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APPLICABILITY OF THE 1992 CONVENTIONS TO OFFSHORE CRAFT

Note by the Director

Summary:	Information is given on the background to the applicable provisions in the Conventions. The discussions at the 3rd session of the Assembly are summarised. The Director sets out certain considerations in order to assist the Working Group.
Action to be taken:	Information to be noted.

1 Introduction

1.1 At its 3rd session the Assembly considered the applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention to offshore craft, namely floating storage units (FSUs) and floating production storage and offloading units (FPSOs). The Assembly decided to set up an intersessional Working Group to study the issues involved (document 92FUND/A.3/27, paragraph 20.11).

1.2 In order to facilitate the Working Group's consideration of the issues involved, this document contains background information, part of which has been provided in documents submitted to previous sessions of the Assembly, and reproduces the part of the Record of Decisions of the Assembly's 3rd session summarising the relevant discussions (document 92FUND/A/ES.3/17 submitted by the Director, document 92FUND/A.3/18 submitted by the United Kingdom delegation, and document 92FUND/A.3/27, paragraphs 20.1-20.14 (Record of Decisions)).

2 General background

2.1 In the last twenty years there has been an increased use of floating systems for the storage of oil. These facilities are no longer confined to marginal oil fields but are widely used in most oil-producing regions. FSUs are generally vessels that are used to store crude oil that is produced from an offshore or onshore exploration and production facility, prior to its sea transport by shuttle tankers. Some FSUs are fully functional tankers with operational engines, whereas others are tankers which have had their engines removed, barges that were never self-propelled or parts of tankers converted to storage units after accidents.

2.2 Some FPSOs are used to produce and store crude oil from offshore wells which may not be sufficiently economically viable to warrant the installation of a fixed platform. The FPSOs have complex anchoring systems to keep them on location, but they can be moved from one offshore well system to another. Other FPSOs are purpose-built to remain in one location for the whole of the unit's expected life. For example, currently under construction is an FPSO designed for a minimum of 25 years service life and a storage capacity of 130 000 tonnes, which is to remain on station in water up to 450 metres deep some 160 kilometres west of Shetland (United Kingdom), with inspection and maintenance being carried out offshore. The first Canadian FPSO will be located 350 kilometres southeast of St John's, Newfoundland, in around 90 metres of water. This structure has a storage capacity of approximately 135 000 tonnes and an intended service life of 25 years. No dry docking is envisaged during that period. This FPSOs structure is likely to be subject to very harsh weather conditions.

2.3 Oil produced at an offshore well is stored in the FPSO until it is discharged into shuttle tankers. FPSOs are operating around the world. It is expected that 100 FPSOs will be in operation by the year 2000. Their storage capacity varies considerably from unit to unit but in many cases it is well in excess of 100 000 tonnes. If they move from one field to another, they are unlikely to have a full oil cargo on board, but they would be likely to have crude residues on board at that time. It has been suggested that FPSOs may sometimes hold significant quantities of oil when moving from one field to another. In addition, some FSUs and FPSOs move off station to avoid severe weather, such as ice or typhoons.

2.4 The early FSUs and FPSOs were converted tankers. The oil industry has, over the years, introduced larger, purpose-built, ship-shaped structures and deployed them in more demanding conditions for longer periods. The FSUs and FPSOs now being put into service are purpose-built, but many have most of the characteristics of a conventional tanker.

3 National liability regimes

3.1 The Director is not aware of any State which has adopted a special liability regime for FSUs and FPSOs.

3.2 It appears that if there is no special liability regime, the liability of the operator of an FSU or FPSO is unlimited. This would not be the case, however, if these structures were regarded as 'ships', since in that case the right of limitation would be governed by the legislation applicable to ships.

4 1977 London Convention

4.1 In this context reference should be made to the 1977 London Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. The Convention, which is open to States which have coastlines on the North Sea, Baltic Sea or that part of the Atlantic Ocean to the north of the 36° North latitude, has not entered into force.

