



# **LIABILITY AND COMPENSATION FOR SHIP-SOURCE OIL POLLUTION:**

AN OVERVIEW OF THE INTERNATIONAL  
LEGAL FRAMEWORK FOR OIL POLLUTION  
DAMAGE FROM TANKERS





UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**Liability and Compensation for Ship-Source Oil Pollution:  
An Overview of the International Legal Framework for Oil  
Pollution Damage from Tankers**

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### *Stop Press:*

The information provided in this report is accurate as at 31 January 2012. **However, it should be noted that, at the time of going to press, there have been two important changes to the status of ratification of Conventions.** In particular, **Togo has acceded to the 1992 Civil Liability Convention (1992 CLC) with effect from 23 April 2013; Mauritania has acceded to the 1992 CLC and the 1992 Fund Convention with effect from 4 May 2013 and has denounced the 1969 CLC with effect from the same date.** This change should be taken into account when considering tables 2, 4, 5 and 6 of this report.

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## ABBREVIATIONS AND ACRONYMS

<b>BOPC</b>	Bunker Oil Pollution Convention
<b>BP</b>	British Petroleum
<b>CLC</b>	Civil Liability Convention
<b>CRISTAL</b>	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
<b>dwt</b>	deadweight
<b>EEZ</b>	Exclusive Economic Zone
<b>EU</b>	European Union
<b>FPSOs</b>	Floating Production, Storage and Offloading Units
<b>FSUs</b>	Floating Storage Units
<b>HNS Convention</b>	Hazardous and Noxious Substances Convention
<b>IEA</b>	International Energy Agency
<b>IMF</b>	International Monetary Fund
<b>IMO</b>	International Maritime Organization
<b>IOPC</b>	International Oil Pollution Compensation
<b>IOPC Funds</b>	International Oil Pollution Compensation Funds
<b>ISM Code</b>	International Safety Management Code
<b>ISPS Code</b>	International Ship and Port Facilities Security Code
<b>ITOPF</b>	International Tanker Owners Pollution Federation Limited
<b>LLMC</b>	Convention on Limitation of Liability for Maritime Claims
<b>MARPOL</b>	International Convention for the Prevention of Pollution from Ships
<b>mt</b>	metric tones
<b>OBOs</b>	Oil/Bulk/Ore ships
<b>OPRC</b>	International Convention on Oil Pollution Preparedness, Response and Co-operation
<b>OPRC-HNS</b>	Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances
<b>OPA</b>	Oil Pollution Act
<b>P&amp;I</b>	Protection & Indemnity
<b>SDR</b>	Special Drawing Right
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>STOPIA</b>	Small Tanker Oil Pollution Indemnification Agreement
<b>TOPIA</b>	Tanker Oil Pollution Indemnification Agreement
<b>TOVALOP</b>	Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution
<b>ULCCs</b>	Ultra Large Crude Carriers
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>VLCCs</b>	Very Large Crude Carriers
<b>WOTC</b>	World Oil Transit Chokepoints

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## Introduction

1. Around half of the global crude oil production is carried by sea. Ever larger volumes of cargoes are carried in increasingly large vessels, taking advantage of economies of scale. At the same time, the steady growth in the size and carrying capacity of ships transporting cargo of any type means that significant quantities of heavy bunker fuel are carried across the oceans and along coastal zones.<sup>1</sup>

2. While large oil pollution incidents have reduced both in number and in size over recent decades, the potential threat of environmental damage and economic loss associated with the carriage of oil remains disconcerting. In particular, for coastal developing countries and small island developing States with economies heavily dependent on income from fisheries and tourism, exposure to damage arising from ship-source oil pollution incidents poses a potentially significant economic threat.

3. As concerns pollution from oil tankers, the relevant international legal framework for liability and compensation is very robust and well developed, providing significant compensation for loss or damage arising from oil pollution incidents. Relevant international conventions, collectively known as the CLC-IOPC Fund regime, have been developed and improved upon, primarily in the aftermath of some particularly large oil spills. The first of these, the 1969 Civil Liability Convention (CLC)<sup>2</sup> and the 1971 Fund Convention<sup>3</sup> were negotiated following the *Torrey Canyon* disaster in 1967, representing a clear legislative response of the international community to an oil pollution incident which – at the time – was of unprecedented proportions. The 1969 CLC and 1971 Fund Convention were subsequently amended, leading to the adoption of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol which today represent the most advanced and modern legal instruments in the field.

4. The legal instruments that are part of the CLC-IOPC Fund regime enjoy broad support and have been widely adopted at the international level. However, a considerable number of coastal states, including developing countries that are potentially exposed to ship-source oil-pollution incidents, are not yet Contracting Parties to the latest legal instruments in the field and, as a result, would not be benefitting from significant compensation in the event of a major oil-spill affecting their coasts or other areas under their marine jurisdiction (territorial waters and exclusive economic zone).

5. It is against this background and in accordance with the secretariat's mandate<sup>4</sup> that this report has been prepared to assist policymakers, in particular in developing countries, in their

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<sup>1</sup> Data on bunker fuel consumption featured in tables 3.3 and A.1.8 of the *Second IMO Greenhouse Gas Study 2009* (available at [www.imo.org](http://www.imo.org)) show that total fuel consumption by shipping was over 330 million tons in 2007. Fuel consumption of tanker vessels, including crude, product and chemical carriers as well as liquefied petroleum products liquefied natural gas (LNG) and other tankers was the largest with a total of around 76 million tons. Large bunker fuel consumers in descending order were container ships, bulkers followed by all other ship categories.

<sup>2</sup> International Convention on Civil Liability for Oil Pollution Damage 1969.

<sup>3</sup> International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

<sup>4</sup> UNCTAD, as part of its mandated work programme in the field of transportation, carries out research and analysis "to help developing countries make informed policy choices to address the environmental challenges in relation to transport strategies, and to help identify associated capacity-building needs and appropriate regulatory responses" (Accra Accord, para. 168).

understanding of the existing legal framework and in assessing the merits of accession to the relevant international legal instruments.

6. The report comprises four chapters, supplemented by an extensive analytical Annex that covers further substantive issues in some detail. Chapter I of the report provides some context, highlighting the potential exposure to oil pollution incidents coastal countries may face as a result of seaborne trade in oil and providing some brief statistical information about the incidence and causes of oil spills from tankers. It also highlights the important public policy dimension of relevant regulatory responses at the international level, with special emphasis on the international liability and compensation framework for oil pollution from tankers.

7. Chapter II provides a brief overview of the development of the international legal framework governing liability and compensation for oil pollution from tankers (CLC-IOPC Fund regime), considering substantive differences between the relevant legal instruments which co-exist at the international level and presenting their key features.

8. Chapter III offers some considerations for national policymaking, highlighting the potential benefits associated with adherence to the latest of the international legal instruments that are part of the CLC-IOPC Fund regime, namely the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol.

9. Chapter IV briefly presents some related international conventions, which are designed to provide for compensation in respect of ship-source oil pollution not covered by the CLC-IOPC Fund regime. These are the 2001 Bunker Oil Pollution Convention,<sup>5</sup> which applies to bunker oil pollution from all types of sea-going vessels other than oil tankers, as well as the 1996 Hazardous and Noxious Substances (HNS) Convention,<sup>6</sup> as amended by its 2010 Protocol, which covers pollution from a wide range of hazardous and noxious substances, including non-persistent oils.

10. An extensive Annex, which forms an integral part of the report, provides a detailed analytical overview of the key substantive provisions, in thematic order, of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol.

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<sup>5</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

<sup>6</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996.

## I. Seaborne oil trade and oil pollution from tankers: some trends<sup>7</sup>

11. Oil is a commodity of key strategic importance, accounting for around 35 per cent of the world's primary energy consumption in 2010 and representing a significant proportion of the volume of global seaborne trade.<sup>8</sup>

12. Global energy supply and demand determine the flow of crude oil trade. Production and reserves are heavily concentrated among a handful of major producers and regions. Much of global crude oil is carried in large vessels, including Very Large Crude Carriers (VLCCs) of up to 320,000 deadweight (dwt) and Ultra Large Crude Carriers (ULCCs) of some 320,000 deadweight (dwt) plus,<sup>9</sup> along major shipping routes.<sup>10</sup> In 2010, about 1.8 billion tons of crude, equivalent to 45 per cent of world crude oil production, were loaded on tankers and carried through fixed maritime routes, e.g. from the Persian Gulf to different parts of the world.<sup>11</sup> Much of this navigation is taking place in relative proximity to the coasts of many countries, in some cases transiting through constrained areas or chokepoints, such as narrow straits and/or canals.<sup>12</sup>

13. With the bulk of global trade in goods<sup>13</sup> – including a significant proportion of the global demand for oil – carried by sea, there is a considerable potential for exposure to oil pollution incidents affecting the marine and coastal environment as well as coastal economies, particularly those dependent on tourism and/or fisheries. Coastal States involved in the import or export of oil, or located along the major maritime routes that handle global oil traffic are potentially most vulnerable to the effects of oil pollution from tankers.

14. However, ship-source oil pollution from vessels other than oil tankers, e.g. container ships, chemical carriers, general cargo ships and passenger ships is also becoming an increasingly significant potential threat for coastal states; this particularly given the steady growth in ship sizes and the corresponding amount of fuel oil (bunkers) carried by vessels of all types.

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<sup>7</sup> Statistical data on oil spills in this chapter is based on information produced by the International Tanker Owners Pollution Federation Limited (ITOPF). Further information, including in respect of the effects of oil spills, is available on the ITOPF website at [www.itopf.org](http://www.itopf.org). For more detailed information and data on maritime transport, see UNCTAD's annual *Review of Maritime Transport*, available electronically at [www.unctad.org/rmt](http://www.unctad.org/rmt).

<sup>8</sup> In 2010, tanker trade, including crude oil, accounted for one-third of the volume of global seaborne trade. This share can be expected to grow, with changes in the geography and patterns of oil trade driven by a number of factors, including, *inter alia*, the growing energy demand of emerging economies, evolving oil extraction technologies, and proliferating new oil finds. UNCTAD *Review of Maritime Transport* 2011. Chapter 1. Table 1.3 and figure 1.2. pp. 7 and 10.

<sup>9</sup> Crude oil is carried in vessels of up to 440,000 deadweight (dwt). Very Large Crude Carriers (VLCCs) and ULCCs accounted for approximately 44 per cent of the world tanker fleet in dwt terms in 2010. UNCTAD, *Review of Maritime Transport* 2011. Chapter 3.

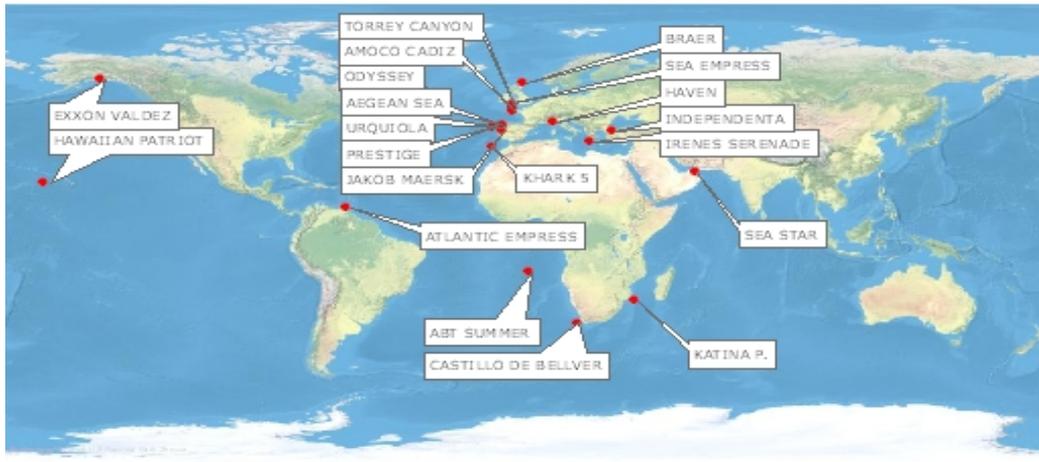
<sup>10</sup> For additional information on seaborne oil trade patterns and developments including major producer and consumers, see Chapter 1 of UNCTAD's *Review of Maritime Transport*, various issues, including the 2011 edition. See also the International Energy Agency (IEA), *World Energy Outlook*, various issues; British Petroleum (BP) Statistical Review, various issues; and The Energy Library, a web-based information resource concerning energy issues (<http://www.theenergylibrary.com>).

<sup>11</sup> UNCTAD *Review of Maritime Transport* 2011. Chapter 1. See in particular Section B.2, table 1.4 and figure 1.2. For graphic representation of the major oil trading lanes, see [http://www.tankersinternational.com/Education-Trading.php#how\\_does\\_the\\_oil\\_get\\_to\\_the\\_refinery](http://www.tankersinternational.com/Education-Trading.php#how_does_the_oil_get_to_the_refinery).

<sup>12</sup> See, for instance, *United States Energy Information Administration: World Oil Transit Chokepoints*, at <http://205.254.135.7/countries/regions-topics.cfm?fips=WOTC>.

<sup>13</sup> According to UNCTAD estimates, over 80 per cent of the volume of global merchandise trade is carried by sea.

**Figure 1. Location of major oil spills**



Source: www.itopf.org

15. Ship-source oil pollution may arise as a result of major accidents, such as collisions, as well as groundings, but also in the course of ordinary cargo operations, such as loading and unloading or bunkering activity at terminals.

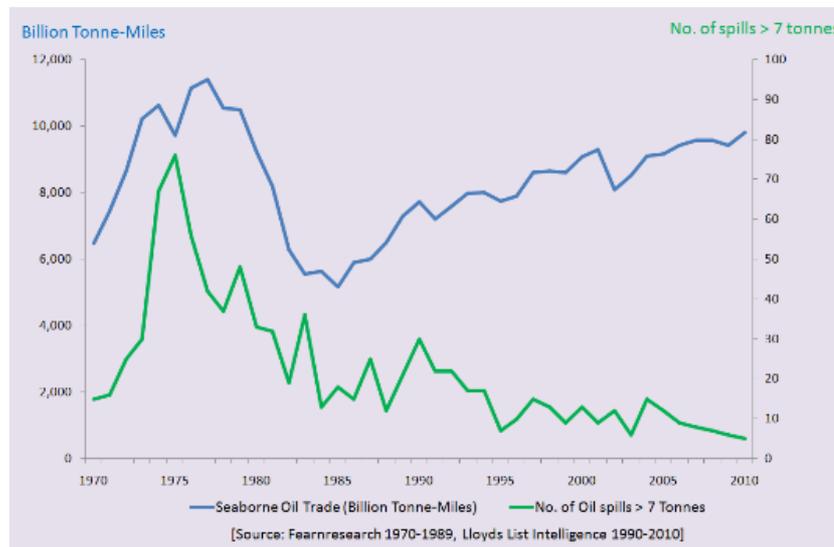
**Table 1. Incidence (number) of spills by cause, (<7 tonnes 1974-2010; 7-700 tonnes; and >700 tonnes 1970-2010)**

	<7 Tonnes	7-700 Tonnes	>700 Tonnes	Total
<b>OPERATIONS</b>				
Loading / Discharging	3157	385	37	3579
Bunkering	562	33	1	596
Other Operations	1250	61	15	1326
<b>ACCIDENTS</b>				
Collisions	180	337	132	649
Groundings	237	269	160	666
Hull Failures	198	57	55	310
Equipment Failures	202	39	4	245
Fire & Explosions	84	33	34	151
Other/Unknown	1975	121	22	2118
<b>TOTAL</b>	<b>7845</b>	<b>1335</b>	<b>460</b>	<b>9640</b>

Source: www.itopf.org

16. While maritime transport in general and seaborne oil trade in particular have steadily grown over the years, the number of oil spills from tankers has decreased significantly over the past forty years. (Figure 2).

**Figure 2. Seaborne oil trade and number of tanker spills over 7 tonnes, 1970-2010 (crude and oil product)**

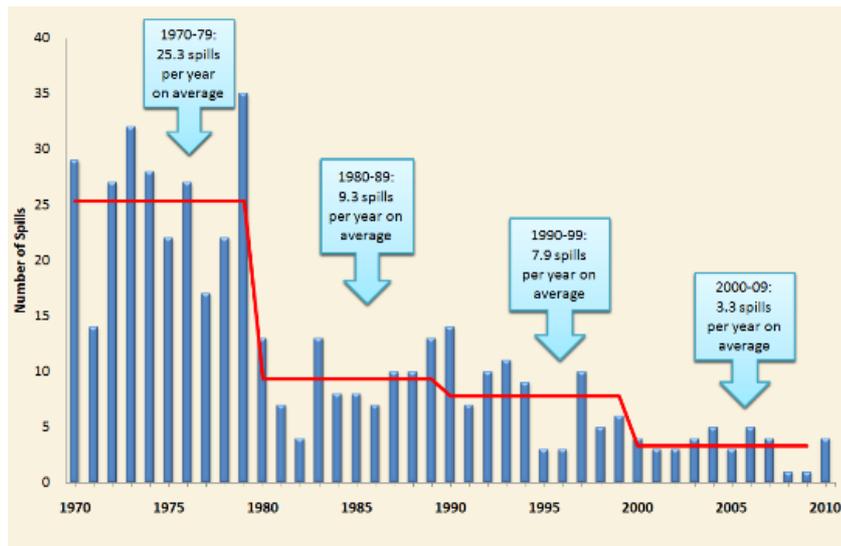


Source: www.itopf.org

17. Moreover, statistics indicate that both the number and the size of large spills, i.e. spills with a potential to cause major economic loss and damage to the marine environment, has also dropped significantly over the same period of time (Figures 3 and 4). Thus, according to the International Tanker Owners Pollution Federation Limited (ITOPF), the average number of major oil spills per year during the 1970s was over 25, dropping to approximately 9 in the 1980s and 8 in the 1990s, to just over 3 in the most recent decade.<sup>14</sup> Figure 4, which shows the quantities involved in larger oil pollution incidents over the past forty years, clearly illustrates a decreasing trend too, with much less severe oil spills occurring during the past decade than during previous decades; this, despite the fact that both seaborne trade in oil and the cargo carrying capacity of oil tankers has grown steadily since the 1970s.

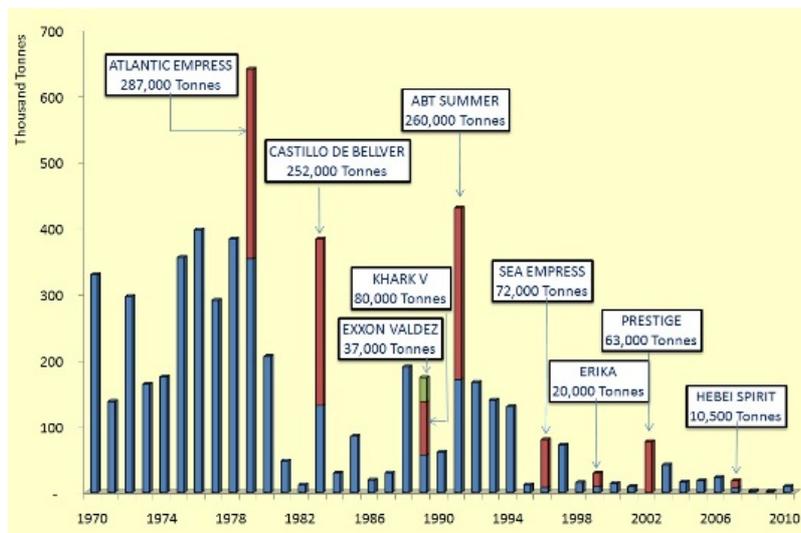
<sup>14</sup> Note that for 2010, four large spills were recorded, representing a minor deviation from the average of 3.3 spills per year over the decade as a whole. At 10,000 tonnes, the total amount of oil lost to the environment in 2010, while more than that of 2008 and 2009, is the fourth lowest annually recorded figure, and is significantly lower than the average of oil lost in previous decades.

**Figure 3. Numbers of large spills (over 700 tonnes) from 1970 to 2010**



Source: www.itopf.org

**Figure 4. Quantities of oil spilt over 7 tonnes, 1970 to 2010**



Source: www.itopf.org

18. The important reduction of large oil spill incidents over time may, to a considerable extent, be attributed to the development of a robust international regulatory framework to combat ship-source oil pollution which, in turn, has been in response to a number of major oil pollution incidents.<sup>15</sup>

19. Relevant international conventions, ensuring that victims of oil pollution incidents are adequately compensated for their losses, have been developed and improved upon primarily in

<sup>15</sup> See *Trends in Oil Spills from Tanker Ships 1995-2004*, available at [www.itopf.org](http://www.itopf.org).

the aftermath of some particularly large oil spills. The 1969 Civil Liability Convention (CLC)<sup>16</sup> and the 1971 Fund Convention<sup>17</sup> in particular, the first dedicated international conventions to deal with the issue of ship-source oil pollution, were negotiated following the *Torrey Canyon* disaster in 1967, representing a clear legislative response of the international community to an oil pollution incident which – at the time – was of unprecedented proportions. The relevant regulatory framework for liability and compensation has, over the past forty years, been further developed and refined – in part, again, in response to large oil spills.<sup>18</sup> Together with related regulatory measures for pollution prevention, preparedness and control, and the improvement of ship design and safety standards (see Box 1)<sup>19</sup>, it has significantly contributed to a steady reduction in both the size and number of major oil pollution incidents, illustrating the important role of regulation as a tool to implement public policy objectives.

20. While the number of large tanker oil spills has significantly fallen over the years, the implications of any oil spill may be devastating for any affected local economies. With global trade in oil set to intensify in response to increasing demand – especially from developing regions – and with growing world oil trade and dependence on longer-haul supply expected to continue to rise (e.g. from Brazil and Africa to China and India), ship-source oil pollution remains a potentially important risk.<sup>20</sup>

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<sup>16</sup> International Convention on Civil Liability for Oil Pollution Damage 1969. The 1969 CLC entered into force on 19 June 1975, and currently has 37 Contracting States, 2.8% of world tonnage.

<sup>17</sup> International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. The 1971 Fund Convention is no longer in force.

<sup>18</sup> See for instance the chronological table prepared by the International Oil Pollution Compensation (IOPC) Funds, relating oil pollution incidents and the development of the international compensation regime, <http://www.iopcfund.org/chronology.htm>.

<sup>19</sup> The international legal instruments dealing with liability and compensation for ship-source oil pollution discussed in this report are complemented by a number of related legal instruments which are briefly referred to in Box 1. A more detailed consideration of these instruments is beyond the scope of this report. For further information, see the International Maritime Organization (IMO) website, at [www.imo.org](http://www.imo.org).

<sup>20</sup> UNCTAD *Review of Maritime Transport* 2011. Chapter 1. See also Cahn C (2011), “VLCC crude shipments face changes”. Fairplay, 1 December; and “The new world oil map”. Fairplay, 1 December.

