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SECOND INTERSESSIONAL
WORKING GROUP

92FUND/WGR.2/4

REPORT OF THE SECOND INTERSESSIONAL WORKING GROUP

Note by the Director

Summary:

An analysis is made of the definition of 'ship' in Article I.5 of the 1992 Civil Liability Convention. The Working Group concluded that an unladen tanker fell within that definition during any voyage after the carriage of a cargo of persistent oil but fell outside the definition if it was proved that it had no residues of such carriage on board. The Working Group took the view that offshore craft fell within the 1992 Conventions only when they carried oil as cargo on a voyage to or from a port or terminal outside the oil field where they normally operated.

Action to be taken:

Consider the Working Group's conclusions on a) the circumstances under which an unladen tanker would fall within the definition of 'ship' in the 1992 Conventions and b) whether and if so to what extent the 1992 Conventions apply to offshore craft.

1 Introduction

1.1 The 2nd Intersessional Working Group was established by the Assembly at its 3rd session to study certain issues relating to the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention. The Group held meetings on 26 and 27 April 1999.

1.2 In accordance with the decision of the Assembly, the Working Group was open to all Member States of the 1992 Fund, and all States and intergovernmental and international non-governmental organisations which had observer status with the 1992 Fund were invited as observers. The session was held in public.

1.3 The Working Group instructed the Director to submit to the Assembly a report of the Group's work and its conclusions.

1.4 This Report, which comprises a summary of the issues discussed and the conclusions drawn by the Working Group, has been drafted in consultation with the Working Group's Chairman.

2 Participation

2.1 The following Member States were represented:

Australia	Latvia	Singapore
Bahamas	Liberia	Spain
Cyprus	Marshall Islands	Sweden
Denmark	Mexico	Tunisia
Finland	Monaco	United Arab Emirates
France	Netherlands	United Kingdom
Germany	Norway	Uruguay
Greece	Philippines	
Japan	Republic of Korea	

2.2 The following non-Member States were represented as observers:

Algeria	Fiji	Peru
Argentina	Gabon	Poland
Belgium	Georgia	Portugal
Brazil	Iceland	Russian Federation
Canada	Italy	Saudi Arabia
Chile	Malaysia	Sierra Leone
China	Morocco	United States
Colombia	New Zealand	Vanuatu
Ecuador	Nigeria	Venezuela
Estonia	Panama	

2.3 The following intergovernmental and international non-governmental organisations participated in the Working Group as observers:

Intergovernmental organisations:

International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Maritime Organization (IMO)

International non-governmental organisations:

Comité Maritime International
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Mandate

The mandate of the Working Group, as determined by the Assembly, was to study two issues relating to the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention (document 92FUND/A.3/27, paragraphs 20.11 and 20.14):

- (i) the circumstances in which an unladen tanker would fall within the definition of 'ship'; and
- (ii) whether, and if so to what extent, the 1992 Conventions apply to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).

4 Election of Chairman

The Working Group elected Mr John Wren (United Kingdom) as its Chairman.

5 Relevant provisions of the 1992 Conventions

5.1 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.

5.2 Article 1.2 of the 1992 Fund Convention incorporates the definition set out in paragraph 5.1 above.

6 Consideration at the 1984 and 1992 Diplomatic Conferences

6.1 The Working Group noted the discussion concerning the definition of 'ship' at the Diplomatic Conference which adopted the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention (documents 92FUND/WGR.2/2, section 7 and 92FUND/WGR.2/3, section 3).

6.2 It was also noted that this issue was not discussed at the Diplomatic Conference which adopted the 1992 Protocols to these Conventions and that the definition of 'ship' in the 1992 Civil Liability Convention is identical to that in the 1984 Protocol.

6.3 It was noted that neither the 1984 Conference nor the 1992 Conference discussed the applicability of the 1984 Protocols to offshore craft.

7 The applicability of the definition of 'ship' to unladen tankers

7.1 Consideration by the Executive Committee at its 1st session

The Working Group recalled that the question of the circumstances in which an unladen tanker would fall within the definition of 'ship' had arisen at the 1992 Fund Executive Committee's 1st session in connection with the Committee's consideration of the *Santa Anna* incident. The discussions were summarised in the Record of Decisions of that session (document 92FUND/EXC.2/3, paragraphs 4.6.7 - 4.6.15).