4.2 The general structure of the London Convention is similar to that of the 1969 Civil Liability Convention. The liability rests with the operator of the installation from which the polluting oil originated. The definition of 'installation' is very wide and covers *inter alia* any well or other facility, whether fixed or mobile, which is used for the purpose of exploring for, producing, treating, storing, transmitting or regaining

control of the flow of crude oil from the seabed or its subsoil. However, it is provided that a ship as defined in the 1969 Civil Liability Convention shall not be considered as an 'installation'.

5 Current insurance arrangements

5.1 Neither FPSOs nor FSUs are insured by P & I Clubs in the same way as oil tankers. There is not a sufficient number of these facilities to be considered by the P & I Clubs as a mutual risk, and special insurance is therefore arranged for each facility. The liabilities insured depend on the terms of the contract for the operation of the facility.

5.2 It is understood that the P & I Clubs generally treat FPSOs as ships only when they are not connected to the exploitation and production facility. They are therefore not covered by P & I insurance from the moment they are connected to the offshore well-head until they disconnect therefrom. During that period, they are treated as an offshore oil installation and are separately insured. It is also understood that for the period when they are connected, FPSOs are no longer considered as flying the flag of the State in which the vessel is registered.

6 Voluntary liability scheme

There is a voluntary liability scheme, the Offshore Pollution Liability Agreement (OPOL), which is funded by oil companies which operate offshore facilities in northern and western Europe. OPOL has a wide definition of facilities, which includes fixed or mobile installations used for treating, storing or transporting crude oil from the seabed. The parties to the OPOL Agreement undertake to bear strict liability in the first instance to third parties for any claims for pollution damage caused by any offshore facility operated by them on behalf of all the parties involved.

7 Relevant provision of the 1992 Conventions

7.1 The question of whether the 1992 Civil Liability Convention and the 1992 Fund Convention apply to the spills from FSUs and FPSOs depends on whether these structures fall within the definition of 'ship' 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.

7.2 Of interest is also the definition of 'oil' in Article I.5 of the 1992 Civil Liability Convention which reads:

> 'Oil' means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.

7.3 Article I.2 of the 1992 Fund Convention incorporates the definitions of 'ship' and 'oil' set out in paragraphs 2.1 and 2.2 above.

7.4 The definition of 'ship' in the 1992 Civil Liability Convention is identical to that in the 1984 Protocol to the 1969 Civil Liability Convention. When the definition of 'ship' was considered at the 1984 International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain

Substances by Sea, the Chairman of the Committee of the Whole made the following introductory statement<1>:

> The Chairman stated that the first task now was to decide whether the CLC Convention, in its revised form, should apply to unladen tankers. The next point to decide was whether that extension would include combination carriers. Finally, a decision would have to be taken on whom, in the case of unladen tankers and combination-carriers, lay the burden of proof that there was no oil residue on board. There was also the question whether any extension of the scope of application of the CLC Convention should also apply to the Fund Convention.

7.5 It appears from the preparatory works that the issue of the applicability of the 1984 Protocols to FSUs and FPSOs was not discussed at the 1984 Conference and that the considerations of the Conference were focused on unladen tankers and combination carriers. The issue was not considered at the 1992 Conference. For this reason, it is not possible, in the Director's view, to make any assumption as to whether the authors of what became the 1992 Protocols intended the definition of 'ship' to cover FSUs and FPSOs.

8 Consideration at the Assembly's 3rd session

8.1 The Assembly's consideration at its 3rd session of whether the 1992 Conventions applied to FSUs and FPSOs was based on a document presented by the United Kingdom delegation (document 92FUND/A.3/18). The discussions are summarised in the Record of Decisions of that session (document 92FUND/A.3/27, paragraphs 20.1 - 20.14).

8.2 The United Kingdom delegation considered that for the purposes of the discussion it would be more appropriate to describe the vessels concerned as offshore craft. The delegation stated that it did not seek to extend the scope of the Conventions but rather wished to obtain clarification as to whether, and if so, which offshore craft were covered by the Conventions.

8.3 In the document the United Kingdom delegation stated that three types of offshore craft had been identified in discussions with the industry:

- (i) craft which were 'ships' and which carried oil within the meaning of the 1992 Fund Convention;
- (ii) craft which were 'ships' but which did not carry oil within the meaning of the 1992 Fund Convention;
- (iii) craft which were not 'ships' within the meaning of the 1992 Fund Convention.