### **Box 1: Oil pollution prevention, preparedness and response: main relevant international conventions**

**MARPOL 73/78** (as amended)<sup>1</sup> is the main international convention aimed at preventing pollution of the marine environment from ships. The MARPOL Convention is made up of Regulations, supplemented by a number of technical Annexes that provide strict controls on operational discharges from ships. The MARPOL Convention provides criminal and disciplinary sanctions for breaches of its provisions. In relation to oil pollution, Annex I contains Regulations for the prevention of pollution by oil and Annex II details Regulations for the control of pollution by noxious liquid substances in bulk. Both Annexes entered into force on the same day as the Convention, on 2 October 1983, and are the only Annexes that are compulsory for Contracting States. The other Annexes govern prevention of pollution by harmful substances carried by sea in packaged form, by sewage and garbage from ships, and also the prevention of air pollution from ships. Following the *Exxon Valdez* disaster in 1989, the IMO adopted amendments to MARPOL that imposed double hull or equivalent design requirements for oil tankers delivered by a fixed date. Single hull oil tankers delivered before that date were also subjected to a phasing out scheme within the amendments.

The **International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties 1969**<sup>2</sup> provides vital powers to coastal States in the face of grave and imminent threats of oil pollution arising from shipping incidents. The 1969 Intervention Convention affirms the right of States to take preventive measures to avoid pollution damage that would otherwise result from maritime casualties that occur outside their territorial waters. In 1973, a **Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil**<sup>3</sup> was adopted to extend the regime of the Intervention Convention to substances other than oil. Such substances are listed in an Annex to the Protocol, although the regime also applies to other substances with similar characteristics to those listed.

Also worth noting is the **International Convention for the Safety of Life at Sea (SOLAS) 1974**, which is concerned with the safety of merchant ships.<sup>4</sup> The SOLAS Convention can be said to have contributed to the prevention of oil pollution incidents, as it details a number of minimum standards for the construction, equipment and operation of ships with a view to maintaining their safety. The SOLAS Convention also includes the International Safety Management (ISM) Code and the International Ship and Port Facilities Security (ISPS) Code. The broader principle behind the SOLAS Convention is that the safer the ship, the less likely it is that an accident will occur, and as a consequence, the potential for oil pollution is lowered.

Maritime disasters have also demonstrated the need for States to be prepared for and equipped to respond to such incidents. Quicker response times and more efficient salvage and clean-up operations have the benefit of lessening the potential pollution damage, and in some cases, the resulting costs. Based on these considerations, the **International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC)** was adopted in 1990 to deal with general pollution incidents.<sup>5</sup> Parties to the OPRC Convention are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries. As an example, ships are required to carry onboard emergency plans to respond to pollution incidents. In 2000, the **Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS)** further developed the principles of the OPRC, by providing a basis for international co-operation in combating major incidents or threats of marine pollution with a specific focus on hazardous and noxious substances.<sup>6</sup>

<sup>1</sup> MARPOL 73/78 is a consolidation of the International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978 relating to the 1973 International Convention for the Prevention of Pollution from Ships. As the 1973 Convention had not yet entered into force, the 1978 Protocol absorbed the Convention. There are currently 151 Contracting States to MARPOL 73/78 (Annex I/II), representing 98.91% of world tonnage.

<sup>2</sup> The 1969 Intervention Convention entered into force on 6 May 1975, and currently has 87 Contracting States, amounting to 75.1% of world tonnage.

<sup>3</sup> The 1973 Intervention Protocol entered into force on 30 March 1983 and currently has 54 Contracting States, equalling 50.36 % of world tonnage. Further amendments have been made to revise the list of substances attached to the Protocol.

<sup>4</sup> The first version of the SOLAS Convention was adopted in 1914, in response to the *Titanic* disaster of 1912, followed by numerous updates and amendments. The 1974 version of the SOLAS Convention was adopted on 1 November 1974 and entered into force on 25 May 1980. The SOLAS Convention has 161 Contracting States representing 98.91% of world tonnage. Two further Protocols were adopted in 1978 and 1988. The 1978 SOLAS Protocol entered into force on 1 May 1981 and the 1988 SOLAS Protocol entered into force on 3 February 2000. The 1978 Protocol has 116 Contracting States and the 1988 Protocol has 101 Contracting States, amounting to 96.31% and 95.32% of world tonnage respectively.

<sup>5</sup> The 1990 OPRC Convention was adopted on 30 November 1990 and entered into force on 13 May 1995. The 1990 OPRC Convention has 103 Contracting States, representing 69.58% of world tonnage.

<sup>6</sup> The 2000 OPRC-HNS Protocol was adopted on 15 March 2000 and entered into force on 14 June 2007. The 2000 OPRC-HNS Protocol has 28 Contracting States, equalling 38.43% of world tonnage.

## II. Oil pollution from tankers: the international liability and compensation regime in context

### 1. The overall scheme of relevant international conventions

21. The devastating effects of some major tanker oil spills on the marine and coastal environment,<sup>21</sup> as well as the resulting economic losses and significant clean-up costs have led to much public attention on the issue of oil pollution from ships; this has acted as a catalyst for the development of a considerable body of international legal instruments to prevent and respond to such incidents and to provide for financial compensation in respect of loss resulting from an oil pollution incident involving tankers<sup>22</sup>. In fact, oil pollution from ships is particularly well regulated with a highly developed and robust international regulatory framework to deal with liability and compensation in the case of ship-source oil pollution from ships that carry oil as cargo, i.e. oil tankers.

22. The international legal framework consists of two sets of conventions which, to an extent, co-exist internationally. In each case, the objective is to compensate victims of oil pollution damage from tankers in the respective Contracting States through a tiered or layered system, whereby liability of the owner of the polluting vessel is supplemented by additional compensation available from a fund, which is financed by oil cargo receivers in Contracting States. Compensation is available for pollution damage from persistent oil suffered in a Contracting State, regardless of the flag of the tanker, the ownership of the oil or the place where the incident occurred.

#### *The 1969 CLC - 1971 IOPC Fund Regime*

23. The first set of conventions was developed following the *Torrey Canyon* incident in 1967, which polluted approximately 190 km of United Kingdom coastline, with total clean-up costs at an estimated £3 million.<sup>23</sup> The unprecedented incident was the most damaging and expensive shipping disaster up to that time and led to the adoption of a comprehensive legal framework to address liability and compensation for oil pollution damage resulting from spills of persistent oil from oil tankers:

- *1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC)* and
- *1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention)*

24. The 1969 CLC, which entered into force in 1975, established a first tier of compensation for oil spills from ships that carry oil as cargo. It provides for liability of a shipowner in respect of any oil pollution damage suffered in the territory or territorial sea of a Contracting State. The shipowner's liability under the Convention is strict, i.e. independent of

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<sup>21</sup> While pollution of the marine environment by persistent oils has fewer long-term effects than may be expected, its immediate impact on marine life, birds and other wildlife is often devastating. Further information on the effects of oil spills on the marine environment and on relevant differences between persistent and non-persistent oils, is available on the ITOPF website [www.itopf.org](http://www.itopf.org).

<sup>22</sup> For a detailed account of the regulation of ship-source pollution, see de la Rue C and Anderson CB (2009). *Shipping and the Environment*. London: Informa, 2<sup>nd</sup> ed., hereinafter referred to as *Shipping and the Environment*.

<sup>23</sup> For a more detailed historical overview, see *Shipping and the Environment*, fn. 22 above, Chapter 1.

fault, but limited according to the ship's tonnage up to an aggregate maximum amount,<sup>24</sup> and subject to a number of exceptions.

25. The 1971 Fund Convention, which entered into force in 1978, established the International Oil Pollution Compensation Fund (the 1971 IOPC Fund)<sup>25</sup> to provide a second tier of compensation in respect of damage in excess of the liability available under the 1969 CLC but, once again, subject to an overall monetary cap per incident.

26. Both Conventions were widely accepted at the international level<sup>26</sup> but were later revised and amended, leading to the adoption of a second set of Conventions which substantially increased the amount of compensation available to oil pollution victims.<sup>27</sup>

### ***The 1992 CLC - 1992 IOPC Fund Regime***

- *1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC)*<sup>28</sup>
- *1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention)*<sup>29</sup>

27. The 1992 CLC and 1992 Fund Convention build upon their predecessors, maintaining the system of tiered liability and compensation, with limited liability of a shipowner, depending on the ship's tonnage, and additional compensation available from an International Oil Pollution Compensation Fund (the 1992 IOPC Fund), up to an overall maximum amount per incident.

28. However, the two Conventions introduce some important changes to the earlier legal regime, in particular by *widening the relevant geographical scope of application* and by *increasing the maximum amounts of compensation* available under each Convention.<sup>30</sup>

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<sup>24</sup> The limitation amounts provided in the 1969 CLC and the 1971 Fund Convention were originally expressed in a unit of account known as the Franc Poincaré. By way of two Protocols adopted in 1976, the relevant unit of account was changed to the more stable Special Drawing Right (SDR), a basket currency updated daily by the International Monetary Fund (IMF).

<sup>25</sup> The 1971 IOPC Fund, as well as the 1992 IOPC Fund and Supplementary IOPC Fund, which were subsequently established under the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, respectively, are independent intergovernmental organizations. The three Funds are administered by a joint Secretariat, but are separate legal entities. For further details about the organizational structure of the IOPC Funds and its secretariat, see [www.iopcfunds.org](http://www.iopcfunds.org).

<sup>26</sup> With 110 States ratifying the 1969 CLC and 79 States ratifying the 1971 Fund Convention.

<sup>27</sup> At the same time as the 1969 CLC and the 1971 Fund Convention were negotiated, two corresponding voluntary industry schemes were developed as an interim solution, to provide benefits comparable to those available under the two Conventions in States pending their widespread international adoption. These two schemes were known as TOVALOP (Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution). In November 1995, the industries concerned decided that the voluntary agreements should cease on 20 February 1997.

<sup>28</sup> The 1992 CLC is a consolidated version of the 1969 CLC, as amended by the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. The 1992 Protocol provides that both instruments are to be read and interpreted together as a single instrument (Article 11).

<sup>29</sup> The 1992 Fund Convention is a consolidated version of the 1971 Fund Convention, as amended by the Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971. The 1992 Protocol provides that both instruments are to be read and interpreted together as one single instrument (Article 27).

29. The 1992 Conventions entered into force on 30 May 1996. However, in the light of a major oil pollution incident in 1999, involving the *Erika*, the need for a further increase of the compensation amounts became apparent and, in 2000, by way of tacit amendment procedure,<sup>31</sup> the compensation levels available in the 1992 Conventions were raised by 50%.<sup>32</sup> The amendments entered into force on 1 November 2003 for all Contracting States to the 1992 CLC and 1992 Fund Convention and the higher limits of compensation are available in respect of all oil pollution incidents in Contracting States occurring after this date.

30. Although many of the original Contracting States to the 1969 CLC have since adopted the 1992 CLC and denounced the earlier convention, not all have done so and, therefore, both the 1969 CLC and the 1992 CLC co-exist at the international level. By contrast, the 1971 Fund Convention, intended to work in tandem with the 1969 CLC, **ceased to have effect** on 24 May 2002 and does not apply to any incidents occurring after that date.<sup>33</sup> A second tier of compensation is, therefore, at present only available under the 1992 Fund Convention, in respect of pollution damage in Contracting States to that Convention.

### ***The 2003 Supplementary Fund Protocol***

31. The 2002 *Prestige* incident called for a renewed review of the compensation amounts, as it soon became clear that the aggregate of admissible claims resulting from that incident would exceed the maximum amount available under the 1992 CLC and 1992 Fund Convention.

32. Accordingly, the *2003 Supplementary Fund Protocol* was adopted, to introduce an optional third tier of compensation for Contracting States to the 1992 CLC and 1992 Fund Convention.<sup>34</sup> The Protocol, which entered into force on 3 March 2005, established the International Oil Pollution Compensation Fund (the Supplementary IOPC Fund), which provides additional compensation for established claims under the 1992 IOPC Fund, up to an aggregate maximum amount of 750 million SDR per incident (equivalent to approximately US\$ 1157,2 million)<sup>35</sup>. There have not yet been any incidents that have required compensation from the Supplementary IOPC Fund.

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<sup>30</sup> The amendments were originally envisaged by two Protocols that were adopted in 1984, however neither of these Protocols ever entered into force and the proposed changes were superseded by the 1992 Protocols.

<sup>31</sup> No formal ratifications were required; the amendments came into force automatically in 2003.

<sup>32</sup> Resolution adopted by the IMO Legal Committee on 18 October 2000 LEG.1(82), "Adoption of Amendments of the Limitation Amounts in the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969"; and Resolution adopted by the IMO Legal Committee on 18 October 2000, "Adoption of Amendments of the Limits of Compensation in the Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971".

<sup>33</sup> The 1971 IOPC Fund that had been established under the 1971 Fund Convention will be wound up as soon as it has paid compensation to those victims of pollution damage from incidents which occurred when the 1971 Fund Convention was in force.

<sup>34</sup> Only Contracting States to the 1992 Fund Convention may become Parties to the 2003 Supplementary Fund Protocol.

<sup>35</sup> SDR = Special Drawing Right. The unit of account in the 1992 Conventions and the 2003 Supplementary Fund Protocol is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this document, the SDR has been converted into United States dollars at the rate of exchange applicable on 3 January 2012 i.e. 1 SDR = US\$1.542930.

## **2. Amounts of compensation for oil pollution damage under legal instruments currently in force**

33. While the 1969 CLC continues to be in force internationally, as noted above, the 1971 Fund Convention, intended to work in tandem with the 1969 CLC, ceased to have effect on 24 May 2002 and does not apply to any incidents occurring after that date. As a result, oil pollution victims in those States that still adhere to the 1969 CLC no longer benefit from a second tier of compensation in respect of damage which exceeds the limited liability of a shipowner under the 1969 Convention.

34. By way of comparison, the maximum available compensation in respect of an oil pollution incident under the 1969 CLC is (depending on ship size) 14 million SDR, whereas oil pollution victims in a State which is both a Contracting State to the 1992 CLC and 1992 Fund Convention benefit from an overall aggregate amount of compensation of 203 million SDR per incident (irrespective of ship size). The situation is less pronounced but similar for those Contracting States to the 1992 CLC that have not yet joined the 1992 Fund Convention. Oil pollution victims in these States benefit from an overall amount of compensation per incident which, depending on ship size, is limited to a maximum of 89,77 million SDR.

35. Tanker oil pollution victims in Contracting States to the 2003 Supplementary Fund Protocol benefit from the availability of an aggregate amount of compensation of up to 750 million SDR per incident - the maximum under any of the international legal instruments in force.

36. For ease of reference, the relevant maximum amounts of compensation currently available under the different legal instruments in force are reflected in the simplified comparative table below (Table 2),<sup>36</sup> which also shows the respective number of Contracting States.<sup>37</sup>

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<sup>36</sup> The simplified table (Table 2) shows maximum amounts of liability calculated with reference to different categories of ship size. Further information on the rules relevant for the purposes of calculating limitation amounts is provided in the Annex, below.

<sup>37</sup> Lists of States for which the different international legal instruments are in force are set out in Tables 4-7, below.

**Table 2: Maximum amounts of compensation available in respect of any one pollution incident (values expressed in million SDR) under different international legal instruments in force and number of Contracting States**

<b>Tanker size (gt)</b>	<b>1969 CLC as amended</b>	<b>1992 CLC (post 2003)</b>	<b>1992 Fund Conv. (post 2003) ***</b>	<b>2003 Supp. Fund Protocol****</b>
5,000	0, 665	4,510	203	750
10,000	1,33	7,665	203	750
50,000	6,65	32,905	203	750
100,000	13,3	64,455	203	750
140,000	14	89,695	203	750
150,000	14	89,770	203	750
200,000	14	89,770	203	750
<b>Contracting States</b>	<b>37*</b>	<b>124**</b>	<b>105**</b>	<b>27**</b>
<p>* Includes several States that are also Party to both the 1992 CLC and 1992 Fund Convention and several States that are also Party to the 1992 CLC, but <u>not</u> the 1992 Fund Convention. Includes one State that has denounced the Convention effective 25 May 2012.</p> <p>** The 1992 CLC and 1992 Fund Convention will enter into force in 2012 for a further four States that have recently acceded. The 2003 Supplementary Fund Protocol will enter into force in 2012 for one further State.</p> <p>*** Maximum amount, including compensation paid under 1992 CLC.</p> <p>**** Maximum amount, including compensation paid under the 1992 CLC and 1992 Fund Convention.</p> <p>gt = gross tonnage</p> <p>SDR = Special Drawing Right. The relevant unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund. As at 3 January 2012, the relevant exchange rate is <b>1 SDR = US\$1.542930</b>.</p>				

*Source:* Information on Contracting States based on IMO (www.imo.org); SDR exchange rate based on (www.imf.org)

### **3. Summary of key features of the CLC – IOPC Fund regime**

37. While the main substantive provisions of the latest of the international legal instruments in the field are explained in some greater detail in the Annex, this Section provides a brief overview of key features of the international liability and compensation regime currently in force.

#### **3.1. The 1969 and 1992 Civil Liability Conventions<sup>38</sup>**

38. As noted above, both the 1969 CLC and the 1992 CLC are in force and continue to co-exist at the international level. The two conventions share central features, but differ in some respects, which will be highlighted below.

39. Both the 1969 CLC and the 1992 CLC govern *the liability of shipowners* for oil pollution damage, providing the *first tier* of compensation. The term “pollution damage” refers to *loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, along with*

<sup>38</sup> For more detailed information as regards the 1992 CLC, see Annex, Part I, below.

*impairment of the environment and the costs of preventive measures.*<sup>39</sup> In general, claims may be brought in relation to property damage, consequential loss and pure economic loss. The costs of reasonable measures to restore the environment are also recoverable, as are the costs of preventive measures.<sup>40</sup>

40. The *substantive provisions* of the 1969 and 1992 Civil Liability Conventions are in essence the same, save for a number of improvements in the later Convention, which are detailed below. However, in terms of *geographical application*, the 1969 CLC is more narrow in scope, only applying to pollution damage that is suffered in the *territory or territorial sea* of a Contracting State. Pollution damage suffered in the exclusive economic zone (EEZ) or equivalent area of a Contracting State to the 1969 CLC is not covered by the CLC 1969. By contrast, the 1992 CLC extends to any pollution damage suffered in the *territory, territorial sea, exclusive economic zone (EEZ) or equivalent area* of a Contracting State, providing a much more extensive coverage.

41. By way of overview, the 1969 and 1992 Civil Liability Conventions:

- place strict liability on the registered shipowner for pollution damage;
- channel all claims for compensation against the shipowner;
- specify a limited number of exceptions/defences to liability;
- fix a monetary cap limiting the liability;
- define the circumstances in which the shipowner may lose the right to limit liability;
- require the shipowner to maintain compulsory insurance for ships carrying more than 2,000 tonnes of oil in bulk as cargo;
- establish a right of direct action against the insurer for claimants;
- set out rules as to jurisdiction and time limitation.

42. The Civil Liability Conventions apply to *pollution damage caused by persistent oil that has escaped or been discharged from a ship that carries oil in bulk as cargo*.

43. The definition of "oil" varies slightly between the two Conventions but, in both cases, covers pollution from *persistent oil*, such as crude oil and fuel oil, rather than non-persistent oil, such as light diesel oil, gasoline or kerosene. The 1992 CLC refers specifically to "persistent hydrocarbon mineral oil"<sup>41</sup> and omits "whale oil", as one of the provided examples.

44. The definition of "ship" is narrow in both Conventions referring to ships that carry oil in bulk as cargo, i.e. typically *oil tankers*. Both Conventions apply irrespective of whether the oil spilled formed part of the ship's cargo or escaped from the ship's bunkers. It should be noted however that the 1969 CLC only applies to ships which are *actually* carrying oil in bulk as cargo, i.e. laden tankers. The 1992 CLC also covers spills of bunker oil from tankers in ballast and is therefore broader in its scope of application.<sup>42</sup>

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<sup>39</sup> Article I(6), 1992 CLC; Article 1(2), 1992 Fund Convention; and Article 1(6), 2003 Supplementary Fund Protocol. This definition and the various types of admissible claims are further discussed by Oosterveen W (2004), "Some recent developments regarding liability for damage resulting from oil pollution - from the perspective of an EU member state", *Env. L. Rev.*, 223-239 (at 229-234).

<sup>40</sup> For further details, see Annex, Part I.1.2 and I.3.

<sup>41</sup> See Annex, Part I.1.2.

<sup>42</sup> See Annex, Part I.1.1.

45. The liability of the owner of the polluting vessel is *strict*, which means that he will be liable *irrespective of fault*, i.e. even if no negligence was involved. Accordingly, liability arises if a claimant is able to establish that the polluting oil came from the relevant shipowner's vessel. Where pollution damage results from the escape of oil from more than one ship and the damage is not reasonably separable, the registered shipowners of both ships will be held *jointly and severally liable*.<sup>43</sup>

46. Both of the Civil Liability Conventions *channel all claims against the registered shipowner*. In particular, the 1969 CLC precludes claims against the "servants or agents of the owner", whereas the 1992 CLC provides a much more extensive list of persons who cannot be held accountable under the scheme of the Convention. The excepted persons will, however, remain liable if it is proved that the damage resulted from their intentional act or omission or that they acted recklessly with knowledge that such damage would probably result.

47. A very limited *number of exceptions* to the shipowner's liability is set out in both of the Civil Liability Conventions. In particular, the shipowner is exempt from liability where the pollution damage resulted from an *act of war or a natural disaster* or was *wholly caused by the intentional act of a third party or the negligence of public authorities in maintaining lights or navigational aids*. Contributory negligence on the part of the claimant may also be available as a complete or partial defence to the shipowner.<sup>44</sup>

48. As a consequence of the shipowner being subject to strict liability, the extent of his liability is limited, i.e. subject to a monetary cap. Thus, the shipowner is entitled to *limitation of liability, with the maximum amount of liability depending on the tonnage of the ship*. The limit of the shipowner's liability under the 1969 CLC (as amended) is significantly lower than that under the 1992 CLC. Under the 1969 CLC, the shipowner is entitled to limit his liability in respect of any one incident to an aggregate maximum amount of 14 million SDR. By contrast, the 1992 CLC has limits up to a current maximum of 89,77 million SDR, offering significantly greater protection to claimants. To benefit from limited liability, the shipowner must *constitute a limitation fund* for the total sum representing the limit of his liability, to be distributed among the claimants by the courts or competent authority of the Contracting State in which the damage was suffered.<sup>45</sup>

49. The shipowner may *lose his right to limit his liability* in certain circumstances. Under the 1969 CLC, the right will be lost where the claimant proves that the incident occurred as a result of the "actual fault or privity", i.e. knowledge of the owner. Under the 1992 CLC, the shipowner will only lose the right to limit his liability if it is proved that the pollution damage occurred from an "intentional act or omission", or where the shipowner acted "recklessly with knowledge that *such damage* would probably result". The wording adopted in the 1992 CLC, which mirrors that in the Convention on Limitation of Liability for Maritime Claims 1976 (1976 LLMC)<sup>46</sup> is more restrictive than that in the 1969 Convention. Thus, under the 1992 CLC, loss of a shipowner's right to limit liability will, in practice, be particularly rare.

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<sup>43</sup> See Annex, Part I.2.

<sup>44</sup> See further Annex, Part I.2.3.

<sup>45</sup> See further Annex, Part I.2.4.

<sup>46</sup> See Annex, Part IV.

