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DEFINITION OF 'SHIP' IN THE 1992 CONVENTIONS

Note by the Director

Summary:

This document sets out the background to the definition of 'ship' contained in the 1992 Conventions, in particular the discussions at the 1984 Diplomatic Conference. The consideration of this issue at the Executive Committee's 1st session is also reflected.

Action to be taken:

Information to be noted.

1 Introduction

1.1 In the context of its consideration of the *Santa Anna* incident which occurred off the coast of Devon (United Kingdom) on 1 January 1998, the Executive Committee examined at its 1st session whether the *Santa Anna* fell within the definition of 'ship' laid down in Article I.1 of the 1992 Civil Liability Convention. The Committee's consideration was based on a note submitted by the Director (document 92FUND/EXC.1/7).

1.2 The Executive Committee decided that it would be useful if the interpretation of the definition of 'ship' in the 1992 Civil Liability Convention could be studied by a Working Group. The Committee took the view that this issue could be examined by the Working Group which had been established by the Assembly to consider the applicability of the 1992 Conventions to offshore craft and invited the Assembly to give the Working Group the mandate to do so (document 92FUND/EXC.1/9, paragraph 4.6.14).

1.3 At its 3rd session, the Assembly agreed that the Working Group referred to in paragraph 1.2 above should study also the interpretation of the definition of 'ship' in the 1992 Civil Liability Convention as regards its applicability to unladen tankers (document 92FUND/A.3/27, paragraph 20.14).

1.4 This document reproduces the background information contained in document 92FUND/EXC.1/7 and sets out a summary of the discussions at the Executive Committee's 1st session. It also includes further considerations by the Director.

2 Relevant provisions of the 1992 Conventions

2.1 The definition of 'ship' is 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.

2.2 Article 1.2 of the 1992 Fund Convention incorporates the definition set out in paragraph 2.1 above.

3 Consideration at the 1984 Diplomatic Conference

3.1 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>}. Reference is 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.

3.2 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 (paragraph 41); 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 3rd 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>}.

3.3 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 3.1 above^{<6>}.

4 Consideration at the Executive Committee's 1st session

4.1 In the note on the *Santa Anna* incident, submitted by the Director to the Executive Committee's 1st session, it was stated that the *Santa Anna* was obviously constructed or adapted for the carriage of oil in bulk as cargo. The point to be considered was, 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".

4.2 The owner of the *Santa Anna* and his insurer argued that the purpose of the 1992 Civil Liability Convention was to cover spills of persistent oil from persistent oil tankers. They pointed out that the distinction drawn by the Convention was between persistent oil and all other cargoes, whether they were non-persistent oil, other liquids or bulk solids. For this reason they took the view that a vessel did not fall within the definition of 'ship' unless it was actually carrying persistent oil in bulk as cargo or was on the ballast voyage immediately following the carriage of persistent oil in bulk as cargo. They stated that, in respect of such a ballast voyage, the shipowner might prove that there were no residues of the persistent cargo remaining on board during the subsequent ballast voyage. For these reasons, the shipowner and his insurer took the view that the 1992 Civil Liability Convention was not applicable to the *Santa Anna* incident.

4.3 In his document the Director made the following analysis:

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.

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.

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.

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

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

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.

4.4 The Executive Committee accepted that the *Santa Anna* had been constructed or adapted for the carriage of oil in bulk as cargo. The Committee took the view that the issue in question was 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".

4.5 It was generally considered that the word 'oil' in the proviso should be interpreted in accordance with the definition of oil in Article I.5, namely any persistent hydrocarbon mineral oil.

4.6 Some delegations took the view that the phrase "unless it is proved that it has no residues of such carriage of oil in bulk aboard" indicated that spills from unladen tankers were covered only if residues of persistent oil were on board. Other delegations maintained that this phrase related only to combination carriers and that dedicated tankers in ballast would always be covered whether or not they were carrying residues of persistent oil.

4.7 A number of delegations raised the question of the interpretation of the expression 'any voyage', and in particular whether that expression referred to any voyage following the carriage of persistent oil or only to the first voyage following such carriage. Some delegations considered that the expression covered only the first ballast voyage and that the *Santa Anna* incident therefore did not fall within the scope of the Conventions.

4.8 Some delegations stated that it might be useful to obtain an opinion from a Legal Counsel on the interpretation of the definition of 'ship', whereas other delegations were of the view that the bodies of the Fund were better placed to interpret the Convention on the point under consideration.

4.9 One delegation made the point that the Convention represented the written reflection of an agreement between States following a Diplomatic Conference and therefore that the intention of the States participating at the Conference should be taken into account. Another delegation stated that not only the intentions of the participants at the Conference but also the wishes of the Contracting Parties to the Convention should be taken into account.

4.10 Several delegations expressed the view that the definition of 'ship' was open to different interpretations.

5 Further consideration by the Director

5.1 The Director has examined the matter further on the basis of the preparatory works and in the light of the discussion at the Executive Committee's 1st session, and submits the following considerations to the Working Group.

5.2 The great majority of dedicated oil tankers are capable of carrying both persistent and non persistent oil in bulk as cargo. If the proviso had been intended to apply also to dedicated oil tankers, it would apply to practically all tankers. It appears from the discussions at the 2nd meeting of the Committee of the Whole at the 1984 Conference that this was not intended (cf paragraph 3.1 above)^{<7>}.

<7> See also Report of the Chairman of the Second Informal Meeting on the revision of the Civil Liability Convention and the Fund Convention (IMO document LE6/48/2/2), paragraphs 13-15.

5.3 The Director takes the view that the intention of the 1984 Diplomatic Conference was to extend the definition of 'ship' to cover unladen tankers without any restrictions and that the proviso in the definition should apply only to combination carriers. If this interpretation is correct, the 1992 Conventions would apply to spills of oil slops from unladen tankers and to spills of bunkers from unladen tankers^{<8>}.

5.4 Another issue is what exactly is meant by "ship capable of carrying oil and other cargoes", normally known as 'combination carriers'. This issue was not directly addressed during the 1984 Conference, nor in the submissions by Governments or organisations to that Conference. It appears however that the delegations at the 1984 Conference had primarily so-called ore/bulk/oil ships (OBO) in mind^{<9>}.

5.5 The proviso would certainly apply to combination carriers. The Director considers that the 1992 Conventions would apply to any voyage (ie not only the first voyage) following a voyage when the ship carried persistent oil in bulk as cargo until there were no residues on board of the persistent oil carried as cargo, ie until the slops were fully discharged. In his view this interpretation is supported by the fact that the Committee of the Whole, choosing between the expressions "the voyage" and "any voyage", adopted the expression "any voyage". The wording ("unless it is proved") makes it clear, in the Director's view, that it is for the shipowner to prove that there were no such residues on board in order to prevent the Conventions from applying.

6 Action to be taken by the Working Group

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

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<8> This interpretation is supported by DW Abecassis and RL Jarashow: *Oil Pollution from Ships*, 2nd edition, London 1985, page 230 (paragraph 10-118). See also Colin de la Rue and Charles B Andersson: *Shipping and the Environment, Law and Practice*, London 1998, pages 79-80.

<9> Only the International Shipowners' Association (INSA) referred to OBO's (document LEG/CONF.6/10), Official Records, Volume 2, page 3.

ANNEX

Text prepared by the Legal Committee (document LEG/CONE.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/CONE.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/CONE.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.*