8.4 The United Kingdom delegation expressed the view that offshore craft of the first type were covered by the regime of compensation established by the 1992 Conventions whereas the other types of craft might not be covered.

8.5 Many delegations agreed with the United Kingdom delegation that the interpretation of the terms 'ship' and 'pollution damage' contained in the 1992 Civil Liability Convention determined which units fell within the scope of the regime established by the 1992 Conventions. Those delegations also shared the view that, to be covered by the Conventions, an offshore craft must be a 'ship' (ie a sea-going vessel or seaborne craft constructed or adapted for the carriage of oil in bulk as cargo) and that the craft must also have 'oil' on board (ie persistent hydrocarbon mineral oil carried on board either as cargo or in the bunkers).

8.6 The Assembly noted the United Kingdom delegation's view that the expression 'carried as cargo' could be interpreted in any of the following three ways:

<1> 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 330

(i) oil carried on voyage to or from a port or terminal could be considered to be 'carried as cargo';
(ii) oil carried on any voyage between two distinct points could be considered to be 'carried as cargo'; or
(iii) oil carried on any movement whatsoever could be considered to be 'carried as cargo'.

8.7 A number of delegations expressed the view that the circumstances set out in paragraph 8.6(i) should be covered by the Conventions. As regards the circumstances referred to in paragraph 8.6(ii), some delegations were of the opinion that a voyage would be covered by the Conventions only if it was from one point to another with the intention of carrying oil as cargo, and that, if such a voyage was not for the purpose of carrying oil as cargo, then that voyage should not be covered. Some delegations expressed doubts as to whether any voyages referred to in paragraph 8.6(ii) would be covered. A number of delegations considered that the conditions described in paragraph 8.6(iii) would not be covered by the Conventions.

8.8 Some delegations stressed that a distinction should be made between the production and the transportation of oil. One delegation stated that it was essential to retain the concept of a journey that was planned and that vessels had all the relevant certificates on board, such as bills of lading, to make the voyage. Some delegations were of the view that only oil in respect of which contributions were paid should give rise to compensation in the event of a spill.

8.9 One delegation stated that, as the Conventions applied only to ships "constructed and adapted for the carriage of oil in bulk as cargo", oil rigs, rigs for exploitation and offshore units did not, in its view, fall within the scope of the Conventions. That delegation pointed out that the reference in the Convention to "carried on board as cargo" excluded offshore craft permanently moored in position.

8.10 Many delegations stated that offshore craft of the type under discussion were operating in their waters and that therefore this matter was of great interest to them.

8.11 Several delegations considered that they needed more detailed information about the particular circumstances in which certain offshore craft were being deployed in order that specific cases could be considered by the Assembly.

9 Possible involvement of a consultant

9.1 The Assembly invited the Director to consider whether to engage a consultant to study the issues involved.

9.2 The Director has considered this question. He has taken the view that since the issues involved relate to the interpretation of the relevant definition in the 1992 Civil Liability Convention and not on the position of national laws, the best expertise is likely to be found within the delegations to the 1992 Fund. For this reason he believes that the engagement of a consultant would not be of great assistance, at least not at this stage. He is also aware of the fact that an examination of these issues is being carried out by a number of delegations. He has therefore not engaged a consultant.

10 Director's consideration

10.1 If FSUs and FPSOs contain oil, they do in fact constitute a risk of oil pollution. Against the background of the purpose of the 1992 Conventions, ie to provide compensation to victims of oil pollution, it could be argued that there are reasons to include them within the scope of the Conventions. However, it

should be recalled that the 1992 Conventions were drafted with a view to covering maritime carriage of oil (cf the preamble to the 1969 Civil Liability Convention)<2>.

10.2 In view of the great variety of types of FSUs and FPSOs which exist, it could be argued that it is not possible to take a definite position on this point in the abstract but that the issue would have to be addressed by the competent bodies of the 1992 Fund when a particular case arises, in the light of the circumstances of that case. However, both for Member States and for the shipping and insurance industries it is important that the 1992 Fund takes a decision which clarifies the legal situation from the 1992 Fund's point of view<3>.