50. To ensure that claims against a shipowner are not frustrated by insolvency, e.g. following loss of a vessel registered in a single-ship company, the Civil Liability Conventions envisage mandatory insurance requirements for most vessels. Thus, ships carrying more than 2,000 tons of oil in bulk as cargo, wherever registered, *must maintain insurance* that is adequate to cover the shipowner's liability under the relevant Convention to be permitted to enter or leave the territorial waters of any Contracting States. A certificate confirming that such cover is in place must also be issued by the appropriate authority in a Contracting State. Claimants benefit from a *right of direct action* against the shipowner's insurer in cases where the shipowner is not financially capable of settling claims.<sup>47</sup>

### 3.2. The 1992 Fund Convention<sup>48</sup>

51. A second tier of compensation is available under the 1992 Fund Convention for pollution damage suffered in a Contracting State to that Convention. However, only Contracting States to the 1992 CLC may accede to the 1992 Fund Convention.

52. The 1992 Fund Convention complements the 1992 CLC and provides compensation where the protection afforded under the 1992 CLC is unavailable or inadequate.

53. In summary, the 1992 Fund Convention:

- established the 1992 IOPC Fund;
- sets out the circumstances where compensation is available from the 1992 IOPC Fund;
- specifies a limited set of circumstances where the 1992 IOPC Fund will be exempt from liability;
- fixes a monetary cap on the liability of the 1992 IOPC Fund;
- sets out rules as to jurisdiction and time limitation;
- details the system of contributions that finances the 1992 IOPC Fund.

54. The 1992 IOPC Fund provides compensation in circumstances where (a) *no liability for pollution damage arises under the 1992 CLC*; (b) *the shipowner is financially incapable of meeting his obligations in full* and his insurance is insufficient to satisfy such claims; or (c) *the damage exceeds the amount of the shipowner's limited liability under the 1992 CLC*. Expenses reasonably incurred or sacrifices reasonably made by the shipowner to prevent pollution damage are also recoverable from the 1992 IOPC Fund.

55. The 1992 IOPC Fund will not provide compensation for pollution damage that occurred in a non-Contracting State. There are also *limited circumstances in which the Fund will not be liable*, for example, where the pollution damage resulted from an act of war, or where the claimant cannot prove that the pollution damage resulted from an incident involving one or more ships, as defined in the Convention.<sup>49</sup> However, if the claimant can prove that the oil which caused the pollution damage originated from *a ship*, the 1992 IOPC Fund will be obliged to compensate the claimant, even where the ship cannot be identified. *Contributory negligence of the claimant* may also discharge the 1992 IOPC Fund wholly or partially from providing compensation.

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<sup>47</sup> See further Annex, Part I.3.

<sup>48</sup> See further Annex, Part II.

<sup>49</sup> See further Annex, Part II.1.2.

56. The liability of the 1992 IOPC Fund is currently limited to the aggregate sum of 203 million SDR in respect of any one incident.<sup>50</sup> This amount includes any compensation actually paid by or on behalf of a shipowner under the 1992 CLC. Pollution damage caused by a natural disaster – for which a shipowner may not be liable under the 1992 CLC – would also be compensated by the 1992 IOPC Fund, up to the limit of 203 million SDR. Where the total amount of claims exceeds the total amount of compensation available under the 1992 Conventions, the compensation paid to each claimant will be reduced proportionately.

57. The 1992 IOPC Fund is made up of annual contributions from any person in a Contracting State (including Government authorities, State-owned companies or private companies) who receives more than 150,000 metric tonnes (mt) of "*contributing oil*" in any calendar year.<sup>51</sup> The oil must be carried by sea to the ports or terminal installations in that State to be considered as "contributing oil". Contracting States must report to the 1992 IOPC Fund those persons who are liable to contribute to the Fund (i.e. persons receiving more than 150,000 mt of oil annually and the relevant quantities of oil received), in order for contribution amounts to be calculated. Annual contributions are levied by the 1992 IOPC Fund, and each contributor will be required to pay a specified amount per tonne of "contributing oil" received through a system of deferred invoicing, whereby part of the annual contributions levied for a given calendar year are invoiced later in the year, in case this proves to be necessary, i.e. if compensation payments need to be made.<sup>52</sup>

### 3.3 The 2003 Supplementary Fund Protocol<sup>53</sup>

58. The 2003 Supplementary Fund Protocol provides for a *third tier* of compensation in cases where the protection afforded under the 1992 CLC and the 1992 Fund Convention is inadequate. Only Contracting States to the 1992 CLC and 1992 Fund Convention may ratify or accede to the 2003 Supplementary Fund Protocol.

59. The 2003 Protocol:

- established the Supplementary IOPC Fund;
- sets out the circumstances where compensation is available from the Supplementary IOPC Fund;
- fixes a monetary cap on the liability of the Supplementary IOPC Fund;
- outlines circumstances where the Supplementary IOPC Fund may temporarily or permanently deny liability;
- sets out rules as to jurisdiction and time limitation;
- details the system of contributions that finances the Supplementary IOPC Fund.

60. The Supplementary IOPC Fund will only provide compensation for pollution damage suffered in a Contracting State to the 2003 Supplementary Fund Protocol and covers only "*established claims*". These are claims that are recognised by the 1992 IOPC Fund, but exceed the relevant limit of compensation payable under the 1992 Fund Convention in respect of the relevant oil pollution incident.

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<sup>50</sup> Under certain circumstances a higher limit of liability is envisaged; see further para. 179, below.

<sup>51</sup> The 1971 IOPC Fund was financed by the same system of annual contributions.

<sup>52</sup> See also Annex, Part II.2.

<sup>53</sup> See further Annex, Part III.

61. The total amount of compensation available from the Supplementary IOPC Fund in respect of any one incident is limited to 750 million SDR, inclusive of any compensation actually received under the 1992 Conventions, which, as noted above, is limited to an aggregate amount of 203 million SDR. A significant benefit of the Supplementary IOPC Fund is that there should rarely be any need to reduce compensation payments proportionately between claimants. The extensively higher limits of liability should enable all claimants to receive 100% compensation.

62. As the Supplementary IOPC Fund is only available for established claims, the 2003 Supplementary Fund Protocol does not envisage any further exemptions from liability. Compensation may be temporarily or permanently denied however, where a Contracting State has not fulfilled its reporting obligations under the Protocol.

63. Annual contributions to the Supplementary IOPC Fund are required from oil importers on the same basis as contributions to the 1992 IOPC Fund. The contribution system differs however in one respect, as, for the purposes of assessing contributions, Contracting States are *deemed* to receive at least 1 million mt of “contributing oil” each year.<sup>54</sup> Where the aggregate amount of “contributing oil” received in a Contracting State is less than 1 million mt, the Contracting State is required to pay contributions for a quantity of “contributing oil” corresponding to the difference between the aggregate quantity of actual contracting oil receipts reported in respect of that State, and 1 million mt. The Supplementary IOPC Fund has not yet been required to provide compensation, and as a result, contributions by Contracting States have been needed to cover administrative costs only, and are therefore nominal.<sup>55</sup>

### 3.4 Supplementary Industry Initiatives: STOPIA 2006 and TOPIA 2006

64. While not part of the regime of international legal instruments, mention also needs to be made of two relevant industry schemes set up by the shipping industry. The two-tier international compensation regime created by the Civil Liability and Fund Conventions was intended to ensure an equitable sharing between the shipping and oil industries of the economic consequences arising from tanker oil spills. In order to address the imbalance created by the establishment of a Supplementary IOPC Fund, i.e. a third tier of compensation financed by the oil industry, the International Group of P&I Clubs<sup>56</sup> voluntarily introduced two private agreements, the *Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006* and the *Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006*, which entered into force on 20 February 2006.<sup>57</sup> It is important to note, however, that the agreements *do not affect* the way in which compensation should be claimed by victims of pollution damage, they simply provide an indemnification mechanism for the benefit of the IOPC Funds to reallocate liability for compensation between the industries.

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<sup>54</sup> See Annex, Part III.2.

<sup>55</sup> See para. 94 below.

<sup>56</sup> The International Group of Protection and Indemnity (P&I) Clubs consists of thirteen principal underwriting member clubs, mutual insurers, which between them provide liability cover (protection and indemnity) for approximately 90% of the world’s ocean-going tonnage. For further information, see <http://www.igpandi.org/>.

<sup>57</sup> Both Agreements provide that a review should be carried out after ten years and thereafter at five-year intervals, to ensure that the balance between the shipping and oil industries does not exceed 60% for either industry. See “The International Regime for Compensation for Oil Pollution Damage”, Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds, January 2012, <http://www.iopcfund.org/npdf/genE.pdf>.

65. Under STOPIA 2006, the limitation amount available to a shipowner under the 1992 CLC for tankers up to 29,548 gross tonnes is voluntarily raised to 20 million SDR per incident. Thus, while the 1992 IOPC Fund and the Supplementary IOPC Fund provide compensation to claimants as envisaged by the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, respectively, the Funds will, under STOPIA 2006, be indemnified by the shipowner for the difference between the vessel's limit of liability under the 1992 CLC and 20 million SDR. TOPIA 2006 applies in respect of claims covered by the 2003 Supplementary Fund Protocol, i.e. relating to oil pollution damage in the territory or EEZ of Contracting States to the 2003 Supplementary Fund Protocol. While the Supplementary IOPC Fund compensates claimants as envisaged by the Protocol, shipowners bound by TOPIA agree to reimburse the Supplementary IOPC Fund for 50% of any compensation that is paid out.

### **III. Liability and compensation for oil pollution from tankers: considerations for national policymaking**

66. As noted at the outset, the legal instruments that are part of the CLC-IOPC Fund regime enjoy broad support and have been widely adopted at the international level. However, not all States that may potentially face exposure to oil pollution from tankers are among the Contracting States. Moreover, a number of coastal developing States that are potentially exposed to tanker oil pollution incidents have not yet acceded to the latest legal instruments in the field, but continue to adhere to the now outdated 1969 CLC.

67. Some of the considerations that may be relevant to national policymakers in the context of assessing the relevant merits of acceding to the 1992 CLC, the 1992 Fund Convention or the 2003 Supplementary Fund Protocol include:

- (i) the risk of exposure to tanker oil pollution and the potential loss to any national/local industries that might arise in connection with a major oil pollution incident;
- (ii) the relative benefits of adherence to the latest of the relevant international legal instruments;
- (iii) the financial burden associated with adherence to the relevant international legal instruments;
- (iv) current levels of protection available to victims of tanker oil pollution under national law or under relevant international legal instruments to which a State is already Party;
- (v) an assessment of the substantive merit of the provisions of relevant international legal instruments.

68. National risk-exposure and vulnerability will vary greatly among States and is not a matter which may suitably be addressed within the constraints of this report. However, it is evident that all States that export or import oil by way of maritime transport are potentially exposed to oil pollution incidents, as are countries located along relevant transit routes and countries with domestic coastal carriage of oil.<sup>58</sup> Economically, countries that are particularly dependent on fisheries or tourism may suffer particularly in the aftermath of a major oil pollution incident.

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<sup>58</sup> In respect of landlocked countries, it is important to note that tanker oil spills affecting a country's inland waterways may, under certain circumstances also be covered by the CLC-IOPC Fund regime; thus, where sea-going vessels are engaged in the transport of oil operate on inland waterways connected to the sea, a relevant oil pollution incident would, in principle, also be covered by the CLC-IOPC Fund regime. See further Annex, at para. 122.

69. In respect of considerations referred to under (ii)-(iv) above, some general observations, which may be of assistance to national policymakers, are set out below. While a brief overview of the key features of the international liability and compensation regime has been provided above, more detailed information regarding the main substantive provisions of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, respectively, is provided in the Annex, which should be consulted for a better and more accurate understanding of these legal instruments. For ease of reference, their central features are summarised in Table 8, at the end of this Chapter.

### *Relative benefits of adherence to the latest of the relevant international legal instruments*

70. In general, States that are Contracting Parties to the relevant international legal instruments are better placed to deal with the financial consequences of a tanker oil spill than those who are not.<sup>59</sup>

71. Under both the 1969 CLC and the 1992 CLC, *compensation for pollution damage from persistent oil is available regardless of the flag of the tanker, the ownership of the oil, or the place where the incident occurred, as long as the damage is suffered in a Contracting State.* The practical enforceability of claims is safeguarded by a statutory mechanism requiring *mandatory liability insurance* for vessels operating in Contracting States, coupled with a *claimant's right of direct action against insurers.*

72. Compensation is available for governments and other authorities, as well as private companies and individuals that have incurred costs as part of the clean-up operations, as a result of any preventive measures taken or in respect of reasonable measures to restore the environment. Compensation is also available to those who have suffered physical or economic losses due to the oil pollution, such as fishermen or those engaged in the tourist industry.<sup>60</sup>

73. However, there are important differences depending on which of the Conventions apply, with potential claimants enjoying significantly better protection under the more modern legal instruments.

74. Thus, potential claimants in Contracting States to the more recent **1992 CLC** benefit additionally from its **broader geographic and substantive scope of application.** While the 1969 CLC covers oil pollution damage suffered in the territory or territorial waters of a Contracting State, application of the 1992 CLC extends to oil pollution damage suffered in the Exclusive Economic Zone (EEZ) or equivalent area of a Contracting State (i.e. up to 200 nautical miles from the baseline). This broader geographical scope of application may be of particular importance in connection with any national fisheries industry that may be affected by

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<sup>59</sup> However, it should be noted that in some cases, substantial compensation may be available under applicable national law, as for instance in the case of the United States Oil Pollution Act 1990 (OPA 1990). For further information on United States laws and regulations developed to combat ship-source pollution, see <http://www.epa.gov/emergencies/lawsregs.htm#opa>. See also *Shipping and the Environment*, fn. 22, above, Chapter 4. For an overview of recent legislative developments, see also Papavizas GG and Kiern LI (2011), "2009-2010 Maritime Legislative Developments", 43 J. Mar. L. Comm. 291. The drawback of a purely national regime is, however, that the country in question carries the entire financial burden of a major marine pollution incident, which may not be a viable option for States that are particularly exposed to the risks of pollution, especially developing countries.

<sup>60</sup> For the amounts of compensation paid out per incident by the 1971 and 1992 IOPC Funds, see the publication *Incidents involving the IOPC Funds 2011*, available on the IOPC website at [http://iopcfunds.org/npdf/incidents2011\\_e.pdf](http://iopcfunds.org/npdf/incidents2011_e.pdf).

an oil spill. Moreover, the 1992 CLC covers damage arising from any relevant oil pollution incident involving an oil tanker, rather than only from incidents that arise in the course of a laden voyage.<sup>61</sup>

75. In addition, compensation available to oil pollution victims varies considerably. This is not only due to the fact that liability amounts under the 1992 CLC are significantly higher than those envisaged in the 1969 CLC, in particular for larger vessels which may be involved in particularly damaging oil pollution incidents. As illustrated in Table 2, above, depending on the ship size, a shipowner's **liability under the 1969 CLC is limited to a maximum of 14 million SDR (approximately US\$ 21,6 million)**, whereas under the **1992 CLC**, the relevant liability rises up to a **maximum of 89,77 million SDR (approximately US\$ 138,5 million), per incident**.

76. Importantly, in respect of oil pollution damage in **Contracting States to the 1969 CLC**, a “second tier” of additional compensation from a fund is no longer available to claimants, since the **1971 Fund Convention ceased to be effective** as of 24 May 2002.<sup>62</sup> As a result, the **overall maximum compensation available to oil pollution victims** in these States is determined by the limits of liability set out in the 1969 CLC, i.e. depending on the ship size up to a **maximum of 14 million SDR per incident**.

77. By contrast, oil pollution victims in **Contracting States to the 1992 Fund Convention** benefit from additional compensation available from the 1992 IOPC Fund, up to an overall aggregate amount – irrespective of vessel size – of **203 million SDR per incident (approximately US\$ 313,21 million)**. This compensation is available **even where the oil receivers based in that Contracting State have not contributed to the 1992 IOPC Fund**, as their annual receipts do not require them to do so. Thus, Contracting States with “contributory” oil receipts of less than 150.000 mt annually benefit from the substantive compensation available from the 1992 IOPC Fund without any financial burden arising for oil receivers (importers) based in that State.

#### ***Financial burden associated with adherence to the 1992 Fund Convention and the 2003 Supplementary Fund Protocol***

78. As noted, adherence to the 1992 CLC is not associated with any financial implications for Contracting States, or for their national shipping and/or oil industries. Moreover, no financial burden arises from adoption of the 1992 Fund Convention for States with “contributing oil” receipts of less than 150.000 mt annually. Thus, for these States, adherence to the 1992 CLC and 1992 Fund Convention represents a ‘win-win’ situation.

79. For those Contracting States to the 1992 Fund Convention, whose annual receipts of oil are in excess of 150.000 mt and who need to report relevant “persons” and quantities of oil to the 1992 IOPC Fund, contributions are payable directly by each of the reported recipients of more than 150.000 mt of oil. Each contributor pays a specified amount per tonne of “contributing oil” received. This amount, levied on an annual basis (in £ Sterling, GBP) by the

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<sup>61</sup> See Annex Part I.1.1.

<sup>62</sup> The 1971 IOPC Fund will be wound up as soon as it has paid compensation to victims of pollution damage from incidents which occurred when the 1971 Fund Convention was in force (i.e. before 24 May 2002). As accession to the 1992 Fund Convention is conditional upon adoption of the 1992 CLC, a second tier of compensation is only available in respect of oil pollution damage in Contracting States to both the 1992 CLC and 1992 Fund Convention.

Assembly of the IOPC Fund, varies, depending on the number and size of claims expected.<sup>63</sup> As a result, the potential financial exposure arising for those Contracting States that are required to contribute to the 1992 IOPC Fund may also vary from year to year. However, an overview of annual contributions levied by the 1992 IOPC Fund during the period 1996-2010 provides some indication of the financial burden that has, in the past, been associated with participation in the 1992 IOPC Fund (Table 3, below).

**Table 3. Contributions levied by the 1992 IOPC Fund during the period 1996-2010**

Annual contributions	Date due	Total Contribution £	Contribution per tonne of contributing oil £
1996	01.02.1997	4 000 000	0.0110440
	01.09.1997	10 000 000	0.0188066
1997	01.02.1998	9 500 000	0.0114295
	<i>Maximum deferred levy</i>	30 000 000	<i>(No deferred levy made)</i>
1998	01.02.1999	28 200 000	0.0400684
	01.09.1999	9 000 000	0.0134974
1999	Credit: 01.03.2000	-3 700 000	-0.0056367
	01.09.2000	53 000 000	0.0552651
2000	01.03.2001	49 500 000	0.0545770
	<i>Maximum deferred levy</i>	43 000 000	<i>(No deferred levy made)</i>
2001	01.03.2002	41 000 000	0.0428439
	<i>Maximum deferred levy</i>	21 000 000	<i>(No deferred levy made)</i>
2002	01.03.2003	31 000 000	0.0274518
2003	01.03.2004	82 000 000	0.0052994
	<i>Maximum deferred levy</i>	40 500 000	<i>(No deferred levy made)</i>
2004	01.03.2005	37 800 000	0.0273362
2005	01.03.2006	0	
	<i>Maximum deferred levy</i>	5 500 000	<i>(No deferred levy made)</i>
2006	01.03.2007	3 000 000	0.0020156
2007	01.03.2008	3 000 000	0.0019699
2008	01.11.2008	50 000 000	0.0328304
2008	01.03.2009	10 000 000	0.0064870
	<i>Maximum deferred levy</i>	85 000 000	<i>(No deferred levy made)</i>
2009	01.03.2010	0	
	<i>Maximum deferred levy</i>	95 000 000	<i>(No deferred levy made)</i>
2010	01.03.2011	53 800 000	0.0351858
	<i>Maximum deferred levy</i>	65 000 000	

*Source:* Explanatory note prepared by the Secretariat of the IOPC Funds, January 2012

80. Thus, for instance, for 2010, the most recent assessment period, the financial contribution payable by receivers in a Contracting State with reported receipts of 155.000 mt of “contributing oil” would, based on the information in Table 3, amount to £5,454; for receipts of 1 million mt, the respective contribution payable by receivers in a Contracting State would amount to £35,186; for reported receipts of 20 million mt of “contributing” oil, the relevant financial contribution payable by receivers, for 2010, would amount to £703,716.

81. While these examples provide only a crude snapshot of potential financial burdens arising in a given year and are based on past experience, they nevertheless illustrate the relevant order of magnitude of contributions to the 1992 IOPC Fund. Even for Contracting States with

<sup>63</sup> A system of deferred invoicing is in place, whereby part of the annual contributions levied for a given calendar year are invoiced later in the year, in case this proves to be necessary.

considerable quantities of “contributing oil” receipts, the relevant annual contributions levied since 1996 appear modest, when juxtaposed with the potential compensation available to the victims of any one oil pollution incident in a Contracting State to the 1992 Fund Convention which - including compensation available from the shipowner under the 1992 CLC - amounts to around £200 million.<sup>64</sup>

82. Given the relatively limited financial exposure that has, in the past, been associated with participation in the 1992 IOPC Fund, national policymakers, in particular in coastal developing States that are not yet Party to the 1992 CLC and 1992 Fund Convention but (i) may face potentially significant exposure to tanker oil spill incidents and/or (ii) receive limited shipments of crude/heavy fuel oil, may wish to consider the merits of accession.

### ***Current levels of protection available to victims of tanker oil pollution***

83. Based on the current status of ratification of the 1969 CLC, the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, respectively,<sup>65</sup> States may be divided into five groups, in terms of the level of protection afforded to victims of tanker oil pollution incidents and the potential benefit that may be associated with future accession to any of the other international legal instruments that are in force.

(a) ***States that have not ratified or acceded to any of the relevant international legal instruments that are part of the CLC-IOPC Fund regime***

- Compensation available to victims of tanker oil pollution depends on national law.

84. As the status information in Tables 4-7 below illustrates, a considerable number of the 193 States that are Members of the United Nations<sup>66</sup> are at present not Party to any of the relevant international legal instruments.<sup>67</sup> This group of States includes many landlocked countries, but also includes some coastal developing countries that may face potentially significant exposure to oil pollution incidents and could, therefore, benefit considerably from accession to the 1992 CLC and 1992 Fund Convention.

85. Accession to the 1992 CLC would entail no financial burden. Accession to the 1992 Fund Convention would entail no financial burden for those States whose relevant annual receipts of oil carried by sea are less than 150.000 mt, as no contribution to the 1992 IOPC

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<sup>64</sup> Based on the International Monetary Fund’s exchange rate at 3 January 2012 (1 SDR = £0.988357), 203 million SDR amount to approximately £200,6 million. It should be noted, however, that this amount, representing the maximum liability of the 1992 IOPC Fund in respect of any one incident includes any compensation paid under the “first-tier” liability of a shipowner under the 1992 CLC.

<sup>65</sup> A list of States for which the relevant international legal instruments are currently in force is provided in Tables 4-7, which are adapted from “The International Regime for Compensation for Oil Pollution Damage”, Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds, January 2012, available at [www.iopcfunds.org](http://www.iopcfunds.org). For comprehensive information on signatures, deposit of formal instruments in respect of the various international acts, entry into force of these acts, and receipt of other notifications and declarations in relation to them, see *Status Of Multilateral Conventions And Instruments In Respect Of Which The International Maritime Organization Or Its Secretary-General Performs Depositary Or Other Functions*, available on the depositary’s website at <http://www.imo.org/About/Conventions/StatusOfConventions>.

<sup>66</sup> On 14 July 2011, South Sudan was admitted as the 193rd Member of the United Nations. The dates of admission for all other Members are listed in Press Release ORG/1469, issued 3 July 2006.

<sup>67</sup> This includes notably the United States, where, however, strong national legislation to provide for liability and compensation has been enacted, see fn. 59 above.