7.2 Documentation considered by the Working Group

The Working Group based its deliberations on documents submitted by the Director (document 92FUND/WGR.2/3), the United Kingdom delegation (document 92FUND/WGR.2/3/1), the observer delegation of the International Group of P & I Clubs (document 92FUND/WGR.2/3/2) and the French delegation (document 92FUND/WGR.2/3/3).

7.3 Applicability of the proviso^{<1>}

7.3.1 The Working Group noted that in his document the Director concluded that, on the basis of the preparatory works of the 1984 Diplomatic Conference, the intention 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. It was also noted that as regards the meaning of the expression 'ship capable of carrying oil and other cargoes', in the Director's view the delegations at the Diplomatic Conference had presumably so-called ore/bulk/oil ships (OBOs) in mind.

7.3.2 A number of delegations considered that the proviso should apply only to combination carriers. In the view of one delegation this would avoid grey areas for shipowners, P & I Clubs, the 1992 Fund and victims.

7.3.3 A number of delegations expressed reservations about restricting the application of the proviso to combination carriers. One delegation pointed out that the drafters of the 1992 Civil Liability Convention merely had in mind extending the 1969 Civil Liability Convention to unladen tankers and not extending the types of tankers to be covered. In that delegation's view there was no justification for deviating from a narrow interpretation of the definition of 'ship' and it was important to strike a balance between the interests of contributors to the 1992 Fund and the interests of the victims of pollution damage.

7.3.4 The point was made by some delegations that if clean product tankers which never carried persistent oil represented only a small portion of all oil tankers, the additional economic burden resulting from their being covered by the 1992 Conventions might be acceptable to contributors, in which case all unladen tankers might be included unreservedly in the definition of 'ship'.

7.3.5 During the discussion it was pointed out that a literal interpretation of the proviso made in conjunction with the definition of 'oil' (ie persistent oil) in Article I.5 would mean that the proviso would apply to all tankers, since any tanker capable of carrying persistent oil was also capable of carrying non-persistent oil. The point was made that such an interpretation was at variance with the intended purpose of the definition of 'ship' and that the proviso 'capable of carrying oil and other cargoes' referred only to combination carriers as defined in MARPOL.

7.3.6 A number of delegations expressed the view that there had never been any intention at the 1984 Diplomatic Conference of modifying the meaning of the term 'oil' in the definition of 'ship' in Article I.5. It was emphasised that the definition of 'oil' in Article I.5 was restricted to persistent oil and that the word 'oil' in the proviso to Article I.1 should therefore be interpreted to mean persistent oil.

7.3.7 The observer delegation of the International Group of P & I Clubs took the view that the proviso should not be restricted to combination carriers but should cover clean product (ie non-persistent oil) tankers and tankers capable of carrying both persistent and non-persistent oil. That delegation argued that the term 'oil', which appeared repeatedly in the proviso to the definition of 'ship', was a term with a defined meaning, ie persistent oil. In that delegation's view it followed therefore that other 'cargoes' referred to cargoes other than persistent oil, and therefore included non-persistent oil.

7.3.8 One delegation stated that at the time of the 1984 Diplomatic Conference the intention had been merely to replace "actually carrying oil in bulk as cargo" in the definition of 'ship' with "constructed or adapted for the carriage of oil in bulk as cargo". That delegation believed that there might have been some confusion at the time of the Diplomatic Conference over the meaning of 'combination carrier'. The point was made that if 'combination carrier' meant a ship capable of carrying non-persistent oils as well as bulk solids, then the proviso would apply to combination carriers.

<1> Throughout this document the term 'proviso' refers to the following part of the definition reproduced in paragraph 5.1 above: "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".

7.3.9 Reference was made to the proposed Bunker Convention, the draft text of which had been largely agreed by the Legal Committee of the International Maritime Organization at its 79th session^{<2>}. It was suggested that if the 1992 Civil Liability Convention always applied to tankers other than combination carriers, owners of such tankers would know that the proposed Bunker Convention would never apply to their ships and that they would face no additional obligations regarding insurance cover. It was noted that if the proviso were to apply to all tankers, their owners would have to comply with the insurance requirements in the 1992 Civil Liability Convention on some voyages and with the insurance requirements in the proposed Bunker Convention on others. The point was made that it might not always be immediately clear which regime applied at any particular time, which would be unhelpful for the industry, for States and for claimants. It was stated that it was important to clarify the relationship between the proposed Bunker Convention and the 1992 Conventions.