10.3 In order to be covered by the 1992 Conventions, in the Director's view, a craft should fulfil two criteria. Firstly, it should fall within the definition of 'ship', ie it should be "constructed or adapted for the carriage of oil in bulk as cargo". Secondly, the craft should have 'oil' on board, namely persistent hydrocarbon mineral oil on board as cargo or in the bunkers.

10.4 As for the first criterion, the expression "constructed or adapted for the carriage of oil in bulk or as cargo" may give rise to different interpretations. One issue is whether the expression should be read so as to include a structure:

(a) when it is constructed or adapted in such a way that it is *capable* of carrying oil in bulk as cargo; or

(b) only when it is constructed or adapted *for the purpose* of carrying oil in bulk as cargo.

10.5 Craft designed so that they are not able to transport oil in bulk as cargo would in any event fall outside the definition. Some craft which have been constructed or adapted permanently for storage may nevertheless be *capable* of carrying oil as bulk or cargo. If interpretation (a) of the definition is correct, such craft would fall within the definition of 'ship', whereas if interpretation (b) is correct such craft would fall outside the definition.

10.6 With respect to the second criterion, ie that the craft should carry oil on board as cargo or as bunkers, the following points can be made. A craft of the types considered can have the capacity to store large quantities of oil and would have the equipment to load and discharge oil. The Director believes that this would not be sufficient to consider the craft as 'carrying' oil as cargo. He suggests that in order to be considered as being 'carried' the oil should be transported from one place to another. In any event, it appears that FSUs and FPSOs should fall within the definition of 'ship' only when they are disconnected from exploitation and production facilities and move off station with oil on board.

10.7 It appears that in the situation set out in paragraph 8.6(i) above, ie that oil is carried on voyage to or from a port or terminal, the oil must be considered as being carried as cargo. As for the other two cases referred to by the United Kingdom delegation (paragraphs 8.6(ii) and 8.6(iii)), the oil might not be considered as being carried as cargo. However it could be argued that in respect of the case referred to in paragraph 8.6(ii), ie a voyage between two distinct points, for example between two wells, the oil should be considered as being carried as cargo. With respect to the case referred to in paragraph 8.6(iii), it could be maintained that the movement does not constitute transport. It should be noted, however, that on occasion these craft disconnect from the well head and steam to avoid heavy weather in order to reduce the risk of damage to the craft, and consequent risk of pollution. Since these movements give rise to the same risk of oil spills as the cases referred to in paragraphs 8.6(i) and 8.6(ii), it could be argued that this type of movement should also fall within the scope of the 1992 Conventions.

10.8 Another element of importance may be whether the oil on board the craft would in principle be subject to contributions under Article 10 of the 1992 Fund Convention. It could be argued that if the oil in

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<2> "The States Parties to the present Convention, conscious of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk, ..."

<3> For an analysis of this issue, reference is made to Colin de la Rue and Charles B Andersson: Shipping and the Environment, Law and Practice (1998), pages 82-83.

question would be taken into account for the purpose of the assessment of contributions to the 1992 Fund, then the Convention should apply to spills of such oil. It should be noted that the oil contained in FSUs and FPSOs would normally at some stage be brought by ship to a port or terminal installation. If the reception facility is located in a 1992 Fund Member State, such quantities would be reported as 'receipts' of 'contributing oil' and would form the basis for levying contributions.

10.9 The Director suggests that a choice could be made between a restrictive and a broader interpretation of the 1992 Civil Liability Convention.

(a) FSUs and FPSOs were not considered at the 1984 Diplomatic Conference when the definition of 'ship' was expanded to that now contained in the 1992 Civil Liability Convention. For this reason it could be maintained that the definition of 'ship' should be given a restrictive interpretation. This would mean that an offshore craft would fall within that definition only when, after having been disconnected from the exploitation or production facility, it carries oil to or from a port or terminal installation.

(b) If a broader interpretation were adopted, the definition of 'ship' would include any craft, with or without its own means of propulsion, constructed or adapted so as to make it capable of carrying persistent oil, either in the cargo spaces or as bunkers, provided that the craft is under way (ie disconnected from the exploration or production facility) with persistent oil on board.

11 Action to be taken by the Working Group

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