Fund would be required. For States with reported receipts of oil in excess of 150.000 mt annually, receivers would be required to pay annual contributions as levied by the 1992 IOPC Fund on a per tonne basis.

*(b) States that continue to adhere to the 1969 CLC*

- Compensation available to victims of tanker oil pollution is limited to the maximum amount envisaged under the 1969 CLC (depending on ship size, up to 14 million SDR), per incident. Additional compensation from the 1971 IOPC Fund is no longer available for oil pollution incidents occurring after 24 May 2002, the date when the 1971 IOPC Fund Convention ceased to have effect.

86. It should be noted that while, at present, 37 States continue to adhere to the 1969 CLC (see Table 4, below), several of these States are also Contracting States to the 1992 CLC (see Table 5) and, in some cases, also the 1992 Fund Convention (see Table 6) and should, therefore, denounce the 1969 CLC<sup>68</sup>.

87. 14 States are still Contracting States to the 1969 CLC only.<sup>69</sup> This group of States includes some coastal developing States that may face potentially significant exposure to tanker oil pollution incidents and could, therefore, benefit from accession to the 1992 CLC and 1992 Fund Convention.

88. In particular, for those States whose relevant annual receipts of oil carried by sea are less than 150.000 mt, accession to the 1992 CLC-IOPC Fund regime would entail no financial burden, as financial contributions to the 1992 IOPC Fund would not be required. For States with reported receipts of oil in excess of 150.000 mt, the relevant receivers would be required to pay annual contributions as levied by the 1992 IOPC Fund, on a per tonne basis.

**Table 4. States Parties to the 1969 Civil Liability Convention as at 1 January 2012**

<i>37 States Parties to the 1969 Civil Liability Convention</i>		
Azerbaijan	Georgia	Mongolia
Benin	Ghana	<b>Nicaragua</b>
<b>Brazil</b>	<b>Guatemala</b>	Peru
Cambodia	<b>Guyana</b>	Saint Kitts and Nevis
Chile	<b>Honduras</b>	<b>Sao Tome and Principe</b>
<b>Costa Rica</b>	Indonesia	Saudi Arabia
<b>Côte d’Ivoire</b>	<b>Jordan</b>	Senegal
Dominican Republic	<b>Kazakhstan</b>	Serbia*
Ecuador	Kuwait	Syrian Arab Republic
Egypt	Lebanon	Turkmenistan
El Salvador	<b>Libya</b>	United Arab Emirates
<b>Equatorial Guinea</b>	Maldives	
<b>Gambia</b>	<b>Mauritania</b>	

*Note: the 1971 Fund Convention ceased to be in force on 24 May 2002*  
*\*Serbia has denounced the CLC 1969, effective 25 May 2012*  
*States that adhere to the CLC 1969 but have not acceded to the 1992 CLC are highlighted in bold*

Source: [www.iopcfunds.org](http://www.iopcfunds.org).

<sup>68</sup> While oil pollution victims in these States would benefit from the relevant compensation available under the 1992 CLC and 1992 Fund Convention respectively, failure to denounce the 1969 CLC could give rise to legal uncertainty and, potentially, disputes.

<sup>69</sup> These States are highlighted in bold, in Table 4.

(c) *States that adhere to the 1992 CLC but have not adopted the 1992 Fund Convention*

- Compensation available to victims of oil pollution is limited to the maximum amount envisaged under the 1992 CLC, per incident (depending on ship size, up to 89,770 million SDR). Additional compensation under the 1992 Fund Convention is not available.

89. This group of States, (see Table 5, below), also includes some coastal developing countries that may face potentially significant exposure to tanker oil pollution incidents and could, therefore, benefit from accession to the 1992 Fund Convention, which provides significant additional compensation to that available under the 1992 CLC.

90. In particular for those States whose relevant annual receipts of oil carried by sea are less than 150.000 mt, accession to the 1992 Fund Convention would entail no financial burden, as contributions to the 1992 IOPC Fund would not be required. For States with reported receipts of oil in excess of 150.000 mt, relevant receivers would be required to pay annual contributions as levied by the 1992 IOPC Fund, on a per tonne basis.

**Table 5. States Parties to the 1992 Civil Liability Convention but not to the 1992 Fund Convention** (and therefore not Members of the 1992 Fund) as at 1 January 2012

<i>19 States for which 1992 Civil Liability Convention is in force</i>			
Azerbaijan	Indonesia	Peru	Solomon Islands
Chile	Kuwait	Republic of	Turkmenistan
China	Lebanon	Moldova	Ukraine
Egypt	Mongolia	Romania	Viet Nam
El Salvador	Pakistan	Saudi Arabia	Yemen

Source: [www.iopcfunds.org](http://www.iopcfunds.org).

(d) *States that adhere to the 1992 CLC and 1992 Fund Conventions:*

- Compensation available to victims of oil pollution is limited to the maximum amount envisaged under the 1992 Fund Convention, per incident. This amounts to 203 million SDR, irrespective of ship size (including any payment under the 1992 CLC).

91. This group of States (see Table 6, below) benefits from a two-tier liability and compensation regime, which ensures the availability of significant amounts of compensation. This group of States could benefit from accession to the 2003 Supplementary Fund Protocol, which provides significant additional compensation to that available under the 1992 Fund Convention, up to an overall amount of 750 million SDR per incident. Accession to the 2003 Supplementary Fund Protocol would, however, entail some financial burden, even for States whose relevant annual receipts of “contributing oil” carried by sea are less than 150.000 mt. This is due to the fact that - for the purposes of assessing contributions to the Supplementary IOPC Fund - Contracting States are *deemed* to receive at least 1 million mt of “contributing oil” annually.

92. Accession to the 2003 Supplementary Fund Protocol may be of particular benefit for Contracting States to the 1992 Fund Convention that report low annual receipts of “contributing oil”, but are potentially especially vulnerable to the effects of a major tanker oil spill, e.g. oil producing countries.

**Table 6. States Parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention (and therefore Members of the 1992 IOPC Fund), as at 1 January 2012**

<i>105 States for which 1992 Fund Convention is in force</i>		
Albania	Germany	Panama
Algeria	Ghana	Papua New Guinea
Angola	Greece	Philippines
Antigua and Barbuda	Grenada	Poland
Argentina	Guinea	Portugal
Australia	Hungary	Qatar
Bahamas	Iceland	Republic of Korea
Bahrain	India	Russian Federation
Barbados	Ireland	Saint Kitts and Nevis
Belgium	Iran (Islamic Republic of)	Saint Lucia
Belize	Israel	Saint Vincent and the Grenadines
Benin	Italy	Samoa
Brunei Darussalam	Jamaica	Seychelles
Bulgaria	Japan	Sierra Leone
Cambodia	Kenya	Singapore
Cameroon	Kiribati	Slovenia
Canada	Latvia	South Africa
Cape Verde	Liberia	Spain
China <sup>&lt;2&gt;</sup>	Lithuania	Sri Lanka
Colombia	Luxembourg	Sweden
Comoros	Madagascar	Switzerland
Congo	Malaysia	Syrian Arab Republic
Cook Islands	Maldives	Tonga
Croatia	Malta	Trinidad and Tobago
Cyprus	Marshall Islands	Tunisia
Denmark	Mauritius	Turkey
Djibouti	Mexico	Tuvalu
Dominica	Monaco	United Arab Emirates
Dominican Republic	Morocco	United Kingdom
Ecuador	Mozambique	United Republic of Tanzania
Estonia	Namibia	Uruguay
Fiji	Netherlands	Vanuatu
Finland	New Zealand	Venezuela (Bolivarian Republic of)
France	Nigeria	
Gabon	Norway	
Georgia	Oman	
<i>4 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated</i>		
Serbia		25 May 2012
Senegal		2 August 2012
Palau		29 September 2012
Montenegro		29 November 2012
<sup>&lt;2&gt;</sup> The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.		

Source: [www.iopcfunds.org](http://www.iopcfunds.org).

(e) *States that adhere to the 1992 CLC and 1992 Fund Convention and, additionally, the 2003 Supplementary Fund Protocol:*

- Compensation available to victims of oil pollution is limited to an overall amount of 750 million SDR, per incident (including compensation under the 1992 CLC and 1992 Fund Convention), the maximum available under any of the international legal instruments currently in force.

93. The 2003 Supplementary Fund is financed by contributions from receivers of oil and, in the case of Contracting States with annual receipts of less than 1 million mt of oil, by additional contributions from the respective governments. While individual receivers of 150.000 mt of “contributing” oil in these States are required to make financial contributions to the Supplementary IOPC Fund, the relevant Contracting States may be required to make additional contributions, as all Contracting States are *deemed*, for the purposes of contributions, to receive at least 1 million mt of “contributing oil” annually.

94. No incidents have yet occurred which have involved the Supplementary IOPC Fund. According to information by the IOPC Secretariat, contributions levied in 2006 to meet the Supplementary Fund’s administrative expenses amounted to GBP 0.0017223 per tonne of “contributing oil”.<sup>70</sup>

**Table 7. States Parties to the 2003 Supplementary Fund Protocol** (and therefore Members of the Supplementary IOPC Fund) as at 1 January 2012.

<i>27 States Parties to the Supplementary Fund Protocol</i>		
Australia	Germany	Netherlands
Barbados	Greece	Norway
Belgium	Hungary	Poland
Canada	Ireland	Portugal
Croatia	Italy	Republic of Korea
Denmark	Japan	Slovenia
Estonia	Latvia	Spain
Finland	Lithuania	Sweden
France	Morocco	United Kingdom
<i>1 State which has deposited an instruments of accession, but for which the Protocol does not enter into force until date indicated</i>		
Montenegro	29 November 2012	

Source: [www.iopcfunds.org](http://www.iopcfunds.org).

95. In conclusion, the position may be summarized as follows:

***For coastal developing States which are potentially exposed to oil pollution from tankers, accession to the 1992 CLC appears to be in all cases advisable.*** Adoption of the 1992 CLC is not associated with any financial burden, yet would ensure that oil pollution victims are able to benefit from much more substantive financial compensation than under the 1969 CLC, in the event of a tanker oil pollution incident.

***Accession to the 1992 Fund Convention would ensure the availability of very significant additional amounts of compensation in the event of a tanker oil pollution incident.*** Moreover,

<sup>70</sup> “The International Regime for Compensation for Oil Pollution Damage”, Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds, January 2012, p.6.

it would ensure that compensation is also available in some circumstances where a shipowner might *exceptionally* be exempt from liability under the 1992 CLC<sup>71</sup>, such as oil pollution damage resulting from certain types of natural disaster, or due to a terrorist attack. This may be an additional relevant consideration for some States as a matter of their national risk-assessment and/or cost-benefit analysis.

However, accession to the 1992 Fund Convention *may be associated with some financial burden, as receivers of quantities in excess of 150.000 mt of “contributing oil” in any Contracting State would be required to make financial contributions to the 1992 IOPC Fund*, on a per tonne basis. While these vary, historical information in respect of annual contributions levied since 1996 (Table 3, above) provide some indication of the potential levels of financial exposure that may arise. Even for States with significant receipts of “contributing oil” the relevant cost-benefit ratio may be attractive, given their potentially higher risk of exposure to oil pollution incidents. *For States with annual receipts of “contributing oil” of less than 150.000 mt, contributions to the 1992 IOPC Fund would not be required. For these States, accession to the 1992 Fund Convention would appear only advantageous and, therefore, highly advisable.*

*Accession to the 2003 Supplementary Fund Protocol is, in all cases, associated with some financial burden, as all Contracting States are deemed to receive at least 1 million mt of “contributing oil”, annually.* While contributions are payable by receivers of “contributing oil” in excess of 150.000 mt annually, Contracting States with actual annual receipts of “contributing oil” below 1 million mt would be required to ensure that appropriate pro rata contributions (equivalent to “deemed” annual receipts of 1 million mt of “contributing oil”) are paid to the Supplementary IOPC Fund. Thus, for coastal developing States with annual receipts of “contributing oil” below 1 million mt, accession to the 2003 Supplementary Fund Protocol would be associated with financial exposure corresponding to pro rata contributions equivalent to 1 million mt of “contributing oil” receipts.

*Accession to the 2003 Supplementary Fund Protocol would offer the greatest protection to oil pollution victims in respective Contracting States*, although the potential financial implications for Contracting States may be more considerable – if and when a major oil pollution incident requiring compensation by the Supplementary IOPC Fund arises. As noted earlier, so far, no incidents have yet required payments from the Supplementary IOPC Fund. However, it should also be noted that the level of contributions, payable on a pro rata basis (per tonne) is calculated with reference to the reported receipts of oil. Thus, widespread international adoption, in particular by States with significant receipts of “contributing oil”, would, in due course, lead to relatively lower contributions per tonne of “contributing oil”.

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<sup>71</sup> In particular, liability for oil pollution damage “resulting from a natural phenomenon of an exceptional, inevitable and irresistible character” or “wholly caused by an act or omission done with intent to cause damage by a third party”, see further Annex, Part I.2.3, below. While the relevant exceptions to liability appear to have not yet played any role in practice, they would seem to cover (i) a natural disaster that was not predictable sufficiently in advance to take appropriate precautions (e.g. a tsunami) or an oil pollution incident due to a terrorist attack. Note also that while the shipowner may be exempt from liability for loss wholly due to “negligence or other wrongful act of any ... authority responsible for the maintenance of lights or other navigational aids ...”, this would not affect the right to compensation under the 1992 Fund Convention.

**Table 8. Simplified Table of the Main Features of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol**

	<b>1992 Civil Liability Convention (CLC) with 2000 Amendments</b>	<b>1992 Fund Convention with 2000 Amendments</b>	<b>2003 Supplementary Fund Protocol</b>
What type of oil pollution is covered?	Pollution damage caused by “ <i>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</i> ”. <ul style="list-style-type: none"> <li>• Ship means “<i>any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo...</i>”</li> <li>• This includes a ship capable of carrying oil and other cargoes when the ship is actually carrying oil in bulk as cargo or during any voyage following such carriage (unless no oil residues remain on board)</li> </ul>		
What type of pollution damage is compensation available for?	Pollution damage includes <ul style="list-style-type: none"> <li>• “<i>loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur...</i>”</li> <li>• costs of preventive measures taken after the incident to prevent or minimize pollution damage and further loss or damage caused by preventive measures</li> </ul> N.B. Compensation for “impairment of the environment other than loss of profit” is limited to the costs of “reasonable measures of reinstatement actually undertaken or to be undertaken”		
Geographical scope	Compensation is available – irrespective of where the incident itself occurred – in respect of pollution damage suffered in the territory, territorial sea, and exclusive economic zone (EEZ) or equivalent area of a Contracting State to the relevant legal instrument. Compensation is also available for preventive measures “wherever taken”.		
Who is compensation available for?	For persons who suffer pollution damage in Contracting States to the 1992 CLC only, after the Convention has entered into force for the State concerned.	For persons who suffer pollution damage in Contracting States to the 1992 CLC and the 1992 Fund Convention only, after the 1992 Fund Convention has entered into force for the State concerned.	For persons who suffer pollution damage in Contracting States to the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol only, after the Protocol has entered into force for the State concerned.

	<b>1992 Civil Liability Convention (CLC) with 2000 Amendments</b>	<b>1992 Fund Convention with 2000 Amendments</b>	<b>2003 Supplementary Fund Protocol</b>
Type of liability imposed	Strict liability of registered shipowner (or insurer) only, for pollution damage caused by oil that escaped or was discharged from his ship.	Liability of 1992 IOPC Fund where compensation provided under 1992 CLC is inadequate or unavailable because: <ul style="list-style-type: none"> <li>• No liability for damage arises under the 1992 CLC;</li> <li>• The shipowner liable under the 1992 CLC is financially incapable of meeting his obligations in full or his insurance is insufficient to satisfy the claims for compensation;</li> <li>• Because the damage exceeds the amount of the shipowner's limited liability under the 1992 CLC.</li> </ul>	Liability of Supplementary IOPC Fund for "established claims" only.
Who can be sued?	Shipowner or insurer only.	1992 IOPC Fund.	Supplementary IOPC Fund.
Exemptions from liability	Where pollution damage: <ul style="list-style-type: none"> <li>• Resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon "<i>of an exceptional inevitable and irresistible character</i>";</li> <li>• Was wholly caused by an intentional act or omission of a third party;</li> <li>• Was wholly caused by the negligence or wrongful act of any Government or other authority responsible for maintaining lights or navigational aids.</li> </ul> <p>The insurer is entitled to use the same defences as the shipowner.</p>	Where pollution damage: <ul style="list-style-type: none"> <li>• Resulted from an act of war, hostilities, civil war, or insurrection;</li> <li>• Was caused by oil which escaped from a warship or other State-owned ship being used for non-commercial activities;</li> <li>• Where the claimant cannot prove that the pollution damage resulted from an incident involving one or more ships.</li> </ul> <p>The 1992 Fund will however be obliged to compensate "mystery spills" where it is proved that the oil originated from a ship, but the ship cannot be identified.</p>	The Supplementary IOPC Fund is available for established claims only so no further exemptions or exclusions are applicable. Compensation may however be denied temporarily or permanently where a Contracting State has not fulfilled its reporting obligations under the Protocol.
Defence of claimant's "contributory negligence"	Available to shipowner and insurer.	Available to the 1992 IOPC Fund. However the Fund will not be discharged from liability in respect of preventive measures.	Not applicable.
Right of recourse against third parties	Available to shipowner and insurer.	Not applicable.	Not applicable.

	<b>1992 Civil Liability Convention (CLC) with 2000 Amendments</b>	<b>1992 Fund Convention with 2000 Amendments</b>	<b>2003 Supplementary Fund Protocol</b>
Monetary limit of liability	<p>Based on ship's tonnage:</p> <ul style="list-style-type: none"> <li>• Less than 5,000 grt = 4,510,000 SDR;</li> <li>• Between 5,000 and 140,000 grt = 4,510,000 plus 631 SDR for each unit of additional tonnage;</li> <li>• More than 140,000 grt = maximum limit of 89,770,000 SDR.</li> </ul> <p>The shipowner's insurer will be entitled to the same limits as the shipowner.</p>	<p>In respect of any one incident, the maximum amount available from the 1992 IOPC Fund is 203 million SDR, inclusive of any compensation paid under the 1992 CLC.</p> <p>Where pollution damage is caused by a natural disaster, the maximum amount available is also 203 million SDR.</p> <p>Where 3 contributing Parties to the 1992 IOPC Fund receive 600 million tonnes or more of "contributing oil" during the preceding calendar year, limits are raised to 300,740,000 SDR.</p>	<p>In respect of any one incident, the maximum amount available from the Supplementary IOPC Fund is 750 million SDR.</p> <p>This amount is inclusive of any compensation actually paid under the 1992 CLC and the 1992 Fund Convention.</p>
Loss of monetary limit of shipowner's liability	<p>Where it is proved that the pollution damage resulted from an intentional or reckless act or omission of the shipowner;</p> <p>The insurer is nevertheless entitled to the shipowner's limits of liability.</p>	Not applicable.	Not applicable.
Obligations to be fulfilled to benefit from limitation of liability	<p>Constitution of a limitation fund by the shipowner for the total sum representing the limit of liability.</p> <p>The insurer is also entitled to constitute a limitation fund on the same conditions and having the same effect as if it were constituted by the shipowner.</p>	Not applicable.	Not applicable.
Compulsory insurance required?	For ships, wherever registered, carrying more than 2,000 tonnes of oil in bulk as cargo only.	Not applicable.	Not applicable.
Insurance certification required?	Yes, for ships required to have compulsory insurance.	Not applicable.	Not applicable.
Direct action against the insurer for claimants?	Yes, up to the maximum amount of the shipowner's liability.	Not applicable.	Not applicable.
When will the insurer's liability be excluded?	<ul style="list-style-type: none"> <li>• Where the shipowner's liability is excluded under the Convention;</li> <li>• Where the pollution damage resulted from the willful misconduct of the shipowner.</li> </ul>	Not applicable.	Not applicable.

	<b>1992 Civil Liability Convention (CLC) with 2000 Amendments</b>	<b>1992 Fund Convention with 2000 Amendments</b>	<b>2003 Supplementary Fund Protocol</b>
Jurisdiction	Exclusive jurisdiction of the Contracting State(s) where the pollution damage was suffered.	Exclusive jurisdiction of the Contracting State(s) where the pollution damage was suffered.	Exclusive jurisdiction of the Contracting State(s) where the pollution damage was suffered.
Time bar	Within 3 years from the date when the damage occurred; and in no case after six years from the date of the incident which caused the damage.	Within 3 years from the date when the damage occurred; and in no case after six years from the date of the incident which caused the damage.	Within 3 years from the date when the damage occurred; and in no case after six years from the date of the incident which caused the damage.
Contributions	Not applicable	Annual contributions by oil importers who receive in any calendar year, total quantities of “contributing oil” exceeding 150,000 tonnes, which has been carried by sea to the ports or terminal installations in a Contracting State.  If no person receives the requisite quantities of “contributing oil”, no contributions need to be made.	Annual contributions by oil importers who receive in any calendar year, total quantities of “contributing oil” exceeding 150,000 tonnes, which has been carried by sea to the ports or terminal installations in a Contracting State.  It is deemed by the Protocol that a minimum of 1 million tonnes of “contributing oil” is received in each Contracting State. Where the aggregate amount of “contributing oil” received is less than 1 million tonnes, the Contracting State is liable to pay contributions for the difference between the amount of oil actually received in that State and 1 million tonnes.
Reporting requirements	Not applicable.	Contracting States must report to the 1992 IOPC Fund the name and address of any person that is liable to contribute to the Fund, including data on the relevant quantities of “contributing oil” received.	Contracting States must report to the Supplementary IOPC Fund the name and address of any person that is liable to contribute to the Fund, including data on the relevant quantities of “contributing oil” received.  Reports made under the 1992 Fund Convention will be deemed made under the 2003 Supplementary Fund Protocol also.

#### **IV. Ship-source oil pollution not covered by the CLC – IOPC Fund regime**

96. Given the obvious potential for pollution associated with the carriage of vast quantities of oil as cargo, the tangible nature of pollution from persistent oil, and the extensive damage and costs that often arise from such spills, it is not surprising that liability and compensation for oil pollution from tankers is well regulated. However, the highly-developed international legal framework which is the focus of this report is limited in its scope, covering only pollution damage arising from spills of persistent oil from tankers. It does not provide compensation for *spills of bunker oil from ships other than those constructed or adapted for the carriage of oil as cargo*, spills of other types of oil, such as *non-persistent oil*, nor does it cover spills of other types of substances, such as *chemicals, liquefied gases or noxious liquid substances*. These issues are addressed, however, in two further international conventions that were developed under the auspices of the IMO, namely:

- The 2001 Bunker Oil Pollution Convention (BOPC),<sup>72</sup>
- The 1996 Hazardous and Noxious Substances (HNS) Convention<sup>73</sup> as amended by its 2010 Protocol<sup>74</sup> (2010 HNS Convention).

97. While it is not possible within the constraints of this report to provide an appropriately detailed overview of these Conventions, it is important to draw attention to their existence and highlight their potentially considerable practical relevancy. Many coastal States, including many developing countries, face a potentially important exposure to oil pollution damage - and indeed HNS damage - which is not covered by the CLC-IOPC Fund regime but would be covered by the 2001 BOPC or by the 1996 HNS Convention, as amended by its 2010 Protocol. To this end, some of the key features of these two Conventions are very briefly set out below for the consideration of national policymakers.