7.3.10 Some delegations, whilst seeing the merits from the shipowners' and victims' points of view of restricting the proviso to combination carriers, could not agree that compensation should be available in respect of pollution damage arising from spills of persistent bunker fuel from ships carrying non-persistent oil as cargo.

7.3.11 One delegation stated that clean-product carriers (ie tankers exclusively carrying non-persistent oil) should not be considered as falling within the scope of the 1992 Conventions since such vessels were not required to maintain appropriate insurance.

7.3.12 The Working Group noted that in any event the 1992 Conventions applied only to pollution damage caused by *persistent* oil. It was also noted that contributions to the 1992 Fund were levied only on receipts of persistent oil.

7.3.13 The Working Group also addressed the question of whether the expression 'combination carrier' referred to a vessel capable of carrying persistent oil and bulk solids or whether it referred to a vessel capable of carrying persistent oil and non-persistent oil. The majority of delegations expressed the view that this expression referred to a vessel capable of carrying either persistent or non-persistent oil. One delegation stated, however, that the issue was not the definition of 'combination carrier' but rather whether there remained on board such a vessel a residue of persistent oil.

7.4 Interpretation of 'any voyage following such carriage'

7.4.1 The Working Group considered the meaning of the expression 'any voyage', namely whether it referred to any voyage following the carriage of persistent oil or only to the first voyage following such carriage.

7.4.2 Reference was made to the decision taken at the 1984 Diplomatic Conference to choose the expression 'any voyage' following the carriage of persistent oil as opposed to 'the voyage'.

7.4.3 Most delegations took the view that the expression 'any voyage' should be given a literal meaning and that the 1992 Conventions should 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 of such cargo on board.

7.4.4 A number of delegations drew attention to the overriding issue of whether any residues remained on board. One delegation considered that in most cases no residues would remain on board during voyages following the carriage of oil, whereas another delegation took the view that, due to the absence of oil reception facilities in some parts of the world, ships could carry slops for several voyages.

7.4.5 One delegation drew attention to a potential inconsistency regarding insurance cover where a ship would be required to comply with the 1992 Civil Liability Convention on a laden voyage but might not require such cover on a subsequent voyage, even if carrying residues of a persistent oil cargo on board. Other

<2> Draft International Convention on Civil Liability for Bunker Oil Pollution Damage (IMO document LEG79/11).

delegations did not consider this to be a problem, since if a ship were to switch trades from persistent to non-persistent oil, insurance cover under the 1992 Civil Liability Convention would normally continue under the original policy for a period of at least three months.

7.5 Burden of proof that no residues remain on board

7.5.1 Most delegations considered the wording "unless it is proved" made it clear that, to prevent the Conventions from applying, the burden of proof that no residues remained on board would normally fall on the shipowner. However, some delegations drew attention to the practical difficulties which could arise in establishing whether residues were present or not, given that the Conventions gave no guidance as to a qualifying quantity of residues. It was pointed out by one delegation that the issuance of a dry certificate merely denoted that there were no pumpable quantities of oil on board and that it was not proof that no residues remained.

7.5.2 It was stated that it was a general principle that the person who claimed the benefit of an exception and was able to establish the facts had to prove them. The view was expressed that, for this reason, any ship to which the proviso applied, and which had carried oil in bulk as cargo, remained a 'ship' on all subsequent voyages until the shipowner or the 1992 Fund proved that it had no residues of such carriage of oil in bulk on board as cargo.

7.6 Conclusions

The Working Group drew the following conclusions of the discussion as regards the circumstances in which an unladen tanker would fall within the definition of 'ship' laid down in the 1992 Conventions:

- (i) the word 'oil' in the proviso in Article I.2 of the 1992 Civil Liability Convention means persistent hydrocarbon mineral oil, as defined in Article I.5 of the Convention;
- (ii) the expression 'other cargoes' in the proviso should be interpreted to mean non-persistent oils as well as bulk solid cargoes;
- (iii) as a consequence the proviso in Article I.2 should apply to all tankers and not only to ore/bulk/oil ships (OBOs);
- (iv) the expression 'any voyage' should be interpreted literally and not be restricted to the first ballast voyage after the carriage of a cargo of persistent oil;
- (v) a tanker which had carried a cargo of persistent oil would fall outside the definition if it was proven that it had no residues of such carriage on board; and
- (vi) the burden of proof that there were no residues of a previous carriage of a persistent oil cargo should normally fall on the shipowner.

