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SECOND INTERSESSIONAL
WORKING GROUP

92FUND/WGR.2/7

REPORT OF THE SECOND MEETING OF THE SECOND INTERSESSIONAL WORKING GROUP

Note by the Director

Summary:

A further analysis is made of the definition of 'ship' in Article I.5 of the 1992 Civil Liability Convention. Following the initial meeting of the Working Group in April 1999 it was decided to reconvene the Group in April 2000. At the latter meeting the Working Group confirmed its conclusion 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.

Action to be taken:

Consider the Working Group's conclusions on the circumstances in which an unladen tanker would fall within the definition of 'ship' in the 1992 Conventions.

1 Introduction

1.1 Mandate

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, namely:

- (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).

The Working Group held meetings on 26 and 27 April 1999 under the Chairmanship of Mr John Wren (United Kingdom). The Working Group's Report of these meetings is contained in document 92FUND/A.4/21.

1.2 Discussion at the Assembly's 4th session

1.2.1 The Assembly considered the Working Groups Report at its 4th session in October 1999.

Offshore craft

1.2.2 The Assembly endorsed the conclusions of the Working Group as regards the applicability of the 1992 Conventions to offshore craft (document 92 FUND/A.4/32, paragraph 2.4.3 and 2.4.10).

Unladen tankers

1.2.3 The Assembly noted that the Working Group drew the following conclusions as regards the circumstances in which an unladen taker would fall within the definition of 'ship':

- (i) the word 'oil' in the proviso in Article I.1 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.1 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.

1.2.4 The Assembly also took note of a document on this issue submitted by Australia, Canada, the Netherlands and the United Kingdom (document 92FUND/A.4/21/1). The Assembly noted the views expressed in the document that:

- (i) a dedicated oil tanker (ie a tanker capable of carrying persistent oil and non-persistent oil) is always a 'ship' for the purposes of the 1992 Civil Liability Convention; and
- (ii) the proviso in the definition of 'ship' applies only to vessels and craft capable of carrying oil, including non-persistent oil, and other cargoes.

1.2.5 In considering the conclusions of the Group, several delegations stated that they supported the interpretation proposed by the Working Group. Some delegations expressed the opinion that they did not agree with the conclusions of the Working Group but supported the views set out in the document presented by the four delegations referred to in paragraph 1.2.4 above.

1.2.6 One delegation stated that the overriding issue was the definition of 'oil' in the Convention, which was restricted to 'persistent oil', and that it would not be legally possible to widen the interpretation of the definition of 'ship' beyond that proposed by the Working Group.

- 1.2.7 Other delegations considered that it was premature for the Assembly to take a decision, particularly in view of the limited time which had been available to study the new document, and that the matter should be examined further.
- 1.2.8 The Assembly instructed the Director to reconvene the Working Group for a one day meeting during the week of the session of the Executive Committee in April 2000 and urged all interested delegations to submit documents well in advance of that meeting in order to allow delegations to consider the matter in detail before the meeting.
- 1.3 Further consideration by the Working Group
- 1.3.1 The Working Group reconvened on 5 April 2000.
- 1.3.2 In accordance with the decision of the Assembly, the Working Group's second meeting was open to all Member States of the 1992 Fund, and all States and intergovernmental and international non-governmental organisations that had observer status with the 1992 Fund were invited as observers. The session was held in public.
- 1.3.3 The Working Group instructed the Director to submit to the Assembly a report of the Group's work and its conclusions.
- 1.3.4 This Report, which comprises a summary of the issues discussed and the conclusions drawn by the Working Group at its second meeting, has been drafted in consultation with the Group's Chairman.

2 Participation

- 2.1 The following Member States were represented:

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

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

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

- 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 (CMI)

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 Applicability of the definition of 'ship' to unladen tankers

3.1 Documentation considered by the Working Group at its April 2000 meeting

The Working Group based its deliberations at its April 2000 meeting on documents submitted by the Director (document 92FUND/WGR.2/6), the Oil Companies International Marine Forum (OCIMF) (document 92FUND/WGR.2/6/1) and the delegations of the Republic of Korea, Japan and Germany (document 92FUND/WGR.2/6/2).