##### **1. The 2001 Bunker Oil Pollution Convention**

98. The 1992 CLC and 1992 Fund Convention cover bunker oil pollution damage only if the bunker oil escapes from a ship “constructed or adapted for the carriage of oil as cargo”.<sup>75</sup> This restrictive coverage left an important gap in the regulatory regime, as bunker spills from other types of vessel, such as dry-cargo and passenger ships, were not covered even though such vessels carry substantial quantities of bunker fuel,<sup>76</sup> in some cases exceeding the cargo carrying capacity of some oil tankers.

99. Moreover, the oil used for bunker fuel is generally of a lesser quality than that carried as cargo and, as a result, even a relatively small spill may cause significant damage and disproportionate clean-up costs. For example, in 1997, the 43,000 dwt wood chip carrier *Kure* struck the dock at a loading facility in California causing a spill of 105 barrels of bunker fuel. The response operation lasted ten days and the final cost amounted to some

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<sup>72</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

<sup>73</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996.

<sup>74</sup> 2010 Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

<sup>75</sup> See Annex, Part I.1.1.

<sup>76</sup> See fn. 1, above.

US\$47 million, setting a new record for the most expensive oil spill in terms of dollars per barrel.<sup>77</sup> The potentially grave nature of bunker oil pollution has recently been highlighted again in the context of the *Rena* incident, where the grounding of a container vessel, in October 2011, resulted in the spill of 400 tonnes of fuel oil off the coast of New Zealand, described as the country's worst maritime environmental disaster.

100. In recognition of the need for international regulation, in March 2001, the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (2001 BOPC) was adopted, under the auspices of the IMO, to provide for liability and compensation in relation to bunker oil pollution from all types of sea-going vessel, other than oil tankers.<sup>78</sup> The 2001 BOPC entered into force on 21 November 2008 and currently has 64 Contracting States, representing 89.12% of world tonnage.<sup>79</sup>

101. The 2001 BOPC is closely modelled on the 1992 CLC and many of its substantive provisions are similar. In particular, the Convention imposes strict but limited liability for pollution damage on the shipowner, coupled with compulsory insurance and a claimant's right of direct action against the insurer.

102. However, there are some important differences, including a broader definition of the term "shipowner", resulting in potential liability of parties other than the registered owner of a vessel. This approach, in principle beneficial to a claimant, may be explained by the fact that the 2001 BOPC, in marked contrast to the 1992 CLC, is designed as a *single tier* system of liability and compensation. No second tier of compensation, equivalent to that established under the 1992 Fund Convention, is available to provide bunker oil pollution victims with additional compensation beyond that available from the owner of the polluting vessel under the 2001 BOPC.<sup>80</sup>

103. Further, in contrast to the 1992 CLC, the 2001 BOPC does not specify a shipowner's limit of liability. Instead, the 2001 BOPC states that it does not affect the right of the shipowner, or his insurer, to limit their liability under any applicable national or international regime, referring, by way of example, to the 1976 LLMC, as amended.<sup>81</sup> This

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<sup>77</sup> See *Shipping and the Environment*, fn. 22, above, at p. 255.

<sup>78</sup> See further Jacobsson M (2009), "Bunkers Convention in force", 15 *Journal of International Maritime Law*, 21-36; Gaskell N and Forrest C (2008), "Marine pollution damage in Australia: implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003", 27 (2) *University of Queensland Law Journal*, 103-165; Tsimplis M (2005), "The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?", *Lloyd's Maritime and Commercial Law Quarterly*, 83-100. See also, <http://www.bmla.org.uk/documents/imo-bunker-convention.htm>.

<sup>79</sup> For comprehensive information on the status of ratification of the Bunker Oil Pollution Convention, see *Status Of Multilateral Conventions And Instruments In Respect Of Which The International Maritime Organization Or Its Secretary-General Performs Depositary Or Other Functions*, available on the depositary's website at <http://www.imo.org/About/Conventions/StatusOfConventions>. European Union Member States have been authorised to ratify the 2001 BOPC by Decision 2002/762/EC of 19 September 2002, and most EU States have done so, although a handful have yet to accede to the Convention.

<sup>80</sup> The decision to adopt a single-tier regime was taken in light of the difficulties encountered during the drafting of the HNS Convention, Jacobsson M (2009), "Bunkers Convention in force", 15 *Journal of International Maritime Law*, 21-36 (23).

<sup>81</sup> Article 6, 2001 BOPC. Regarding the 1976 LLMC, see also fn. 46, above, and Annex, Part IV. For a detailed discussion of limitation of liability under the BOPC, along with the reasons for adopting the limitation provisions in this manner, see Gaskell N (2009), "The Bunker Pollution Convention 2001 and Limitation of Liability", *Journal of International Maritime Law*, 477-494. See further, Tsimplis M (2005),

has been seen by some as a considerable weakness of the Convention, as it means that a shipowner's limit of liability will depend on any domestic or international regime that determines liability amounts, and will differ between States.<sup>82</sup>

104. Despite this potential weakness, the 2001 BOPC plays an important role in complementing the international regulatory framework on liability and compensation for ship-source oil pollution. It remains the only international legal instrument which ensures that significant compensation is available to the victims of bunker oil pollution damage arising from ships other than oil tankers, such as coaters, container vessels, reefers, bulk carriers, chemical carriers, and cruise ships.

## **2. The 1996 HNS Convention and the 2010 HNS Protocol<sup>83</sup>**

105. While oil pollution from ships is particularly 'tangible' in its effects, the carriage of a large range of hazardous and noxious chemicals and other substances also poses a substantial threat of pollution damage and, even more importantly, to human life and health. In this regard, the HNS Convention, modelled largely on the 1992 CLC and 1992 Fund Convention was adopted in 1996 to complement the CLC - IOPC Fund regime by providing for compensation to victims of accidents involving a wide range of hazardous and noxious substances, including bulk cargoes (solids, liquids including oils, or liquefied gases) and packaged goods.

106. Substances covered also include oils and petroleum products which do not fall within the definition of "persistent oil" under the 1992 CLC and 1992 Fund Convention, such as gasoline, light diesel oil and kerosene.<sup>84</sup>

107. The 1996 HNS Convention covers pollution damage resulting from a spill, as well as the risks of fire and explosion. Recoverable loss includes loss of life or personal injury on board or outside the ship carrying the HNS, in addition to loss of or damage to property (outside the vessel), economic loss resulting from contamination, e.g. in the fishing, mariculture and tourism sectors and costs of preventive measures, e.g. clean-up operations at sea and onshore. Costs of reasonable measures of reinstatement of the environment may also be recovered.

108. The HNS Convention adopts an approach similar to that of the 1992 CLC-IOPC Fund regime, by providing for a "tiered" system, with liability/compensation to be shared between the shipping industry and the HNS industry, albeit within the framework of a

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"The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?", *Lloyd's Maritime and Commercial Law Quarterly*, 83-100 (91-93).

<sup>82</sup> In recognition of the problems that may arise, the 2001 Diplomatic Conference adopted Conference Resolution 1 on limitation of liability, urging States that have not already done so to ratify the 1976 LLMC. For further discussion of the numerous potential difficulties, see generally Gaskell N (2009), "The Bunker Pollution Convention 2001 and Limitation of Liability", *Journal of International Maritime Law*, 477-494; Tsimplis M (2005), "The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?", *Lloyd's Maritime and Commercial Law Quarterly*, 83-100; and Jacobsson M (2009), "Bunkers Convention in force", *Journal of International Maritime Law*, 21-36 (28-30).

<sup>83</sup> For further information, see also the IOPC Fund website at <http://www.hnsconvention.org>, where an informative overview of the HNS Convention, agreed by the IMO Legal Committee, is also available.

<sup>84</sup> The HNS Convention does not apply to oil pollution damage from tankers, as defined in the 1992 CLC, nor to loss or damage as covered by the 2001 BOPC. Loss or damage caused by radioactive materials is also excluded.

single convention. Under the HNS Convention, strict liability, up to an amount limited by the ship's tonnage, is placed on the registered shipowner, along with compulsory insurance and a claimant's right of direct action against the insurer. This first tier of liability is complemented by a second tier, under which compensation is available from a fund, financed by contributions from HNS receivers and set up under the Convention. This International Hazardous and Noxious Substances Fund (HNS Fund) is designed to provide compensation for damage in connection with the carriage of hazardous and noxious substances by sea, to the extent that the relevant compensation provided by the shipowner is inadequate or not available.<sup>85</sup>

109. The 1996 HNS Convention has been ratified by 14 States, corresponding to 13.61% of world tonnage,<sup>86</sup> but has not entered into force. A number of factors appear to have dissuaded States from ratifying the Convention, including the requirement for Contracting States to report the quantities of hazardous and noxious substances ("contributing cargo") that are received by sea transport in their respective territory,<sup>87</sup> and the difficulties in setting up a reporting system for packaged goods.

110. In a bid to overcome obstacles to the entry into force of the HNS Convention, in 2010, a Protocol to the HNS Convention was adopted under the auspices of the IMO.<sup>88</sup> The 2010 HNS Protocol provides for amendments to a number of provisions in the 1996 HNS Convention, including, *inter alia*, revised provisions on the reporting requirements.<sup>89</sup> The substantive provisions of the 1996 HNS Convention in essence remain the same, although the liability scheme under the first tier has been changed slightly and the concept of contributing cargo has been amended.<sup>90</sup>

111. Given the increasing trade of large volumes of hazardous and noxious substances by sea, entry into force of the HNS Convention, which addresses an important regulatory gap and complements the international regime for compensation for ship-source oil pollution, could provide significant benefits to coastal States that are exposed to potential accidents and pollution incidents.

112. If and when the relevant conditions for the entry into force of the 2010 HNS Protocol are met, a consolidated version of the 1996 HNS Convention, as amended by the

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<sup>85</sup> Article 13(1), HNS Convention. The HNS Fund also has a number of related tasks such as considering claims made against the HNS Fund and preparation of an estimated annual budget. See further Article 15, HNS Convention.

<sup>86</sup> For comprehensive information on the status of ratification, see "Status Of Multilateral Conventions And Instruments In Respect Of Which The International Maritime Organization Or Its Secretary-General Performs Depositary Or Other Functions", available on the depositary's website at <http://www.imo.org/About/Conventions/StatusOfConventions>.

<sup>87</sup> Only 2 of the Contracting States to the 1996 HNS Convention have submitted reports on contributing cargo.

<sup>88</sup> See also UNCTAD. *Review of Maritime Transport* 2010, Chapter 6, at pp. 124-125.

<sup>89</sup> For further information on the development of the 2010 Protocol see the Reports of the IOPC Fund meetings in October 2007, and March and June 2008, and of the IMO Legal Committee in October 2008. For an overview of the principal areas of concern during the drafting process, see Shaw R (2009), "Hazardous and Noxious Substances - Is the end in sight?", *Lloyd's Maritime and Commercial Law Quarterly*, 279-284 and Jacobsson M, "The HNS Convention - Prospects for its entry into force", *CMI Yearbook* 2009, 418-430 (425-430).

<sup>90</sup> The type of changes introduced by the 2010 HNS Protocol are too technical to be appropriately summarized here. For further information, see an overview of the Convention, agreed by the IMO Legal Committee, available on the IOPC Fund website at <http://www.hnsconvention.org>.

2010 Protocol (2010 HNS Convention<sup>91</sup>) will enter into force. This, however, is likely to take some time.

113. The 2010 HNS Convention will enter into force 18 months following the date when 12 States have acceded to the 2010 HNS Protocol thus ratifying the 2010 HNS Convention; further conditions for entry into force are that this number is to include four States with not less than 2 million units of gross tonnage, and that the volume of contributing cargo for the general account has reached at least 40 million tonnes.<sup>92</sup> The Protocol was open for signature between 1 November 2010 and 31 October 2011, and will now remain open for accession. While eight countries have signed the 2010 Protocol,<sup>93</sup> there have been no accessions so far. Accordingly, the 2010 HNS Convention is unlikely to enter into force soon.

## **Conclusion**

114. While the substantive analytical Annex below forms an integral part of this report, it appears appropriate to recap at this point some of the main issues addressed so far. As illustrated in Chapter I, despite a steady increase in seaborne trade, including the seaborne trade of oil, major ship-source oil pollution incidents have become increasingly rare over recent decades. This important reduction of large oil spills over time may, to a considerable extent be attributed to the development of a sophisticated international legal framework to combat ship-source oil pollution which, in turn, has been in response to some major oil pollution incidents. Relevant legal instruments include not only those dealing with pollution prevention and control, as well as ship safety, but also those which establish mandatory standards of liability and compensation, providing relief to potential victims of oil pollution and, at the same time, creating a commercial incentive for industry efforts at pollution prevention.

115. Despite a reduction in the number and size of major ship-source oil pollution incidents, the potential threat of environmental damage and large-scale economic loss associated with any one such incident remains disconcerting, in particular for coastal developing nations that rely heavily on fisheries, aquaculture and tourism. From the perspective of potential victims of ship-source oil pollution, whether private sector entities that may have suffered extensive losses, or government entities that are concerned with the costs for clean-up, reinstatement of the environment or loss of revenue, the issue of how to obtain adequate financial compensation is of particular urgent practical importance, if and when a ship-source oil pollution incident occurs.

116. As concerns oil-pollution from tankers, the relevant international legal framework, the CLC-IOPC Fund regime, which is the focus of this report, is particularly robust and well developed. As is illustrated in Chapter II, the system is designed to ensure that even large-scale economic losses may be adequately compensated. To this end, the system

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<sup>91</sup> Contracting States to the 1996 HNS Convention will be deemed to have denounced the 1996 Convention upon ratification of the 2010 HNS Protocol (Article 20(8), 2010 HNS Protocol).

<sup>92</sup> Article 21, 2010 HNS Protocol.

<sup>93</sup> Denmark was the first State to sign, subject to ratification, the 2010 HNS Protocol, followed by Canada, France, Germany, Greece, the Netherlands, Norway and Turkey.

provides for strict mandatory liability of a shipowner, covered by compulsory insurance, and supplemented by substantive additional compensation available from a fund, financed by receivers of quantities of oil above a certain threshold in Contracting States. However, a number of coastal States that are potentially exposed to ship-source oil-pollution incidents, including some developing States, are not yet Contracting Parties to the latest international legal instruments in the field and, as a result, would not be able to benefit from significant compensation in the event of a major oil-spill affecting their coasts or other areas under their marine jurisdiction (territorial waters and exclusive economic zone).

117. To assist national policymakers in their assessment of the merits of accession, some of the relevant considerations are addressed in Chapter III of this report, with reference to different groups of States. The chapter highlights the potential benefits that may be associated with adherence to the most recent of the international legal instruments, namely the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. While key features of these legal instruments are briefly described in Chapter II, a more detailed analytical overview of relevant substantive provisions is provided in the Annex below, which forms an integral part of this report and should be consulted for further details regarding the regulatory regime.

118. Although the focus of this report is on the international liability and compensation framework for oil pollution from tankers, it is important to note that the CLC-IOPC Fund regime - however sophisticated - has its limits and does not cover all types of ship-source oil pollution. With the entry into force, in 2008, of the 2001 BOPC, the international liability and compensation framework has been further significantly strengthened, by providing for liability and compensation in the event of bunker oil spills from sea-going ships other than oil tankers, such as container vessels, reefers, chemical tankers, general cargo ships, as well as cruise ships and ferries. Compensation relating to incidents arising in connection with the carriage of a broad range of hazardous and noxious substances, including non-persistent oil, is addressed in another international Convention, the 1996 HNS Convention and its 2010 amending Protocol (2010 HNS Convention). This Convention, however, has not yet entered into force.

119. Both the 2001 BOPC and the 2010 HNS Convention, presented briefly in Chapter IV, are to some extent modelled on the CLC-IOPC Fund regime, but have, so far, been much less successful in attracting widespread international support. This may be due in part to the fact that there have been fewer large-scale incidents involving pollution covered by these Conventions and, as a result, the economic threat associated with such pollution may be perceived to be low. It may also be due in part to some substantive differences in regulation that distinguish the two Conventions from the CLC-IOPC Fund regime. Although proper consideration of the 2001 BOPC and 2010 HNS Convention is, unfortunately, beyond the scope of the present study, it is hoped that the range of issues addressed as part of this report will contribute also to raising awareness among national policymakers about these two important international Conventions and encourage further consideration of their respective merits.

## ANNEX

### DETAILED ANALYTICAL OVERVIEW OF KEY SUBSTANTIVE PROVISIONS OF THE 1992 CLC, THE 1992 FUND CONVENTION AND THE 2003 SUPPLEMENTARY FUND PROTOCOL

120. This part of the report provides a more detailed overview of the substantive provisions of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, in thematic order.<sup>94</sup> For the purposes of illustration, reference is made to some of the cases in which compensation was paid or considered under the 1992 IOPC Fund as well as the 1971 IOPC Fund which, in respect of provisions that have remained unchanged in the 1992 Conventions, continue to serve as guidance.

121. In terms of *geographical scope of coverage*, it should be noted that there is no difference between the three legal instruments. In each case, compensation is available – irrespective of where the incident itself occurred – in respect of pollution damage *suffered* in the *territory, territorial sea*,<sup>95</sup> and *exclusive economic zone (EEZ)*<sup>96</sup> or *equivalent area*<sup>97</sup> of a Contracting State to the relevant legal instrument. Compensation for preventive measures is, in all cases, available without any geographical restrictions.

122. It is important to note that tanker oil spills affecting a country's inland waterways may, under certain circumstances also be covered by the CLC-IOPC Fund regime, subject to other requirements of the Conventions being satisfied. Thus, where sea-going vessels engaged in the transport of oil operate on inland waterways connected to the sea, pollution arising from an oil spill would, in principle, also be covered by the CLC-IOPC Fund regime.<sup>98</sup>

123. The term “pollution damage” refers to “*loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such*

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<sup>94</sup> For more detailed information, see *Shipping and the Environment*, fn. 22, above, Chapters 2 and 3. See also the extensive information material available on the website of the IOPC Funds, at [www.iopcfunds.org](http://www.iopcfunds.org).

<sup>95</sup> As defined in Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the territorial sea is an area measured up to a limit of 12 nautical miles from the applicable baselines. Under the 1992 CLC, rivers and inland waterways also fall within the territory of a Contracting State, even though they are excluded from the scope of UNCLOS, and pollution damage suffered in such areas may be compensated under the regime. See 92FUND/EXC.26/3, para 3.5.

<sup>96</sup> The EEZ is defined in Part V of UNCLOS 1982. Article 57 refers to the breadth of the EEZ as an area extending no further than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

<sup>97</sup> The Civil Liability and Fund Conventions also provide coverage for an area beyond and adjacent to the territorial sea of a Contracting State determined in accordance with international law and extending no more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. This is because not all States have established an EEZ.

<sup>98</sup> See in particular the *Victoriya* incident in 2003, where the vessel suffered a fire and explosion at a terminal on the Volga river, some 1300 km inland from the Caspian Sea and the Sea of Azov. The tanker was loading crude oil, a significant quantity of which was spilled into the river. The Executive Committee of the 1992 IOPC Fund, which had to consider whether the incident fell within the geographical scope of application of the 1992 CLC and Fund Convention accepted that, in principle, pollution damage in the inland reaches of rivers (tidal or non-tidal) within the territory of a Contracting State would be covered, provided relevant other requirements for the application of the Conventions were met, in particular that the polluting vessel was a sea-going vessel or a sea-borne craft covered by the definition of “ship” under the Conventions. See 92FUND/EXC.26/3, para. 3.5. See also *Shipping and the Environment*, fn. 22, above, at p. 84.

*escape or discharge may occur, along with impairment of the environment and the costs of preventive measures.”*<sup>99</sup>

124. The State in which the ship is registered is irrelevant for the purposes of the liability and compensation regime. Thus, compensation will be available for pollution damage suffered in the territory or EEZ of a Contracting State, even if the oil escaped or was discharged from a ship registered in a non-Contracting State.<sup>100</sup>

## **I. 1992 CIVIL LIABILITY CONVENTION**

### **1. Substantive scope of application**

#### ***1.1 To which ships does the Convention apply?***

125. The 1992 CLC exclusively applies to pollution damage caused by oil that is carried on board a “ship”. Ship is defined in the Convention as “*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.*”<sup>101</sup> Thus, the Convention applies to pollution incidents involving oil tankers, as well as other ships that have been adapted for the carriage of oil in bulk. Combination carriers, or Oil/Bulk/Ore ships (OBOs), as well as tankers capable of carrying cargoes of persistent oil but also other liquid cargo in bulk, such as non-persistent oil or chemicals, are covered by the definition of “ship” only when actually carrying oil in bulk as cargo or when in ballast following such carriage.<sup>102</sup> Warships and other government ships are excluded from the Convention, unless used for commercial activities.<sup>103</sup>

126. In respect of some types of vessels, such as vessels registered for both river and sea navigation, or oil barges, the question of whether they may be regarded as “ship” for the purposes of the Convention and would trigger application of the liability regime may depend on the surrounding circumstances.<sup>104</sup> There have been a number of cases focusing on the definition of “ship”, and the outcome has often varied. However, based on the decided cases in which the definition of “ship” has played a material role, it appears that in general, vessels and craft operating at sea at the time of the incident and actually carrying oil as cargo will be considered as a “ship”, for the purposes of the Convention.<sup>105</sup>

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<sup>99</sup> Article I(6), 1992 CLC; Article 1(2), 1992 Fund Convention; and Article 1(6), 2003 Supplementary Fund Protocol. This definition and the various types of admissible claims are further discussed by Oosterveen W (2004), “Some recent developments regarding liability for damage resulting from oil pollution - from the perspective of an EU member state”, *Env. L. Rev.* 223-239 (229-234).

<sup>100</sup> By the same token, if a vessel registered in a Contracting State is involved in an oil pollution incident which causes oil pollution damage outside the territory or EEZ/equivalent of a Contracting State, for instance on the High Seas, or in a non-Contracting State, the regime will not apply. See the litigation following the *Patmos* incident, *IOPC Fund Annual Report 1994*, p. 38.

<sup>101</sup> Article I(1), 1992 CLC. The size of a ship is not referred to in the Convention, and is therefore irrelevant for determining the scope of application.

<sup>102</sup> See the proviso in Article I(1), 1992 CLC, “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”.

<sup>103</sup> Article XI, 1992 CLC.

<sup>104</sup> However, where oil pollution involves a sea-going vessel operating on inland waterways, the Convention may apply, see fn. 98, above, and accompanying text.

<sup>105</sup> A detailed examination of all cases is unfortunately outside the scope of this report. For further information and discussion, see *Shipping and the Environment*, fn. 22, above, at pp. 86-92.

127. The situation is less clear in respect of offshore units or craft, such as FSUs (floating storage units) or FPSOs (floating production, storage and offloading units) and in respect of ships used for the purposes of storage rather than for the carriage of oil,<sup>106</sup> as is frequently the case, for instance, off the coast of West Africa.