8 Applicability of the 1992 Conventions to offshore craft

8.1 Background

8.1.1 The Working Group noted that in the last twenty years there had been an increased use of floating systems for the storage of oil and that these facilities were no longer confined to marginal oil fields but were widely used in most oil-producing regions. The Group took note of the factual information contained in sections 2 - 6 of document 92FUND/WGR.2/2.

8.1.2 The Working Group noted that floating storage units (FSUs) and floating production, storage and offloading units (FPSOs) were not insured by P & I Clubs in the same way as oil tankers and that special

insurance was therefore arranged for each facility, since there was not a sufficient number of these facilities to be considered by the P & I Clubs as a mutual risk.

8.2 Consideration by the Assembly at its 3rd session

The Working Group recalled that the Assembly had considered at its 3rd session whether the 1992 Conventions applied to FSUs and FPSOs, on the basis of a document presented by the United Kingdom delegation (document 92FUND/A.3/18). The discussions were summarised in the Record of Decisions of that session (document 92FUND/A.3/27, paragraphs 20.1 - 20.14).

8.3 Documents considered by the Working Group

The Working Group based its deliberations on documents submitted by the Director (document 92FUND/WGR.2/2), the delegation of Australia (document 92FUND/WGR.2/2/1), the observer delegation of the International Group of P & I Clubs (document 92FUND/WGR.2/2/2), and the delegations of France (document 92FUND/WGR.2/2/3) and the United Kingdom (document 92FUND/WGR.2/2/4).

8.4 Working Group's considerations

8.4.1 The Working Group noted that the issue of the applicability of the 1984 Protocols to FSUs and FPSOs or other offshore craft was not discussed at the 1984 Diplomatic Conference, that the considerations of the Conference were focused on unladen tankers and combination carriers, and that the issue was not considered at the 1992 Diplomatic Conference.

8.4.2 The Working Group took the view that any offshore craft should fulfil two criteria in order to be covered by the 1992 Conventions, namely that it should fall within the definition of 'ship', ie be 'constructed or adapted for the carriage of oil in bulk as cargo', and that it should have persistent hydrocarbon oil on board as cargo or as bunkers.

8.4.3 The Working Group noted that the Director had suggested two possible interpretations of the expression 'constructed or adapted for the carriage of oil in bulk as cargo', namely

- (i) when a craft is constructed or adapted in such a way that it is *capable* of carrying oil in bulk as cargo; or
- (ii) only when a craft is constructed or adapted *for the purpose* of carrying oil in bulk as cargo.

8.4.4 It was also noted that the Director had suggested that a choice could be made between a restrictive and a broader interpretation of the 1992 Conventions, as follows:

- (a) A restrictive interpretation would mean that an offshore craft would fall within the definition only when, after having been disconnected from the exploration or production facility, it carries oil to or from a port or terminal installation.
- (b) A broader interpretation would extend the definition of 'ship' to 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 underway (ie disconnected from the exploration or production facility) with persistent oil on board.

8.4.5 The United Kingdom delegation referred to its previous document submitted to the 3rd session of the 1992 Fund Assembly (document 92FUND/A.3/18) in which it set out three scenarios in which 'oil' could be considered to be 'carried as cargo':

- (i) only oil carried on voyages to and from a port or terminal;
- (ii) oil carried on any voyage between two distinct points; or
- (iii) oil carried on any movement whatsoever.

8.4.6 The United Kingdom delegation also referred to an industry scheme known as the Offshore Pollution Liability Agreement (OPOL) which covered certain risks associated with offshore oil and gas exploration and production in the United Kingdom and other States. It was noted that the scheme had been amended in January 1999 to cover offshore facilities, defined as any installation of any kind, fixed or mobile, intended for the purpose of exploring for, producing, treating or storing oil from the seabed or its subsoil, when temporarily removed from their operational site for whatever reason. It was also noted that a potentially grey area existed when offshore craft changed from being part of the production process to acting as a carrier for a third party, since the OPOL scheme provided cover only in respect of the former activities.

8.4.7 In the light of the apparent recognition by the offshore industry that movements of offshore installations were an operational matter, the United Kingdom delegation proposed that the Working Group should recommend to the Assembly that scenarios (i) and (ii) in paragraph 8.4.5 were consistent with the scope and purpose of the 1992 Conventions. The United Kingdom delegation also proposed that although scenario (iii) would in some circumstances constitute 'carriage of oil', where the movement was primarily due to safety or operational considerations, that scenario would normally fall outside the scope of the Conventions.

