect the provisions of the 1969 Civil Liability Convention in respect of ships registered in Panama, and that Convention does not cover pre-spill preventive measures. It could be maintained, however, that since the 1969 Civil Liability Convention only deals with laden tankers, the United Kingdom would be allowed to apply the 1992 Civil Liability Convention also to unladen tankers registered in Panama. The Director would support the latter interpretation.

<5> Official Records, Volume 2, page 508 (paragraphs 12-19).

<6> Official Records, Volume 2, pages 509-510 (paragraphs 20-32).

4 **Action to be taken by the Executive Committee**

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
- (b) to decide whether:
 - (i) the occurrence falls within the definition of 'incident' in Article I.6 of the 1992 Civil Liability Convention;
 - (ii) the *Santa Anna* falls within the definition of 'ship' in Article I.1 of that Convention;
 - (iii) the 1992 Civil Liability Convention can be applied in this case, since the *Santa Anna* was registered in a State Party to the 1969 Civil Liability Convention but not to the 1992 Convention; and
- (c) to give the Director such instructions in respect of this occurrence as it may consider appropriate.

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ANNEXText prepared by the Legal Committee (document LEG/CONF.6/4)

'Ship' means any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk and during [the] [any] voyage following such carriage [unless it is proved that it has no residues of such carriage of oil in bulk aboard] [if it has residues of such carriage of oil in bulk still on board].

Text proposed by the USSR delegation (document LEG/CONF.6/C.2/WP.7)

'Ship' means any sea-going vessel or sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that it is actually carrying oil in bulk as cargo or it has residues of such carriage of oil still on board during first voyage following such carriage.

For the purpose of the Convention a vessel capable of carrying oil and other cargoes and complying with the above requirement also is regarded as a ship.

Text proposed by the United Kingdom delegation (document LEG/CONF.6/C2/WP.15)

'Ship' means any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk and during any voyage following such carriage *until it has been transferred to the carriage of other cargoes.*