128. In 1999, the issue was considered in some detail by the 1992 IOPC Fund Assembly<sup>107</sup> and a rather restrictive approach appears to have been taken. While the particular circumstances of the case always needs to be taken into consideration, the Assembly decided that offshore craft should normally only be considered as a “ship” for the purposes of the 1992 Conventions when carrying oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. Several delegations also took the view that oil pollution from a ship used for the purposes of storage would not be covered by the 1992 Conventions, because oil in storage would not satisfy the definition of “oil” in the absence of carriage. The question of whether FSUs fall within the definition of “ship” was revisited by the 1992 IOPC Fund Assembly at its October 2011 session and the Assembly confirmed the view that FSUs were not included within the definition of “ship” under Article I(1) of the 1992 CLC.<sup>108</sup>

129. However, it should be noted that this view appears to differ somewhat from the view taken in the Greek Courts in the *Slops* litigation.<sup>109</sup> There, it had been held that a vessel originally in service as a cargo-carrying tanker and later converted to serve as a storage unit was covered by the definition of “ship” under the 1992 CLC.

130. In 2000, the Greek-registered waste oil reception facility *Slops*, suffered an explosion and caught fire in the port of Piraeus, and an unknown but substantial quantity of oil was spilled. *Slops* had been originally designed and constructed for the carriage of oil in bulk as cargo, but underwent major conversion in 1995 when its propeller was removed and its engine was deactivated and officially sealed. The purpose of this process was to convert the status of the craft from a ship to a floating oily waste reception and processing facility. Legal proceedings were brought against the 1992 IOPC Fund for compensation for the costs of clean-up operations and preventive measures, and it was initially decided by the Executive Committee that the *Slops* should not be considered as a “ship” for the purpose of the 1992 Conventions. However, in 2006, after much litigation, the Greek Supreme Court held that the *Slops* should be regarded as a “ship” as defined in the 1992 Conventions, as it had the character of a seaborne craft which, following its modification into a floating storage unit, stored oil products in bulk and had the ability to move by being towed with a consequent pollution risk. The case was referred back to the Court of Appeal, where the claimed amount of £2.2 million plus legal interests and costs was awarded; the

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<sup>106</sup> See further *Shipping and the Environment*, fn. 22, above, at Chapter 5.

<sup>107</sup> See *Record of the Decisions of the Third Extraordinary Session of the 1992 Fund Assembly* 92FUND/A/ES.3/21 at para. 18.5.

<sup>108</sup> A legal opinion on the issues raised by the definition “ship” in the 1992 CLC had been commissioned by the IOPC Fund Assembly in October 2010 and a detailed written opinion by Prof. V. Lowe, QC (Document IOPC/OCT11/4/4), was subsequently considered by the Assembly at its October 2011 session. The legal opinion discusses relevant arguments in some detail and should be consulted for further information. It concludes, among other things that FSUs are not included within the definition of “ship” under Article (1) of the 1992 CLC.

<sup>109</sup> Regarding the question of which courts have jurisdiction to decide on a claim, see Part I.4 and Part II.3, below.

judgment by the Court of Appeal was final and therefore enforceable against the 1992 IOPC Fund.<sup>110</sup>

### **1.2 What types of oil pollution does the Convention cover?**

131. The 1992 CLC provides for compensation in respect of pollution damage resulting from “any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil.”<sup>111</sup> Damage caused by non-persistent oil is not covered by the Convention, and this includes, *inter alia*, gasoline, light diesel oil and kerosene. The relevant rationale for a restrictive definition of “oil” appears to be that non-persistent oils are less likely to cause pollution damage.<sup>112</sup> It should be noted that the definition of oil under the 1992 Fund Convention as regards “contributing oil”, i.e. oil relevant for the purposes of calculating financial contributions to the 1992 IOPC Fund differs slightly.

132. For the purposes of the 1992 CLC, it is immaterial whether an oil spill is due to operational or accidental causes. As already noted (see Table 1), oil spills may arise as a result of loading and discharging operations, collisions, groundings, hull failures, equipment failures, bunkering, fires and explosions. Moreover, it is immaterial whether the oil is part of the ship's cargo or escapes from the ship's bunkers. Thus, pollution damage covered by the Convention may arise both where the ship is actually carrying oil in bulk as cargo, *i.e.* where the ship is laden, or during any voyage following such carriage, *i.e.* where the ship is in ballast.<sup>113</sup> By contrast, however, the Convention does not apply to pollution damage caused by oil that was not “carried on board” a ship at the time of its escape into the sea. For example, the 1971 IOPC Fund has confirmed the application of the Convention to oil that was inadvertently pumped overboard during deballasting operations,<sup>114</sup> whereas it has also held that oil which escapes from a submarine hose during its discharge from a ship, is no longer carried on board the ship at the time of the spill.<sup>115</sup>

### **1.3 For which types of loss or damage is compensation available?**

133. In general, the 1992 CLC, but also the 1992 Fund Convention and the 2003 Supplementary Fund Protocol cover claims relating to property damage, consequential losses, pure economic loss, and environmental damage.<sup>116</sup>

134. In relation to *property damage*, compensation may be available for the reasonable costs of cleaning, repairing or replacing property that has been contaminated by oil.<sup>117</sup>

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<sup>110</sup> IOPC Annual Report 2008, at pp. 90-95. According to the IOPC Annual Report 2010, a total of £3,217,421 was paid by the 1992 IOPC Fund in respect of the incident involving the *Slops*.

<sup>111</sup> Article I(5), 1992 CLC. See further, *Shipping and the Environment*, fn. 22, above, at pp. 95-98.

<sup>112</sup> See the *1992 IOPC Fund Claims Manual*, December 2008 edition (“*Claims Manual*”), which states: “Such oils are usually slow to dissipate naturally when spilled into the sea and are therefore likely to spread and require cleaning up...[non-persistent] oils tend to evaporate quickly when spilled and do not normally require cleaning up,” at p. 11.

<sup>113</sup> See fn. 102 above.

<sup>114</sup> 71FUND/EXC.54/10, at para 3.6.

<sup>115</sup> 71FUND/EXC.59/17, at para 3.13.

<sup>116</sup> For further detail see *Shipping and the Environment*, fn. 22, above, Chapters 9-13, and the *Claims Manual*, fn. 112 above, which gives detailed information on the scope of compensation available and how each type of claim should be presented at pp. 23-37.

<sup>117</sup> *Claims Manual*, fn. 112 above, at p.12, 27-28.

*Consequential losses* covered by the Convention are likely to include loss of earnings suffered by the owners of property damaged by oil as a result of the spill, such as fishermen whose nets have become oiled and require cleaning or replacing, which prevents them from fishing.<sup>118</sup> Compensation for *pure economic loss* may be available in certain circumstances for loss of earnings caused by oil pollution for those persons whose property has not been polluted.<sup>119</sup> For instance, fishermen who are prevented from fishing in a particular area of the sea because of the oil spill, even though their nets have not been damaged may be eligible for compensation. Also, hoteliers who suffer losses because of a downturn in the number of guests due to contamination of a public beach may also have a claim. In addition, compensation for the costs of *reasonable measures taken to prevent or reduce pure economic losses* following a pollution incident may be recovered, such as the costs of marketing campaigns.<sup>120</sup>

135. Compensation for *impairment of the environment* may also be available, provided that any compensation claimed, other than loss of profit, is limited to costs of reasonable<sup>121</sup> measures taken, or to be taken, to restore the environment to the condition it was in before the incident.<sup>122</sup> Such reinstatement measures should be aimed at accelerating the natural recovery of environmental damage. Contributions may, for example, be made to the cost of post-spill studies, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.<sup>123</sup> In this respect, the importance of “baselines” or reference data must be noted, as quantitative – and in some cases qualitative – information will be required in order to assess the environmental damage and consequent restoration measures.

136. It should be noted that *general claims for damage to the marine environment are not admissible*, as compensation cannot be awarded for claims of a non-economic nature. This must be contrasted with claims for the economic consequences of such damage, such as those suffered by the fishing and other industries described above, which are eligible for compensation.

137. In addition, the costs of *reasonable measures, wherever taken, to prevent or minimize pollution damage* may be compensated. This means that where preventive measures were taken on the High Seas or in the territorial waters or EEZ of a non-Contracting State in order to prevent or minimize pollution damage within the territorial sea or EEZ of a Contracting State, the costs of such measures may be recovered. Expenses incurred for preventive measures may also be recovered where no spill actually occurs, provided that there was a grave and imminent threat of pollution damage.<sup>124</sup> Clean-up

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<sup>118</sup> *Claims Manual*, fn. 112, above, at p.12, 28-34.

<sup>119</sup> *Claims Manual*, fn. 112, above, at p.13, 28-34.

<sup>120</sup> *Claims Manual*, fn. 112, above, at pp. 34-35. For example, following the *Erika* incident, Total SA, the French oil company, established a publicity campaign to restore the image of the Atlantic coast.

<sup>121</sup> The concept of reasonableness means reasonable from an objective, technical point of view, IOPC Funds document, 92FUND/A.11/35, s.26. See further Jacobsson M (2010), “How clean is clean? The concept of reasonableness in the response to tanker oil spills”, *Il Diritto Marittimo*, Scritti in Onore di Francesco Berlingieri, Vol.I, 565-585.

<sup>122</sup> *Claims Manual*, fn. 112, above, at p.13, 35-37.

<sup>123</sup> *Ibid.*

<sup>124</sup> “The International Regime for Compensation for Oil Pollution Damage”, Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds, January 2012, at page 2. By contrast, the 1969 CLC only compensates preventive measures taken after an incident has actually occurred, and as a consequence, preventive measures which avoid the pollution damage occurring at all, will not be reimbursed.

operations at sea and on-shore are usually considered as preventive measures, as they are generally intended to prevent or minimise pollution damage.<sup>125</sup> Such compensation also includes the reasonable costs associated with the capture, cleaning and rehabilitation of wildlife, in particular birds, mammals and reptiles.<sup>126</sup> Further loss or damage caused by preventive measures is also compensated.

138. The reasonable costs of using advisers to assist claimants in presenting their claims for compensation may also be reimbursed. Account will be taken of the necessity for the claimant to use the adviser, the usefulness and quality of the work carried out, the time reasonably needed and the normal rate in the country concerned for work of that kind.<sup>127</sup>

## 2. Liability of the Shipowner

### 2.1 *Strict liability of the registered shipowner*

139. The 1992 CLC imposes strict liability on the shipowner for any pollution damage caused by his ship as a result of an incident.<sup>128</sup> The term “incident” is defined in Article I(8) as “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”.<sup>129</sup> Liability is *strict*, which means that the shipowner will be liable, *irrespective of any fault* on his part, i.e. even if no negligence was involved.<sup>130</sup>

140. Under the 1992 CLC liability attaches to the registered shipowner, or in the absence of registration, the person or persons owning the ship;<sup>131</sup> in this context, “*person*” refers to “any individual or partnership or any public or private body, whether corporate or not, including a State of any of its constituent subdivisions”.<sup>132</sup> As a consequence, provided a company is registered as the owner of the ship, there is no scope for “piercing the corporate veil” i.e. for bringing a claim against those who control the company, so-called beneficial owners.<sup>133</sup> Given that many vessels are operating as one-ship companies, the compulsory insurance requirement imposed by the Convention<sup>134</sup> is of particular relevance in this context.

141. Where an *incident involving two or more ships* occurs with consequential pollution damage, the owners of all the ships concerned will be jointly and severally liable for all damage that is not reasonably separable.<sup>135</sup> Therefore, a claimant would not be required to

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<sup>125</sup> *Claims Manual*, fn. 112, above, at pp. 23-27.

<sup>126</sup> *Claims Manual*, fn. 112, above, at p.12.

<sup>127</sup> *Claims Manual*, fn. 112, above, at p.13.

<sup>128</sup> Article III(1), 1992 CLC

<sup>129</sup> Article I(8) 1992 CLC.

<sup>130</sup> For an economic analysis of the law which gives preference to strict liability coupled with contributory negligence as the most suitable private law regime to deal with oil spills, see Xu J (2009), “The law and economics of pollution damage arising from carriage of oil by sea”, *Maritime Policy and Management*, 309-323.

<sup>131</sup> Also, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship’s operator, “owner” shall mean such company. Article I(3), 1992 CLC.

<sup>132</sup> Article I(2), 1992 CLC.

<sup>133</sup> *Shipping and the Environment*, fn. 22, above, at p. 85.

<sup>134</sup> See Part I.3 below.

<sup>135</sup> Article IV, 1992 CLC.

establish which of the different shipowners should be liable in relation to different types of damage. It should however be noted that both vessels must also fall within the definition of “ship” under the 1992 CLC. Thus, where a collision occurs between a tanker and a non-tanker, the owner of the tanker would be strictly liable for the pollution damage, although he may be able to recover from the owner of the other vessel outside the Convention, if the other shipowner was wholly or partly liable for the collision.

## 2.2 *Channelling of Claims*

142. The 1992 CLC channels all claims for compensation against the shipowner, by expressly excluding the liability of other parties, and by removing the right to pursue the owner for oil pollution claims outside the Convention.<sup>136</sup> Under the 1992 CLC, it is only the shipowner who is strictly liable for pollution damage, as he is also the only party able to limit his liability, and the only party required to obtain insurance for such liability. This system provides a simplified and efficient claims procedure for those who suffer pollution damage, and also allows the insurance market to provide appropriate cover. Accordingly, no claim for pollution damage may be made against:

- (a) the servants or agents of the owner or the members of the crew; this exclusion extends to the employees of representatives of the owner, manager, operator and other parties whose liabilities are excluded.<sup>137</sup>
- (b) the pilot or any other person who performs services for the ship;
- (c) any charterer, including bareboat charterer, manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures, and
- (f) all servants or agents of those persons in subparagraphs (c)-(e).<sup>138</sup>

143. Consequently, the shipowner and/or his insurer are the only persons/entities that may be sued under the 1992 CLC. The Convention does not prejudice any right of recourse that the shipowner may have against third parties, and the shipowner may therefore be able to reclaim all or part of any compensation paid by pursuing the person who was at fault regarding the incident.<sup>139</sup> Such persons will not be excluded from liability however if the damage resulted from a listed person’s personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.<sup>140</sup>

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<sup>136</sup> See Article III(4), 1992 CLC.

<sup>137</sup> The scope of the exclusion was discussed in detail in the proceedings following the *Erika* spill, where defences based on the channelling provisions were dismissed for Mr Savarese, the beneficial owner of Tever Shipping Company, which owned the ship; Mr Pollara, president of Panship Management and Services Srl, the technical managers of the ship; and Total SA, the parent company in the major oil group which owned the cargo and chartered the ship, although the reasons given for dismissing the defences are unclear. The case is referred to in *Shipping and the Environment*, fn 22, above, at pp. 109-111.

<sup>138</sup> Article III(4)(a)-(f), 1992 CLC.

<sup>139</sup> Article III(5), 1992 CLC.

<sup>140</sup> Article III (4) and (5), 1992 CLC.

### 2.3 *Exceptions to liability*

144. The strict liability imposed on the shipowner is subject to a limited number of exceptions which, in most cases, reflect the risks that marine liability insurers were unwilling to bear. The exemptions are likely to be construed narrowly, and have so far only become relevant in a small number of cases.

145. The shipowner will be exempt from liability if he can establish that one of three sets of circumstances applies:

*(a) the pollution damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;*

146. This exemption would apply provided that the relevant listed peril was the proximate or dominant cause of the pollution damage. In respect of pollution damage due to natural disasters, it should be noted that the exemption from liability only applies if the relevant natural phenomenon was “*of an exceptional, inevitable and irresistible character*”. Thus, it has been suggested that while the exception may apply to tidal waves, it may not apply to hurricanes, as these can often be avoided by ships.<sup>141</sup>

147. Moreover, while the 1992 Fund Convention also excludes liability of the 1992 Fund for pollution damage “*resulting from an act of war, hostilities, civil war, insurrection*”, it is important to note that the 1992 Fund Convention does not exclude liability in respect of pollution damage due to natural disasters.<sup>142</sup> Therefore, in cases of pollution damage due to a natural disaster, a claimant would still be able to seek compensation from the 1992 IOPC Fund<sup>143</sup> even if the shipowner was exempt from liability under the 1992 CLC.

*(b) the pollution damage was wholly caused by an act or omission done with intent to cause damage by a third party;*

148. This exemption may apply in the case of pollution damage caused by terrorism, sabotage and other malicious acts of third parties. However, the restrictive wording of the provision should be noted. As the pollution damage must have been “wholly caused” by the malicious act, the shipowner may be precluded from invoking the exception if there was any additional contributory cause, however small, such as a failure to take appropriate security measures,<sup>144</sup> for instance, as required under the International Ship and Port Facilities Security (ISPS) Code.<sup>145</sup> Once again, it should be noted that even in cases where the shipowner successfully invokes the exemption, claimants would still be able to seek compensation from the 1992 IOPC Fund under the 1992 Fund Convention.

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<sup>141</sup> *Shipping and the Environment*, fn. 22, above, at p. 99.

<sup>142</sup> See Part II.1.2 below.

<sup>143</sup> Provided, however, that the State in which the pollution damage was suffered is also a Contracting State to the 1992 Fund Convention.

<sup>144</sup> *Shipping and the Environment*, fn. 22, above, at p. 100.

<sup>145</sup> For some further information on the ISPS Code, see UNCTAD publications available at [www.unctad.org/ttl/legal](http://www.unctad.org/ttl/legal) under “Maritime and Supply-Chain Security”.

(c) the pollution damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.<sup>146</sup>

149. This exemption from liability only applies if the shipowner proves that damage was “wholly caused” by matters falling within the exclusion. Thus, a shipowner would not be able to rely on the exemption in cases where the relevant pollution damage was also due to another contributory cause, such as contributory negligence by those on board the ship, or indeed, by those on board a colliding ship; a common factor in maritime accidents.<sup>147</sup> The exemption was considered at length by the Supreme Court of Sweden in *The Tsesis* (1977), where the failure of the Swedish State to mark a shoal on a marine chart and to adjust the white sector from a lighthouse, led to exemption of the shipowners from liability for a spill of approximately 500 tonnes of oil.<sup>148</sup> Once again, exemption of the shipowner from liability under this heading does not affect the right to compensation under the 1992 Fund Convention.

150. In cases where an *intentional act or negligence on the part of the claimant himself has caused or contributed to the oil pollution damage*,<sup>149</sup> the shipowner’s liability may be excluded or reduced. Thus, a claim for compensation by a claimant who is deemed to have also contributed to the incident may be granted only in part, or, depending on the circumstances, be rejected.

151. By way of example, in 1997, the *Katja* struck a quay while manoeuvring into a berth at the port of Le Havre, France, resulting in a spill of 190 tonnes of oil. Among other actions, a claim was made by the port authority for clean-up costs of €878,000. The shipowner and his insurer however brought proceedings against the port authority on the grounds that (a) the port had sent the tanker to an unsuitable berth and had thereby been wholly or partially responsible for the incident, and (b) the port’s inadequate counter-pollution response to the incident had increased the extent of the pollution damage caused. The port authority rejected the arguments submitted against it, yet a settlement agreement was concluded in 2008 between the parties whereby the shipowner and his insurer agreed to pay €70,000, and all parties withdrew their legal actions.<sup>150</sup> Other examples where such a defence may arise include negligent acts of state-employed pilots, or collisions with vessels that are wholly or partly to blame.

## 2.4 *Limitation of Liability*

### *Limitation amounts*

152. As a corollary to the strict nature of liability under the 1992 CLC, the shipowner is entitled to monetary limitation of liability. The relevant limitation amounts depend on the ship’s gross tonnage,<sup>151</sup> subject to an overall aggregate maximum, and only apply in

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<sup>146</sup> Article III(2)(a)-(c), 1992 CLC.

<sup>147</sup> *Shipping and the Environment*, fn. 22 above, at pp. 101-104.

<sup>148</sup> The case is referred to in *Shipping and the Environment*, fn. 22 above, at pp. 101-102.

<sup>149</sup> “...the pollution damage resulted from an act or omission done with intent to cause damage by the person claiming compensation, or by the negligence of that person” Article III(3), 1992 CLC.

<sup>150</sup> *IOPC Annual Report 2008*, at p. 70.

<sup>151</sup> See Article V(10), 1992 CLC.

respect of liability for *pollution damage* under the Convention; other liabilities are not subject to the limitation amount and would need to be compensated separately. For incidents occurring on or after 1 November 2003, the limitation amounts in respect of any one incident are as follows:

- (a) for a ship not exceeding 5,000 grt, 4,510,000 SDR<sup>152</sup> (approximately US\$ 6,96 million);
- (b) for a ship with a tonnage between 5,000 and 140,000 grt, 4,510,000 SDR (approximately US\$ 6.96 million) plus 631 SDR (approximately US\$ 974) for each additional unit of tonnage;
- (c) for a ship exceeding 140,000 grt, there is a maximum limit of 89,770,000 SDR (approximately US\$ 138.5 million).<sup>153</sup>

#### *Loss of the right to limit liability*

153. The shipowner will lose his right to limit his liability if is the claimant can prove that “*the pollution damage resulted from a personal act or omission, committed with the intent to cause such damage, or recklessly with knowledge that such damage would probably result*”.<sup>154</sup>

154. The test regarding recklessness on the part of the shipowner has a very high threshold as it must be proved that the shipowner was aware of the potential for the pollution damage that actually resulted, but continued to act in spite of this knowledge. The test mirrors that in the 1976/1996 LLMC, and is likely to be satisfied in very rare cases. In circumstances where the shipowner is a corporation, it seems likely that the right of limitation will only be lost if the requisite act or omission was committed by the *alter ego* of the company, identified in accordance with principles that developed in cases concerning the 1957 Limitation Convention, i.e. at management level.<sup>155</sup>

#### *Constitution of a limitation fund*

155. In order to benefit from limited liability, the shipowner must constitute a fund for the total sum representing the limit of his liability with the courts or other competent authority of any one of the Contracting States in which an action is or could be brought.<sup>156</sup> The limitation fund may be constituted by depositing the requisite sum or by producing a bank guarantee or other guarantee, acceptable under the national legislation of the Contracting State.

156. Shipowners must also take into consideration any additional provisions of the national law of the State where the damage was suffered. For example, the *Sung II No.1* grounded on 8 November 1994 near Onsan in the Republic of Korea, spilling an estimated

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<sup>152</sup> See Article V(9), 1992 CLC.

<sup>153</sup> Article V(1), 1992 CLC. These amounts take into consideration the amendments made in 2000, see fn. 32, above, and accompanying text. Rate of SDR conversion to US\$ used throughout this report is the published IMF rate of 3 January 2012 (see further Table 2 above).

<sup>154</sup> Article V(2), 1992 CLC.

<sup>155</sup> *Shipping and the Environment*, fn. 22, above, at pp. 119; for further details, see also Chapter 22.

<sup>156</sup> Article V(3), 1992 CLC.

quantity of 18 tonnes of oil. The shipowner lost his right to limit his liability, however, because the limitation proceedings were not commenced within the period specified under the law of the Republic of Korea.<sup>157</sup>

157. Following an incident, where a limitation fund has been constituted in the above manner - and provided the shipowner has not lost the right to limit his liability - claimants are not entitled to exercise any right against other assets of the shipowner in respect of that incident.<sup>158</sup> The fund is therefore the only asset available for the settlement of claims among different claimants. Moreover, once a limitation fund has been set up, any ship or other property belonging to the owner which may have been arrested following the oil pollution incident and any bail or other security furnished to avoid such arrest must be released.<sup>159</sup> This, however, only provided that the claimant has access to the court administering the fund and the fund is actually available in respect of his claim.<sup>160</sup>

### 3. Compulsory Insurance, Mandatory Certification and Direct Action

158. It is often the case that a vessel is rendered a total loss following a pollution incident, removing the main asset that could be used to satisfy claims for compensation. With the proliferation of one-ship companies, the lost vessel may have been the *only* asset that was available, leaving injured parties without any hope of reimbursement for their losses. To combat this problem, all ships that are registered in a Contracting State that carry *more than 2,000 tonnes of oil in bulk as cargo* are required by the 1992 CLC to maintain insurance or another form of financial security, such as a bank guarantee or a certificate provided by an international compensation fund.<sup>161</sup> The insurance or financial security must be adequate to cover the shipowner's limit of liability, as provided by the Convention.