3.2 Relationship between the words 'oil' and 'other cargoes' in Article I.1 and the word 'oil' as defined in Article I.5 of the 1992 Civil Liability Convention

- 3.2.1 The Working Group noted that in their documents OCIMF and the delegations of the Republic of Korea, Japan and Germany had supported the conclusions adopted at the first meeting of the Working Group, as set out in paragraph 1.2.3 above. Those delegations considered that the definition of 'oil' in Article I.5, which was clearly restricted to 'persistent hydrocarbon mineral oil', was paramount and applied wherever the word 'oil' was used in the 1992 Conventions. Those delegations concluded that 'other cargoes' therefore meant anything other than persistent oil, ie non-persistent oil, chemicals and bulk solids.

- 3.2.2 It was pointed out that the final decision regarding the definition of 'ship' rested with the national courts in Contracting States. For this reason, the delegations of the Republic of Korea, Japan and Germany were of the view that a restrictive interpretation of the definition of 'ship' was required in order to avoid confusion.

3.3 Practical implications

- 3.3.1 The Working Group noted that OCIMF and the delegations of the Republic of Korea, Japan and Germany had pointed out in their documents that it would be inequitable for the 1992 Fund to be potentially liable for spills of bunker fuel from non-persistent oil and chemical tankers since the cargo interests involved did not contribute to the Fund.
- 3.3.2 It was also noted that under Article VII.1 of the 1992 Civil Liability Convention the maintenance of insurance or other financial guarantee was only required in respect of a ship registered in a Contracting State carrying more than 2 000 tonnes of oil in bulk as cargo. It was stated that a strict legal interpretation of that Article would lead to the conclusion that no insurance or financial guarantee was required in respect of unladen tankers. It was pointed out that, if this were the case, the burden of paying compensation for pollution damage in respect of incidents involving unladen tankers could fall on the 1992 Fund in accordance with Article 4.1(b) of the 1992 Fund Convention.
- 3.3.3 It was further noted that vessels which never carried non-persistent oil, even if they were capable of doing so, might not always carry insurance cover in respect of the 1992 Civil Liability Convention, and

that this could also lead to the 1992 Fund being exposed to a greater number of incidents through the requirement to pay compensation under Article 4.1(b) of the 1992 Fund Convention.

- 3.3.4 The Working Group noted that the Director in his document had drawn attention to the fact that if the proviso in Article I.1 were to apply to all tankers, as originally proposed by the Working Group, this would have the effect of excluding unladen, dedicated crude oil tankers from the ambit of the 1992 Conventions if it was proven that they had no residues on board.
- 3.3.5 The Working Group took note of the analysis contained in document 92FUND/WGR.2/3 presented by the Director. The Working Group noted in particular the information on various types of craft, namely vessels carrying liquid cargos (including oil) and solid cargos, vessels carrying oil and other liquid cargos and vessels carrying persistent and non-persistent oils.
- 3.3.6 It was noted that in the view of the delegations of Australia, Canada, the Netherlands and the United Kingdom, the interpretation that correctly reflected the intention of the Diplomatic Conference would be to consider only vessels in the two former categories as combination carriers (ie ships capable of carrying oil and other cargos) whereas the third category (ie vessels capable of carrying only persistent and non-persistent oil) these were, in their view, dedicated tankers and therefore always 'ships' for the purpose of the 1992 Conventions.
- 3.3.7 The Working Group noted in particular the table set out in the Annex to document 92FUND/WGR.2/6 which set out the consequences of the two approaches, ie the Working Group's recommendation and the proposal by the delegations of Australia, Canada, the Netherlands and the United Kingdom. It was noted that the two approaches led to the same result in respect of the two first categories of craft referred to in paragraph 3.3.6 above (ie those carrying liquid cargos (including oil) and solid cargos) and those carrying persistent and non-persistent oil and other liquid cargos. It was also noted that the two approaches gave different results in three cases namely in respect of:
- (i) craft capable of carrying persistent and non-persistent oils when carrying non-persistent oil;
 - (ii) craft capable of carrying persistent and non-persistent oils when unladen with no persistent oil residues on board; and
 - (iii) crude oil tankers when unladen with non-persistent oil residues on board.
- 3.3.8 The table is reproduced in the Annex to this Report.