8.4.8 It was emphasised that the question to be addressed was only that of an interpretation of the definition of 'ship' in the 1992 Conventions.

8.4.9 One delegation stated that although the criterion of 'construction' was essential in establishing whether offshore craft fell within the scope of the 1992 Conventions, it was insufficient by itself and the concept of 'carriage' was equally fundamental. In that delegation's opinion FSUs and FPSOs could fall within the scope of the Conventions only in so far as they were engaged in an activity involving the carriage of oil. That delegation expressed the view that FPSOs would appear not to be covered, but that in the case of FSUs the situation was more varied, depending on whether they were engaged in the carriage of oil to a port or terminal outside the oil field in which they normally operated.

8.4.10 A number of delegations referred to the fact that offshore craft generally operated in national or territorial waters and as such were not regulated by international conventions such as MARPOL or SOLAS, but by local laws and regulations. These delegations argued that unless the offshore craft were engaged in the carriage of oil which was subject to the payment of contributions to the 1992 Fund, such craft should not fall within the scope of the 1992 Conventions. They maintained that this would automatically exclude movements from oil well to oil well or to avoid bad weather, which should be covered by alternative regimes.

8.4.11 One delegation expressed the view that FPSOs which had been retained in classification as tankers would be covered by the 1992 Conventions when on voyages to and from repair or drydocking facilities or on voyages to avoid the possible effects of severe weather conditions. That delegation stated that it might not be clear whether the 1992 Conventions applied to any FPSO or FSU while connected to a pipeline in normal operating mode and that the issue needed to be resolved to avoid disputes in the future.

8.4.12 Some delegations favoured a very narrow interpretation of the definition of 'ship', since offshore craft represented risks that were very different to those caused by oil tankers. It was suggested that in order to be covered by the 1992 Conventions, an offshore craft had to be constructed or adapted for the purpose of carrying oil in bulk as cargo and not only capable to do so.

8.4.13 Some delegations considered that neither FSUs nor FPSOs should fall within the scope of the 1992 Conventions since they were not engaged in the carriage of oil in the traditional sense, ie on the basis of a commercial contract requiring vessels to carry relevant certificates such as bills of lading.

8.4.14 Other delegations were of the view that it was not clear whether and if so to what extent the 1992 Conventions applied to offshore craft and that it might be necessary to consider the matter on a case by case basis.

8.4.15 The observer delegation of the International Group of P & I Clubs, in reconciling the conflicting arguments, sought to distinguish between the different purposes for which offshore craft might be constructed or adapted, apart from being used for conventional carriage. In the view of that delegation a typical FPSO differed to a relatively large extent from the conventional tanker, not only in design and construction, but also in its ordinary intended use. That delegation stated that the distinctions were less clear in the case of storage, which Clubs belonging to the International Group did not exclude from the ambit of their mutual reinsurance arrangements unless there was some additional production element, such as the transfer of oil directly from the producing well and/or the operation of equipment to separate oil from gas. That delegation therefore proposed that the 1992 Conventions should generally not apply to FPSOs but that FSUs should be regarded as 'ships', recognising the need in both cases for sufficient flexibility to deal with exceptional cases.

8.4.16 One delegation expressed the view that guidelines similar to those proposed by the United Kingdom delegation were necessary in view of the fact that the terms 'FSU', 'FPSO', 'carriage' and 'cargo' were not defined in the 1992 Conventions. That delegation considered that the expression 'carriage' should not necessarily be restricted to voyages linked to a commercial contract, or involve a cargo which was subject to contributions to the 1992 Fund. On the basis that any voyage from one place to another would fall within the scope of the 1992 Conventions, that delegation considered that both scenarios (i) and (ii) in paragraph 8.4.5 above would be covered, but that scenario (iii) should be covered by the national law of the individual coastal states or through schemes similar to OPOL.

8.4.17 The majority of delegations took the view that the case set out in paragraph 8.4.5(i) should fall within the scope of application of the 1992 Conventions, whereas there was less support for including also the case set out in paragraph 8.4.5(ii) and no support for inclusion of the case set out in paragraph 8.4.5(iii).

8.5 Conclusions

The Working Group drew the following conclusions as to the applicability of the 1992 Conventions to offshore craft:

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

9 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider the Working Group's recommendations on:
 - (i) the circumstances in which an unladen tanker would fall within the definition of 'ship' in the 1992 Conventions; and
 - (ii) whether, and if so to what extent, the 1992 Conventions apply to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).
-