159. A certificate attesting that such insurance or financial security is in force in accordance with the Convention must be issued to each ship by the appropriate authority of a Contracting State.<sup>162</sup> In the absence of the necessary insurance or financial security, ships carrying more than 2,000 tonnes of oil in bulk as cargo, *wherever registered*, will not be able to enter or leave a port in a Contracting State's territory, or arrive or leave an off-shore terminal in its territorial sea.<sup>163</sup> Thus, ships registered in non-Contracting States are required to maintain the necessary financial security in order to operate within the waters of a Contracting State; for these ships, the relevant certificates may be issued by the appropriate authority of any Contracting State. Certificates must be recognised by other Contracting States as having the same force as certificates issued by them, even if issued in respect of a ship not registered in a Contracting State.<sup>164</sup> Furthermore, Contracting States must not permit ships flying their flag to trade unless a certificate has been issued.<sup>165</sup>

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<sup>157</sup> "Incidents involving the IOPC Funds", October 2009, at p.87.

<sup>158</sup> Article VI(1)(a), 1992 CLC.

<sup>159</sup> Article VI(1)(b), 1992 CLC.

<sup>160</sup> Article VI(2), 1992 CLC.

<sup>161</sup> Article VII(1), 1992 CLC.

<sup>162</sup> Article VII(2), 1992 CLC. The certificate must be in the form of the annexed model to the Convention.

<sup>163</sup> Article VII(11), 1992 CLC. Contracting States are required to ensure by virtue of their national law that such insurance or security is in force in respect of such ships.

<sup>164</sup> Article VII(7), 1992 CLC.

<sup>165</sup> Article VII(10), 1992 CLC.

160. The 1992 CLC establishes a *right of direct action for the claimant against the insurer* or other person providing financial security to the shipowner.<sup>166</sup> This right of action allows the claimant to recover, even where the shipowner is not financially capable of settling claims, for example, where the shipowner has become bankrupt or insolvent. The insurer's liability is always limited to the same limitation amounts available to the shipowner, even where the shipowner has lost his right to limitation, and the insurer may also invoke the same defences available to the shipowner under the Convention.<sup>167</sup> Accordingly, if the shipowner's liability is excluded under the Convention, the insurer will not be liable.

161. Furthermore, the insurer can avoid liability altogether if it is proved that the pollution damage resulted from the wilful misconduct of the shipowner himself. The insurer cannot however, avail itself of any other defences that may ordinarily be available, such as avoidance of the insurance contract for breach of a warranty, for misrepresentation, or for breach of the duty of good faith. The insurer is also entitled to constitute a limitation fund on the same conditions and having the same effect as if it were constituted by the shipowner.<sup>168</sup>

#### **4. Jurisdiction and Time Bar**

162. Actions for compensation may only be brought in the Contracting State(s) in which the pollution damage was suffered.<sup>169</sup> Once a limitation fund has been constituted in a particular Contracting State, the courts of that State shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.<sup>170</sup>

163. Judgments given by a court with jurisdiction as outlined above must be recognised in all Contracting States, except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.<sup>171</sup> Such judgments will be enforceable in each Contracting State as soon as any formalities required by that State have been complied with.<sup>172</sup>

164. Actions for compensation must be brought within the time limits set out in the 1992 CLC.<sup>173</sup> Generally, an action must be brought within three years from the date when the damage was suffered. However, in no case can actions be brought after six years from the date of the incident which caused the damage. The dual time bar allows for claims to be made where the pollution damage does not occur immediately but is for whatever reason delayed, for example, where a laden tanker sinks but the oil is not released until the vessel deteriorates.

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<sup>166</sup> Article VII(8), 1992 CLC. The term 'insurer' here refers both to the shipowner's insurer or other person providing financial security to the shipowner.

<sup>167</sup> Article VII(8), 1992 CLC.

<sup>168</sup> Article V(11), 1992 CLC. The constitution of a fund by the insurer where the shipowner has lost his right to limit liability does not prejudice the rights of any claimant against the owner.

<sup>169</sup> Article IX(1), 1992 CLC.

<sup>170</sup> Article IX(3), 1992 CLC.

<sup>171</sup> Article X(1)(a)-(b), 1992 CLC.

<sup>172</sup> Article X(2), 1992 CLC. Any formalities that require performance to enforce a judgment must not permit the merits of the case to be re-opened.

<sup>173</sup> Article VIII, 1992 CLC.

## II. 1992 FUND CONVENTION

165. The 1992 Fund Convention established the 1992 IOPC Fund to provide compensation for oil pollution damage in circumstances where the protection afforded by the 1992 CLC is inadequate. As already noted, only Contracting States to the 1992 CLC may become Party to the 1992 Fund Convention.<sup>174</sup> Moreover, compensation from the 1992 IOPC Fund will only be available in respect of incidents which occur *after* the 1992 Fund Convention has entered into force for the State concerned.<sup>175</sup>

### 1. Compensation from the 1992 Fund

#### 1.1 *When will compensation be available?*

166. The 1992 IOPC Fund will provide compensation where a claimant has been unable to obtain full and adequate compensation under the 1992 CLC. This may arise in three sets of circumstances.

(a) No liability for the damage arises under the 1992 CLC.<sup>176</sup>

167. No liability may arise under the 1992 CLC in cases where the claimant is unable to identify the owner of the ship concerned, or where the shipowner is exonerated from liability under the Convention. As noted above, the shipowner will not be liable for damage resulting from certain types of natural disaster; from the intentional act or omission of a third party; or from the negligence of an authority responsible for the maintenance of navigational aids.<sup>177</sup> While the shipowner is exempt from liability in these cases, compensation may be available from the 1992 IOPC Fund. It should, however, be noted that so far, there have not yet been any cases of compensation being payable by the 1992 IOPC Fund due to the exoneration of the shipowner from liability under the 1992 CLC. It should also be noted that some of the exceptions to liability under the 1992 CLC are mirrored in the 1992 Fund Convention. These are detailed further below (at II.1.2).

(b) The shipowner liable for the damage under the 1992 CLC is financially incapable of meeting his obligations in full and any insurance or financial security of the shipowner does not cover/is insufficient to satisfy the claims for compensation for the damage.<sup>178</sup>

168. For instance, following the sinking of the *Vistabella*, resulting in an unknown quantity of heavy fuel oil being spilled, the 1971 IOPC Fund paid compensation amounting to FFfr 2,354,000 (around € 359,000) to the French Government in respect of clean-up operations. The *Vistabella* was not insured by a P&I Club but was covered by third party

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<sup>174</sup> Article 28(4), 1992 Fund Convention.

<sup>175</sup> There have been a number of claims that have been dismissed by the 1971 IOPC Fund in the past, because, at the date of the incident that caused the pollution damage, the 1971 Fund Convention had not yet entered into force for the State concerned. See “Incidents involving the IOPC Fund”, October 2009, at pp.71-77.

<sup>176</sup> Article 4(1)(a), 1992 Fund Convention. For example, in circumstances where the shipowner’s liability is excluded under the 1992 CLC.

<sup>177</sup> See Part I.2.3 above.

<sup>178</sup> Article 4(1)(b), 1992 Fund Convention. The claimant must first take all reasonable steps to pursue the legal remedies available to him.

liability insurance with a Trinidad insurance company. The insurer argued that the insurance did not cover the incident and refused to establish a limitation fund and take part in the claims-settlement procedure. The 1971 IOPC Fund consequently initiated legal proceedings to recover the amount paid by the Fund from the shipowner and his insurer.<sup>179</sup>

169. There have also been instances where the 1971 and 1992 IOPC Funds have paid compensation in cases where the vessel involved in the incident had no insurance whatsoever. In 2000, the *Al Jaziah I* sank near Abu Dhabi, resulting in between 100-200 tonnes of oil escaping from the wreck. The vessel was not entered with any classification society, nor did it hold any liability insurance, as its insurance policies had expired. At the time of the incident, the United Arab Emirates was a party to both the 1969/1971 Conventions as well as the 1992 Conventions, and it was decided that both sets of Conventions applied to the incident and that the liabilities were to be distributed between the two IOPC Funds on a 50:50 basis. Accordingly, the IOPC Funds settled various claims for clean-up costs and preventive measures, and jointly pursued the shipowner to recover the monies paid. What is interesting to note in this case is that the ship had not even been registered as an oil tanker; it was designed as a water carrier; and it had not been authorised by the United Arab Emirates' Ministry of Communications to carry oil. In the criminal proceedings against the Master, it was held that the ship did not fulfil basic safety requirements and that it was not fit to sail.<sup>180</sup>

(c) The damage exceeds the amount of the shipowner's limited liability under the 1992 CLC.<sup>181</sup>

170. There have been numerous instances where the IOPC Fund has provided compensation because the relevant loss claimed exceeded the shipowner's limit of liability under the 1992 CLC. A recent example is the compensation provided by the 1992 IOPC Fund for the major spill of around 19,800 tonnes of heavy fuel oil off the coast of France following the breaking into two of the *Erika* in 1999. As at October 2011, payments of compensation had been made in respect of 5,939 claims for a total of €129.7 million, out of which the shipowner's insurer had paid €12.8 million and the 1992 IOPC Fund had paid €116.9 million. The case is still ongoing.<sup>182</sup>

171. It should be noted that expenses reasonably incurred or sacrifices reasonably made by the shipowner on a voluntary basis, to prevent or minimize pollution damage, may also be compensated by the 1992 IOPC Fund; relevant claims will rank equally with other claims.<sup>183</sup>

## ***1.2 Are there circumstances under which the 1992 IOPC Fund will not provide compensation?***

172. The 1992 IOPC Fund will assess each claim to ensure, *inter alia*, that the loss or damage claimed falls within the scope of the 1992 Conventions, that the shipowner's

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<sup>179</sup> *IOPC Funds Annual Report 2008*, at pp. 56-57.

<sup>180</sup> *IOPC Funds Annual Report 2008*, at pp. 72-74.

<sup>181</sup> Article 4(1)(c), 1992 Fund Convention.

<sup>182</sup> For further information, see *Incidents involving the IOPC Funds 2011*, available on the IOPC website at [http://iopcfunds.org/npdf/incidents2011\\_e.pdf](http://iopcfunds.org/npdf/incidents2011_e.pdf).

<sup>183</sup> Article V(8), 1992 CLC.

liability has been exceeded, and that the claim is not time barred. Where the damage results from an incident that is not covered by the Conventions, then the IOPC Fund will not provide compensation. For example, in 1998, an estimated quantity of 262 tonnes of oil was spilled following an incident involving the *Maritza Sayalero* in Carenero Bay, Bolivarian Republic of Venezuela. As the incident was caused by a ruptured discharge pipe, the 1971 IOPC Fund considered that the Conventions did not apply to this incident and, consequently, did not provide any compensation for claims related to environmental damage or clean-up and preventive measures.<sup>184</sup>

173. Also, the 1992 IOPC Fund will incur no liability where the claimant cannot prove that the damage resulted from an incident involving one or more ships.<sup>185</sup> For instance, in 1994, claims were made against the 1971 IOPC Fund for clean-up and preventive measures following a spill from an unknown source in Mohammédia, Morocco. The 1971 IOPC Fund did not provide any compensation, as it was not established that the oil originated from a ship as defined in the 1969 CLC and 1971 Convention.<sup>186</sup> However, if the claimant can prove that the oil that caused the damage came from *a ship* (as defined in the 1992 Conventions); the 1992 IOPC Fund will be obliged to compensate the claimant. The 1992 IOPC Fund may therefore be liable for “mystery” oil spills where the ship that caused the damage cannot be identified.

174. In addition, there are certain, very limited, sets of circumstances where the IOPC Fund is exempt from liability and is therefore not required to provide compensation. These correspond to some of the exceptions of liability that are equally applicable under the 1992 CLC.<sup>187</sup> Thus, the 1992 IOPC Fund will not be liable where it proves that the pollution damage resulted from an *act of war, hostilities, civil war or insurrection*, or was *caused by oil which escaped or was discharged from a warship or other State-owned ship being used for non-commercial activities at the time of the incident*.<sup>188</sup>

175. Moreover, where the 1992 IOPC Fund proves that the pollution damage resulted wholly or partially from *negligence of the claimant or from an act or omission on the part of the claimant, done with the intent to cause damage*, the 1992 IOPC Fund may be discharged wholly or partially from its obligation to pay compensation.<sup>189</sup>

### ***1.3 What are the limits of compensation available from the 1992 IOPC Fund?***

176. The 1992 Fund Convention allows a claimant to recover compensation for pollution damage from the 1992 IOPC Fund in addition to any compensation received from the shipowner or his insurer<sup>190</sup> under the 1992 CLC, subject to an overall monetary limit. Thus, in certain circumstances, the IOPC Fund will “top up” the amount received

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<sup>184</sup> “Incidents involving the IOPC Fund”, October 2009, at p.93.

<sup>185</sup> Article 4(2)(b), 1992 Fund Convention.

<sup>186</sup> “Incidents involving the IOPC Fund”, October 2009, at p.87.

<sup>187</sup> See Part I.2.3 above.

<sup>188</sup> Article 4(2)(a), 1992 Fund Convention.

<sup>189</sup> Article 4(3), 1992 Fund Convention. In this respect, the 1992 IOPC Fund will also not be liable to the extent that the shipowner is exonerated from liability under the 1992 CLC, although the Fund remains liable in respect of preventive measures.

<sup>190</sup> Article 1(7), 1992 Fund Convention refers to the “Guarantor” as the person providing insurance or other financial security to cover the shipowner's liability under the 1992 CLC. For current purposes, the term “insurer” will be used interchangeably to refer to such persons.

from the shipowner or his insurer, while in others, the entire claim will be paid by the 1992 IOPC Fund.

177. For incidents occurring on or after 1 November 2003,<sup>191</sup> the liability of the 1992 IOPC Fund in respect of any one incident is limited to the aggregate sum of **203 million SDR** (approximately US\$ 313.21 million). This amount is available irrespective of the size of the ship and includes any compensation actually paid under the 1992 CLC.<sup>192</sup>

178. The same limit of liability applies in respect of pollution damage due to “*a natural phenomenon of an exceptional, inevitable and irresistible character*”.<sup>193</sup> However, in these cases, the liability limit of the IOPC Fund applies to *all pollution damage resulting from the phenomenon*, rather than to each individual pollution incident which the natural disaster may have caused.

179. It should be noted that the 1992 Fund Convention envisages a higher limit of liability of 300,740 million SDR in circumstances where three contributing State Parties to the 1992 Fund Convention receive 600 million tonnes or more of “contributing oil” in any one year.<sup>194</sup> This situation has, however, not yet arisen and appears to be unlikely in the near future.<sup>195</sup>

180. Where the total amount of claims exceeds the total amount of compensation available under both the 1992 CLC and the 1992 Fund Convention, the compensation paid to each claimant will be reduced proportionately. When there is a risk that this situation may arise, the 1992 IOPC Fund may have to restrict compensation payments to ensure that all claimants are given *equal treatment*.<sup>196</sup> The payment level may however be increased at a later stage, if the uncertainty about the total amount of established claims is reduced.<sup>197</sup> This has happened in a number of cases including the sinking of the *Pontoon 300* in 1998. In that incident, in view of the uncertainty regarding the total amount of claims for compensation, the 1971 IOPC Fund limited its payments to 75% of the loss or damage actually suffered by each claimant. It was, however, later decided to increase the level of payments to 100% of all settled claims. For Contracting States to the 2003 Supplementary Fund Protocol, claimants may also be able to claim against the Supplementary IOPC Fund for the remainder of their losses.

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<sup>191</sup> As noted in para.29 above, amendments of the limits of compensation available under the 1992 CLC and 1992 Fund Convention were introduced in 2000 and entered into force on 1 November 2003.

<sup>192</sup> Article 4(4)(a), 1992 Fund Convention.

<sup>193</sup> Article 4(4)(b), 1992 Fund Convention. Note that liability of the shipowner for pollution damage caused by this type of natural phenomenon is excluded under Article III(2)(a), 1992 CLC.

<sup>194</sup> Article 4(4)(c), 1992 Fund Convention. Thus, if, at any given time, three Member States reach a combined quantity of “contributing oil” of 600 million tonnes or more, the compensation limit would rise from 203 million SDR to 300.74 million SDR for any incident in any Contracting State in that year. The limit would be maintained at that level for as long as the 600 million tonnes threshold is maintained.

<sup>195</sup> Communication by the secretariat of the IOPC Fund. At present, Japan is the biggest contributor to the 1992 IOPC Fund with 217 million tonnes; India, the Republic of Korea, and Italy are the next largest contributors with 150 million tonnes or less.

<sup>196</sup> See further Oosterveen W (2004), “Some recent developments regarding liability for damage resulting from oil pollution - from the perspective of an EU member state”, *Env. L. Rev.*, 223-239 (228-229).

<sup>197</sup> *Claims Manual*, fn. 112, above, at p.11.

## 2. Contributions to the 1992 IOPC Fund

181. The 1992 IOPC Fund is financed by contributions from oil receivers in each Contracting State to the 1992 Fund Convention. Annual contributions to the 1992 IOPC Fund must be made in respect of each Contracting State by any person who, in any calendar year, has received total quantities of “*contributing oil*” exceeding 150,000 tonnes, which has been *carried by sea* to the ports or terminal installations in the territory of that State.<sup>198</sup> Accordingly, oil importers, but *not* oil exporters, in Contracting States contribute to the 1992 IOPC Fund.

182. As already noted earlier, Contracting States in which no company or entity is liable to pay contributions<sup>199</sup> benefit from the substantial compensation available under the 1992 Fund Convention without incurring any financial burden. Contracting States are required, under their national law, to ensure that any obligation to contribute in respect of oil received in its territory is fulfilled.<sup>200</sup> A Contracting State is, however, not responsible for the payment of individual contributions, unless it has voluntarily assumed such responsibility.<sup>201</sup> Accordingly, Contracting States do not pay contributions unless they choose to do so, and only a few States have done this.

183. Each Contracting State is required to report to the 1992 IOPC Fund, on an annual basis, the name and address of any person in the State who is liable to contribute to the 1992 IOPC Fund, as well as data on the relevant quantities of “contributing oil” received by that person during the preceding calendar year.<sup>202</sup> Such persons<sup>203</sup> could be private companies, State-owned companies or Government authorities.<sup>204</sup>

184. “Contributing oil” refers to crude oil and fuel oil, as further defined in the 1992 Fund Convention.<sup>205</sup> The explanatory notes to the IOPC Fund standard form for reporting “contributing oil” also provides a list of examples of both contributing and non-contributing oil.<sup>206</sup>

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<sup>198</sup> Article 10(1)(a), 1992 Fund Convention. See also Article 10(1)(b).

<sup>199</sup> Such Contracting States should notify the Director accordingly.

<sup>200</sup> Article 13(2), 1992 Fund Convention.

<sup>201</sup> See Article 14, 1992 Fund Convention.

<sup>202</sup> Article 15, 1992 Fund Convention. Such reports should be submitted using the standard form provided by the IOPC Fund.

<sup>203</sup> The term “person” includes any individual, partnership or public or private body, whether corporate or not, including a State or any of its constituent subdivisions, Article 1(2), 1992 CLC; Article 1(2), 1992 Fund Convention.

<sup>204</sup> Only those receiving more than 150,000 metric tonnes of “contributing oil” in the applicable year need to be reported. Note however, where the aggregate amount of “contributing oil” received by “associated persons” exceeds 150,000 tonnes, each person shall pay contributions in respect of the amount received by him notwithstanding that the individual quantity did not exceed 150,000 tonnes, Article 10(2)(a), 1992 Fund Convention. “Associated person” relates to any subsidiary or commonly controlled entity, and is a question for determination by national law, Article 10(2)(b), 1992 Fund Convention.

<sup>205</sup> Article 1(3)(a) and (b), 1992 Fund Convention.

<sup>206</sup> *Explanatory notes to the IOPC Fund standard form for reporting “contributing oil”*, p. 4.

185. “Contributing oil” should be counted each time it is received at a port or terminal installation<sup>207</sup> situated in a Contracting State after it has been carried by sea.<sup>208</sup> “Received” refers to receipt into tankage or storage immediately after carriage, and discharge into a floating tank within the territorial waters of a Contracting State will also constitute a receipt, irrespective of whether the tank is connected with onshore installations or not.<sup>209</sup> Ship-to-ship transfers do not constitute as receipts, irrespective of where or how such transfers take place.<sup>210</sup>

186. It is important to note that “contributing oil” may include both oil that has been carried from abroad or from another port in the same State (domestic coastal transport), transported by ship from an offshore production rig or received for transshipment to another port or for further transport by pipeline.<sup>211</sup> The first physical receiver of oil in a Contracting State is liable to pay, as long as the “contributing oil” has been carried by sea. Thus companies that receive oil temporarily in a storage facility for others may also be liable to contribute.

187. Annual contributions are levied by the 1992 IOPC Fund, taking into consideration the anticipated payments of compensation for the coming year, expenditure of the 1992 IOPC Fund including administrative expenses, and any income.<sup>212</sup> Income may include surplus funds from previous years including any interest, annual contributions and any other income. The amount of the annual contribution is then calculated by dividing the relevant total amount of contributions required by the total amount of “contributing oil” received in all Contracting States in the relevant year.<sup>213</sup> Consequently, each contributor will be required to pay annually a specified amount per tonne of “contributing oil” received.

188. Once the amount of annual contributions has been levied by the 1992 IOPC Fund, each contributor will receive an invoice for their contribution. Payment by individual contributors is made directly to the 1992 IOPC Fund. A system of ‘deferred invoicing’ exists whereby the contributor will only pay part of his annual contribution by 1 March of the following year, and the remaining amount (or part of the remaining amount) will only be paid if it is required to provide funding for successful claims. Where required, the contributor will be invoiced for the remaining amount later in the year. The amounts of compensation paid out by the 1992 IOPC Fund for oil pollution damage varies considerably from year to year, as it is dependent on the number and gravity of incidents that create pollution damage. As a consequence, the amount of contributions levied by the

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<sup>207</sup> “Terminal installation” refers to any site for the storage of oil in bulk which is capable of receiving oil from waterborne transportation; including any facility situated off-shore and linked to such site, Article 1(8), 1992 Fund Convention.

<sup>208</sup> Article 10(1)(a), 1992 Fund Convention. See also Article 10(1)(b). “Carriage by sea” does not include movement within the same port area.

<sup>209</sup> *Explanatory notes to the IOPC Fund standard form for reporting “contributing oil”*, at p 2.

<sup>210</sup> Ships may, however, be considered as floating tanks if they are ‘dead’ ships; that is, if they are not ready to sail, or if they are permanently or semi-permanently at anchor. In this respect, see also the discussion in Document IOPC/OCT11/4/4, a detailed legal opinion in respect of the definition of “ship”, which was subsequently considered by the Assembly at its October 2011 session.