3.4 Discussion

- 3.4.1 A number of delegations expressed concern that in accepting the original recommendation of the Working Group, tankers that were dedicated to the carriage of persistent oil would be included in the proviso in Article I.1. Those delegations doubted that this had been the intention when the Diplomatic Conference adopted the 1984 Protocols to 1969 Civil Liability Convention and the 1971 Fund Convention and pointed out that if this restrictive interpretation had been intended, there would have been no need to refer to 'other cargoes' in Article I.1. However, those delegations noted that from a practical point of view, it was very unlikely that a dedicated crude oil tanker would have no residues of persistent oil cargo. It was also noted that under the proposed Bunker Convention^{<1>} compensation would be available for pollution damage arising from unladen tankers not covered by the 1992 Civil Liability Convention and the 1992 Fund Convention.
- 3.4.2 During the discussion it was suggested that the obligation to maintain insurance under Article VII.1 of the 1992 Civil Liability Convention applied to tankers which were capable of carrying more than 2 000 tonnes of oil in bulk as cargo not only for voyages when the tanker actually carried such a quantity but also for others voyages. The Director expressed the view that the obligation to maintain insurance laid down in the Convention applied only to voyages when the ship was actually carrying more than 2 000 tonnes of oil

<1> Draft International Convention on Civil Liability for Bunker Oil Pollution Damage (IMO document LEG/CONF.12/3).

in bulk as cargo. He added that tankers capable of carrying such quantities normally had insurance for oil pollution also for ballast voyages. A number of delegations supported the Director's view.

- 3.4.3 Most delegations supported the Working Group's original recommendation. The four delegations that had proposed the alternative recommendation regarding the applicability of the definition of 'ship' to unladen tankers set out in paragraph 1.2.4 above accepted that position.
- 3.4.4 Whilst agreeing that an interpretation of the definition of 'ship' in Article I.1 had to be based on the wording of the definition of 'oil' in Article I.5, some delegations proposed that the Intersessional Working Group established by the Assembly to assess the adequacy of the 1992 Civil Liability Convention and the 1992 Fund Convention (cf document 92FUND/A/ES.4/7, section 5.3) should give further consideration to the definition of 'ship'. Those delegations considered that, if a consensus emerged that the present definition was inadequate or ambiguous, the definition of 'ship' could be modified at some time in the future as part of the revision of the 1992 Conventions.

4 Conclusions

- 4.1 Summing up, the Chairman recalled the conclusions arrived at at the first meeting of the Working Group, at which a majority had supported the view that an unladen tanker would fall within the definition of 'ship' in the circumstances set out in paragraph 1.2.3 above. He noted that the Working Group had at its second meeting taken up the continuing concerns that a number of delegations had about the definition which had also been discussed at the 4th session of the Assembly. He stated that the discussions at the Group's second meeting had benefited from additional explanations and justification for the adoption of the more restrictive interpretation in most circumstances and that this approach had now been generally accepted. He noted, however, that concerns had persisted regarding the applicability of the definition to dedicated crude oil tankers and that the majority of the delegations which had intervened in the discussion were of the view that the Convention should always apply to such tankers. However, the Chairman noted that in view of the fact that it would be rare that such tankers would have no persistent oil residues on board, the assumption should always be that such residues were present and that it would be open to the shipowner to prove otherwise. The Chairman stated that there was general agreement that for practical purposes further consideration by the Working Group would be unnecessary. He also pointed out that some delegations felt that the definition of 'ship' in the 1992 Conventions might need to be reconsidered when the Conventions were next revised.
- 4.2 The Working Group decided to maintain the conclusions drawn at its first meeting as regards the circumstances in which an unladen tanker would fall within the definition of 'ship' as set out in paragraph 1.2.3 above.

5 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to consider the Working Group's recommendations on the circumstances in which an unladen tanker would fall within the definition of 'ship' in the 1992 Conventions.
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