<sup>211</sup> *Explanatory notes to the IOPC Fund standard form for reporting “contributing oil”*, at p 4.

<sup>212</sup> Article 12, 1992 Fund Convention.

<sup>213</sup> Article 12(3), 1992 Fund Convention.

Fund will also differ each year. An overview of contributions levied by the 1992 IOPC Fund during the period 1996-2010 is set out in Table 3, above.<sup>214</sup>

### **3. Jurisdiction and Time Limit for Proceedings**

#### ***3.1 Where must a claim for compensation be brought?***

189. Actions against the 1992 IOPC Fund for compensation should be brought before the courts of the State Party who would also have jurisdiction under the 1992 CLC.<sup>215</sup>

190. Where an action has been brought against a shipowner or his insurer before the courts of a State that is a Contracting Party to both 1992 Conventions, those courts will have exclusive jurisdictional competence over any actions against the 1992 IOPC Fund for compensation in respect of the same damage. Where however, an action for compensation has been brought before the courts of a State who is not a Contracting Party to the 1992 Fund Convention, any action against the 1992 IOPC Fund can, at the option of the claimant, be brought before the courts of the State where the 1992 IOPC Fund has its headquarters (England), or before the courts of any State Party who would also have jurisdiction under the 1992 CLC.<sup>216</sup>

191. Where an action has been brought against a shipowner or his insurer under the 1992 CLC, each party will be entitled to notify the 1992 IOPC Fund of the proceedings. Such notification will allow the 1992 IOPC Fund to intervene in the proceedings, and consequently, any final judgment of the court will also be binding on the 1992 IOPC Fund.<sup>217</sup> Nevertheless, the 1992 IOPC Fund has a general right to intervene as a party to any legal proceedings instituted against the shipowner or his insurer,<sup>218</sup> and the 1992 IOPC Fund will not be bound by any judgment or decision in proceedings or by any settlement to which it has not been a party.<sup>219</sup>

192. Judgments given by a court with jurisdiction as outlined above must be recognised in all Contracting States, except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.<sup>220</sup> Such judgments will be enforceable in each Contracting State as soon as any formalities required by that State have been complied with.<sup>221</sup>

#### ***3.2 When will rights to compensation be extinguished?***

193. The time bar under the 1992 Fund Convention<sup>222</sup> is similar to the time bar under the 1992 CLC. In order to prevent a claim from becoming time-barred, *an action must be*

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<sup>214</sup> Extracted from “The International Regime for Compensation for Oil Pollution Damage”, Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds, January 2012”.

<sup>215</sup> Article 7(1), 1992 Fund Convention. See Part I.4 above.

<sup>216</sup> Article 7(3), 1992 Fund Convention.

<sup>217</sup> Article 7(6), 1992 Fund Convention.

<sup>218</sup> Article 7(4), 1992 Fund Convention.

<sup>219</sup> Article 7(5), 1992 Fund Convention.

<sup>220</sup> Article 8, 1992 Fund Convention and Article X(1)(a)-(b), 1992 CLC.

<sup>221</sup> Article 8, 1992 Fund Convention and Article X(2), 1992 CLC. Any formalities that require performance to enforce a judgment must not permit the merits of the case to be re-opened.

<sup>222</sup> Article 6(1), 1992 Fund Convention.

brought against the 1992 Fund or notification of an action against the shipowner or his insurer must be made to the Fund<sup>223</sup> within three years from the date when the damage occurred. However, in no case may actions be brought against the 1992 IOPC Fund after six years from the date of the incident which caused the damage. This means that even where the claimant has notified the IOPC Fund of an action against the shipowner or his insurer within the initial three year period, a claim against the IOPC Fund will still be time-barred unless the claimant brings an action against the Fund within six years of the date of the incident. The dual time bar aims to provide an extension in circumstances where, for example, it is not immediately evident that the shipowner will be unable to provide the requisite compensation or that the damages will exceed the shipowner's liability.

194. It must be stressed that where an action has not been brought against the IOPC Fund within the six year period, claims will be strictly time-barred, i.e. rights will be extinguished.

195. Following the incident involving the Greek tanker *Nissos Amorgos* in 1997 in the Gulf of Venezuela, legal actions by the Bolivarian Republic of Venezuela were brought against the shipowner and his P&I insurer. However, no claims were brought against the 1971 IOPC Fund, and even though the Fund intervened in the proceedings, the actions could not have resulted in a judgment against the Fund. Accordingly, the claims by the Bolivarian Republic of Venezuela were held to be time-barred *vis-à-vis* the 1971 IOPC Fund.<sup>224</sup> Furthermore, litigation is still ongoing in relation to the incident involving the *Plate Princess* in the Bolivarian Republic of Venezuela in 1997 on the interpretation of the time-bar provisions, and whether a sufficient notification had been made to the IOPC Fund in that case.<sup>225</sup> Given the importance of the time bar, claimants are advised to initiate actions against the IOPC Fund within the relevant time limits, even where it is not clear that the compensation claimed will exceed the shipowner's limits of liability; this will ensure that any potential claims against the IOPC Fund are not excluded for mere procedural reasons.

### III. 2003 SUPPLEMENTARY FUND PROTOCOL

196. The 2003 Supplementary Fund Protocol<sup>226</sup> established the Supplementary IOPC Fund to provide compensation for oil pollution damage in circumstances where the protection afforded by the 1992 CLC and the 1992 Fund Convention is inadequate. To date, no claims have been made against the Supplementary IOPC Fund.

197. The Supplementary IOPC Fund will only provide compensation for oil pollution damage to the Contracting States of the Supplementary Fund Protocol, for incidents which occur after the Protocol has entered into force for the State concerned. Again, it is important to note that, in order to become a Party to the 2003 Supplementary Fund Protocol, States must also become a Party to the 1992 Fund Convention.<sup>227</sup>

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<sup>223</sup> See Article 7(6), 1992 Fund Convention.

<sup>224</sup> *IOPC Funds Annual Report 2008*, at pp. 61-66.

<sup>225</sup> For further information see *IOPC Annual Report 2008* at pp. 66-70, and "Incidents involving the IOPC Fund", October 2009, at pp. 60-64.

<sup>226</sup> See further Gaskell N and Forrest C (2008), "Marine pollution damage in Australia: implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003", *University of Queensland Law Journal*, 103-165 (115-125).

<sup>227</sup> Article 19(3), 2003 Supplementary Fund Protocol.

## 1. Compensation from the Supplementary IOPC Fund

### 1.1 *When will compensation be available?*

198. As the 2003 Supplementary Fund Protocol complements the 1992 Conventions, it will *only provide compensation* for an “established claim”.<sup>228</sup> Such claims are those that have been recognised by the 1992 IOPC Fund or have been accepted as admissible by a decision of a competent Court binding upon the 1992 IOPC Fund, which would have been fully compensated if the limits of limitation in the 1992 Fund Convention had not been applied to that incident.<sup>229</sup> Therefore, the Supplementary IOPC Fund will provide compensation to any person suffering pollution damage where they have been unable to obtain full and adequate compensation for an established claim under the 1992 Fund Convention, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation provided by the 1992 Fund Convention.<sup>230</sup> Accordingly, the Supplementary IOPC Fund is available to “top up” a claim for pollution damage where the limitation amounts under the 1992 Fund Convention are insufficient to fully compensate a claim.

### 1.2 *Are there circumstances under which the Supplementary IOPC Fund will not provide compensation?*

199. As the Supplementary IOPC Fund will only be liable in respect of an established claim, there are no further provisions on exemptions or exclusions from liability under the Supplementary Fund Protocol. Even so, compensation may be temporarily or permanently denied where certain requirements of the Protocol have not been fulfilled.

200. No compensation will be paid by the Supplementary IOPC Fund until the reporting obligations relating to oil receipts under Article 13(1) or with regard to no person receiving total quantities of “contributing oil” exceeding 150,000 tonnes under Article 15(1) have been complied with, in respect of that Contracting State for all years prior to the occurrence of the incident.<sup>231</sup> Where compensation has been denied temporarily, it will be denied permanently in respect of that incident if the reporting obligations have not been complied with within one year after the Director of the Supplementary IOPC Fund has notified the Contracting State of its failure to report.<sup>232</sup>

### 1.3 *What are the limits of compensation available from the Supplementary IOPC Fund?*

201. The aggregate amount of compensation payable by the Supplementary IOPC Fund, in respect of any one incident, is limited to **750 million SDR** (approximately US\$ 1157,1 million).<sup>233</sup> This amount is inclusive of any compensation actually received under the 1992 Conventions.

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<sup>228</sup> Article 4(4), 2003 Supplementary Fund Protocol.

<sup>229</sup> Article 1(8), 2003 Supplementary Fund Protocol.

<sup>230</sup> Article 4(1), 2003 Supplementary Fund Protocol.

<sup>231</sup> Article 15(2), 2003 Supplementary Fund Protocol.

<sup>232</sup> Article 15(3), 2003 Supplementary Fund Protocol.

<sup>233</sup> Article 4(2)(a), 2003 Supplementary Fund Protocol.

202. Being a Contracting State to the 2003 Supplementary Fund Protocol has an additional important advantage. No matter how serious the pollution incident may be, it is extremely unlikely that claims for compensation from the Supplementary IOPC Fund will need to be reduced proportionately between claimants. The extensively higher limits of liability should enable all claimants to receive 100% compensation.

## **2. Contributions to the Supplementary IOPC Fund**

203. The Supplementary IOPC Fund is financed by the same method of contributions as the 1992 IOPC Fund. Namely, annual contributions to the Supplementary IOPC Fund must be made in respect of each Contracting State by oil importers who, in any calendar year, have received total quantities of “contributing oil” exceeding 150,000 tonnes, which has been *carried by sea* to the ports or terminal installations in the territory of that State.<sup>234</sup>

204. The reporting obligations of Contracting States under the 1992 Fund Convention are also required by the 2003 Supplementary Fund Protocol.<sup>235</sup> That is, each Contracting State is required to annually report to the Supplementary IOPC Fund details, including data on the relevant quantities of “contributing oil” received, of any person who may be liable to contribute to the Supplementary IOPC Fund. It should be noted, however, that reports made under the 1992 Fund Convention will be deemed to have also been made under the 2003 Supplementary Fund Protocol. Where there is no person who has received total quantities of “contributing oil” exceeding 150,000 tonnes in a Contracting State, that State is obliged to inform the Director of the Supplementary IOPC Fund.<sup>236</sup>

205. Calculation of contributions for the Supplementary IOPC Fund is determined in a similar way to that under the 1992 Fund Convention.<sup>237</sup> In brief, “contributing oil” should be counted each time it is received at a port or terminal installation situated in a Contracting State after it has been carried by sea. Annual contributions are then levied by the Supplementary IOPC Fund, taking into consideration the anticipated payments of compensation for the coming year, expenditure of the Supplementary IOPC Fund including administrative expenses, and any income.<sup>238</sup> The amount of the annual contributions is then calculated by dividing the relevant total amount of contributions required by the total amount of “contributing oil” received in all Contracting States in the relevant year.<sup>239</sup> Consequently, each contributor will be required to pay annually a specified amount per tonne of “contributing oil” received.

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<sup>234</sup> Article 10(1)(a), 2003 Supplementary Fund Protocol. See also Article 10(1)(b). The same regime in relation to “associated persons” as that in the 1992 Fund Convention also applies in respect of the 2003 Supplementary Fund Protocol, Article 10(2), 2003 Supplementary Fund Protocol. Accordingly, where the aggregate amount of “contributing oil” received by associated persons exceeds 150,000 tonnes, each person shall pay contributions in respect of the amount received by him notwithstanding that the individual quantity did not exceed 150,000 tonnes, Article 10(2)(a), 1992 Fund Convention. “Associated person” relates to any subsidiary or commonly controlled entity, and is a question for determination by national law, Article 10(2)(b), 1992 Fund Convention.

<sup>235</sup> Article 13(1), 2003 Supplementary Fund Protocol. See Article 15, 1992 Fund Convention.

<sup>236</sup> Article 15(1), 2003 Supplementary Fund Protocol.

<sup>237</sup> See Part II.2 above.

<sup>238</sup> Article 11, 2003 Supplementary Fund Protocol.

<sup>239</sup> Article 11(3), 2003 Supplementary Fund Protocol.

206. Once the amount of annual contributions has been levied by the Supplementary IOPC Fund, each contributor will receive an invoice for their contribution. The same system of ‘deferred invoicing’ exists under the Supplementary IOPC Fund as under the 1992 IOPC Fund.<sup>240</sup> This means that contributors must pay part of their annual contribution by 1 March of the following year, and the remaining amount (or part of the remaining amount) will only be paid if it is required. Where required, the contributor will be invoiced for the remaining amount later in the year. Payment by individual contributors should be made directly to the Supplementary IOPC Fund.

207. Contracting States are required, under their national law, to ensure that any obligation to contribute in respect of oil received in its territory is fulfilled.<sup>241</sup> A Contracting State is not responsible however, for the payment of individual contributions, unless it has voluntarily assumed such responsibility.<sup>242</sup>

208. The 2003 Supplementary Fund Protocol differs from the 1992 Fund Convention however, as, for the purposes of paying contributions, it is *deemed* that a minimum of 1 million tonnes of “contributing oil” is received in each Contracting State.<sup>243</sup> Where the aggregate amount of “contributing oil” received is less than 1 million tonnes, the Contracting State is required to assume the obligations that would otherwise be incumbent on persons liable to contribute under the Protocol.<sup>244</sup> As a consequence, a Contracting State may be liable to pay contributions for a quantity of “contributing oil” corresponding to the difference between the aggregate quantity of actual oil receipts reported in respect of that State, and 1 million tonnes.

209. There have been no incidents so far that have required compensation from the Supplementary IOPC Fund. As a result, since 2007, no levies have been made.

### **3. Jurisdiction and Time Bar**

#### ***3.1 Where must a claim for compensation be brought?***

210. The jurisdictional provisions of the 1992 Fund Convention (except for Article 7(3)) also apply to actions for compensation for an established claim brought against the Supplementary IOPC Fund.<sup>245</sup> As a consequence, actions against the Supplementary IOPC Fund should be brought before the courts of the State Party who would also have jurisdiction under the 1992 CLC,<sup>246</sup> namely, the courts of the State Party in whose territory, territorial sea, EEZ or equivalent area the damage occurred.

211. Where an action for compensation for pollution damage has been brought before a court competent under the 1992 CLC, that court will have exclusive jurisdictional competence over any actions against the Supplementary IOPC Fund for compensation in respect of the same damage. Where however, an action for compensation has been brought

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<sup>240</sup> See Part II.2 above.

<sup>241</sup> See Article 12(1), 2003 Supplementary Fund Protocol and Article 13(2), 1992 Fund Convention.

<sup>242</sup> See Article 12(2), 2003 Supplementary Fund Protocol and Article 14, 1992 Fund Convention.

<sup>243</sup> Article 14(1), 2003 Supplementary Fund Protocol.

<sup>244</sup> Article 14(2), 2003 Supplementary Fund Protocol.

<sup>245</sup> Article 7(1), 2003 Supplementary Fund Protocol. See Article 7, 1992 Fund Convention.

<sup>246</sup> See Article 7(1), 1992 Fund Convention and Part I.4 above.

before the courts of a State who is not a Contracting Party to the 2003 Supplementary Fund Protocol, any action against the Supplementary IOPC Fund can, at the option of the claimant, be brought before the courts of the State where the Supplementary IOPC Fund has its headquarters (England), or before the courts of any State Party who would also have jurisdiction under the 1992 CLC.<sup>247</sup>

212. Alternatively, where an action for compensation against the 1992 IOPC Fund has been brought before a court in a Contracting State to the 1992 Fund Convention but not to the 2003 Supplementary Fund Protocol, any related action against the Supplementary IOPC Fund can, at the option of the claimant, be brought either before the courts of the State where the Supplementary IOPC Fund has its headquarters (England), or before the courts of any State Party who would also have jurisdiction under the 1992 CLC.<sup>248</sup>

213. Final judgments given by competent courts against the Supplementary IOPC Fund must be recognised and enforced in all Contracting States,<sup>249</sup> except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.<sup>250</sup> Such judgments will be enforceable in each Contracting State as soon as any formalities required by that State have been complied with.<sup>251</sup>

### ***3.2 When will rights to compensation be extinguished?***

214. Except where compensation is denied under the 2003 Supplementary Fund Protocol,<sup>252</sup> rights to compensation against the Supplementary IOPC Fund will only be extinguished if they are extinguished against the 1992 IOPC Fund under the 1992 Fund Convention.<sup>253</sup> Accordingly, claims for compensation must be brought or a notification to the Supplementary IOPC Fund must be made<sup>254</sup> within three years from the date when the damage occurred. However, in no case can actions be brought after six years from the date of the incident which caused the damage. Again, the dual time bar allows for claims to be made after the initial time bar has expired, where, for example, it was not immediately apparent that the limits under the 1992 Fund Convention would be insufficient to compensate claimants.

## **IV. THE RELATIONSHIP BETWEEN THE CLC-IOPC FUND REGIME AND THE GLOBAL LIMITATION CONVENTIONS**

215. As stated above, under the 1992 CLC the shipowner is entitled to limit his liability to an amount based on the tonnage of his ship. A unique privilege of the maritime industry to limit liability has existed for hundreds of years,<sup>255</sup> developing today into two separate

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<sup>247</sup> Article 7(2), 2003 Supplementary Fund Protocol.

<sup>248</sup> Article 7(3), 2003 Supplementary Fund Protocol.

<sup>249</sup> Article 8(1), 2003 Supplementary Fund Protocol. See also Article X, 1992 CLC.

<sup>250</sup> Article X(1)(a)-(b), 1992 CLC.

<sup>251</sup> Article X(2), 1992 CLC. Any formalities that require performance to enforce a judgment must not permit the merits of the case to be re-opened.

<sup>252</sup> See Article 15(2) and (3), 2003 Supplementary Fund Protocol, and Part III.1.2 above.

<sup>253</sup> Article 6(1), 2003 Supplementary Fund Protocol. See Article 6, 1992 Fund Convention.

<sup>254</sup> See Article 7(6), 1992 Fund Convention.

<sup>255</sup> See further, Griggs P, Williams R and Farr J (2005). *Limitation of Liability for Maritime Claims*. London: Informa, 4th ed. For a critical analysis of the maritime entitlement to limit liability, see Lord Mustill (1993), "Ships are different - or are they?", *Lloyd's Maritime and Commercial Law Quarterly*, 490-501; Gauci G

classifications. On the one hand, limitation of liability is available to the shipowner under *incident-specific liability regimes* including, for example, the carriage of goods or passengers, and, as described in this report, oil pollution. By contrast, *global liability regimes* have been established that limit the shipowner's liability to an aggregate amount for any one incident, irrespective of the type of action against the shipowner. The global limitation convention in force, if at all, will depend on the law in the State concerned, and may be one of the following international conventions<sup>256</sup>:

- The International Convention relating to the Limitation of Liability of Owners of Sea-going Ships 1957 (1957 Limitation Convention);<sup>257</sup>
- The Convention on Limitation of Liability for Maritime Claims 1976 (1976 LLMC);<sup>258</sup>
- The Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 LLMC Protocol.<sup>259</sup>

216. Under the 1976 LLMC, claims for oil pollution damage within the meaning of the 1992 CLC are expressly excluded by Article 3(b).<sup>260</sup> This means that claims for oil pollution damage against the shipowner will only be limited by the regime provided under the 1992 CLC, irrespective of the limits provided by the 1976 LLMC. Furthermore, such claims cannot be used in the calculation of aggregate claims against the shipowner for the purpose of global limitation. This exclusion was not amended by the 1996 LLMC Protocol and remains in place for Contracting States to the 1976 LLMC, as amended by the 1996 Protocol.

217. The 1957 Limitation Convention, however, was drafted before the 1969 CLC, and therefore does not expressly exclude claims for oil pollution. Even so, if the pollution damage falls under the definition provided by the 1969 CLC, the owner of the ship cannot incur liability outside the Convention, and liability of certain other parties will be excluded by its channelling provisions. Nevertheless, there may be other parties who could be held

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(1995), "Limitation of Liability in Maritime Law: an anachronism", *Marine Policy*, 65-74; Steel D (1995), "Ships are different: the case for limitation of liability", *Lloyd's Maritime and Commercial Law Quarterly*, 77-87.

<sup>256</sup> An earlier convention, the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels 1924 ("the 1924 Limitation Convention") has since been over taken by the 1957 Limitation Convention and later the 1976 LLMC. The 1924 Limitation Convention had been adopted on 25 August 1924 and entered into force on 2 June 1931.

<sup>257</sup> The 1957 Limitation Convention was adopted on 10 October 1957 and entered into force on 31 May 1968. At present, it remains in force for a limited number of Contracting States. Full status information is available on the website of the Depository, the Belgian Ministry of Foreign Affairs [http://diplomatie.belgium.be/fr/traites/la\\_belgique\\_depositaire/](http://diplomatie.belgium.be/fr/traites/la_belgique_depositaire/).

<sup>258</sup> The 1976 LLMC was adopted on 19 November 1976, under the auspices of the IMO, and entered into force on 1 December 1986. The Convention currently has 52 Contracting States representing 51.95% of world tonnage.

<sup>259</sup> Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976. The 1996 LLMC Protocol was adopted on 2 May 1996 and entered into force on 13 May 2004. The Protocol currently has 45 Contracting States, amounting to 45.67% of world tonnage. See further, Griggs et al., fn 255 above, Chapter 3.

<sup>260</sup> The exact wording of the exclusion is as follows: "claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage dated 29th November 1969 or of any amendment or Protocol thereto which is in force," which therefore applies to the 1992 CLC.

liable for the pollution damage who would not be protected by the Civil Liability Conventions. In such circumstances, only those persons entitled to limit their liability under the 1957 Limitation Convention, for example charterers, would be eligible to do so.<sup>261</sup>

218. It is worth noting that certain provisions found in the Civil Liability Conventions, for example, the test of conduct barring the shipowner's right to limit his liability,<sup>262</sup> are modelled on those found in the 1957 Limitation Convention (1969 CLC) and the 1976/1996 LLMC (1992 CLC). Thus, case law relating to such provisions may also be a useful tool of interpretation.

219. It is important to note that the limits of liability in the Civil Liability Conventions are only applicable to claims in respect of pollution damage as defined under each Convention. The global limitation conventions may therefore have a significant role to play in relation to any other liabilities that may have arisen from the causal incident that would need to be compensated separately. The very different regimes under each global limitation convention and the very different limits of liability would need to be taken into consideration.<sup>263</sup>

220. Furthermore, the exclusion of oil pollution under the 1976 LLMC only refers to that described under the 1992 CLC, and does not therefore apply to spills of bunker oil from non-tankers. This is reflected in the fact that the 2001 Bunker Oil Pollution Convention does not provide its own limits of liability for the shipowner, but instead makes express reference to any applicable national or international regime, *such as* the 1976 LLMC.

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<sup>261</sup> Article 6(2), 1957 Limitation Convention. See further, *Shipping and the Environment*, fn. 22 above, at p 789.

<sup>262</sup> See Part I.2.4 above.

<sup>263</sup> For an examination of the two global limitation conventions in relation to pollution and HNS damage, see *Shipping and the Environment*, fn. 22 above, Chapter 22.





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