A study on the definition of ship related seaborne oil transportation

Seokjin Kang

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A study on the definition of ship related seaborne oil transportation

By
Seokjin KANG
Republic of Korea

A dissertation submitted to the World Maritime University in partial Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE
In
MARITIME AFFAIRS
(MARITIME LAW AND POLICY)

2018

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DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature):

(Date):

18 September 2018

Supervised by: Associate Professor Henning Jessen

Supervisor’s affiliation: MLP
ACKNOWLEDGEMENTS

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I am very much grateful to my distinguish supervisor, Professor Henning Jessen, who led me to this dissertation topic with valuable comments. In addition, I owe my deepest gratitude to Lecturer Anne Pazaver for her sincere review of this dissertation.

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I would like to deliver my deepest appreciation to my parents and mother-in-law for wishing my success of this study. Lastly, I have to express my special thanks to my wife and lovely three children for their support and patience.
ABSTRACT

Title of dissertation: A Study on the definition of ship related seaborne oil transportation.

Degree: Master of Science

The shipping industry has contributed to improving the global imbalance of oil supply and demand, but seaborne oil transportation potentially presents an issue of oil spill incident. To provide adequate liability and compensation scheme, IMO introduced the international regime consisting of CLC and FUND. IOPC Funds, as a governing body of the regime, has developed a number of decisions related to the scope and application of the regime.

The definition of “ship” is one of import agenda since it is determining the scope of the regime. However, a number of incidents such as the Olympic Bravery case, the Santa case and Slops case illustrated the uncertainties surrounding the regime. Moreover, the increased complexity of seaborne oil transportation demands a clearer interpretation on the definition of “ship”. Consequently, this demands led to the introduction of IOPC Funds’ Guidance.

To promote a comprehensive understanding of the definition of “ship”, nine oil spill incidents cases were used for analysis. In addition, other IMO instruments providing distinct liability and compensation scheme were reviewed to identify any legal gab in the CLC and FUND regime. Furthermore, the IOPC Funds' Guidance was analyzed to examine to its validity.

The result of this study showed that there is a certain legal gabs concerning the scope and application of the international regime. However, the result also highlighted that a considerable awareness and commitment of all concerned parties involving in seaborne oil transportation can minimize the risk of legal gabs.

KEYWORDS: the definition of ship, Seaborne oil transportation, CLC, FUND, liability and compensation
# TABLE OF CONTENTS

DECLARATION.......................................................................................................................... ii

ACKNOWLEDGEMENTS.......................................................................................................... iii

ABSTRACT ................................................................................................................................ iv

TABLE OF CONTENTS .......................................................................................................... v

LIST OF TABLES .................................................................................................................... vii

LIST OF FIGURES ................................................................................................................ viii

LIST OF ABBREVIATIONS ...................................................................................................... ix

1. INTRODUCTION.............................................................................................................. 1
   1.1. Background .............................................................................................................. 1
   1.2. Objectives ............................................................................................................... 4
   1.3. Structure of the dissertation .................................................................................. 5
   1.4. Limitation of the Study .......................................................................................... 5

2. International regime for oil pollution damage ................................................................. 7
   2.1. Threat from seaborne oil transportation ................................................................ 7
   2.2. Concept of the international liability and compensation regime ....................... 8
   2.3. CLC – the first tier of compensation ..................................................................... 10
   2.4. FUND – the second tier of compensation ............................................................... 11

3. Other IMO Conventions on liability matters ................................................................. 14
   3.1. Liability under LLMC ............................................................................................ 14
   3.2. Liability under BUNKER ....................................................................................... 15
   3.3. Liability under WRC ............................................................................................. 16

4. Case study on the IOPC Funds’ decisions .................................................................... 17
   4.1. In the old ‘1969 CLC and 1971 FUND’ regime ..................................................... 17
      4.1.1. Case 1: Unladen tanker - Olympic Bravery ..................................................... 17
4.1.2. Case 2: Residues – Tolmiros and Santa Anna................................. 18
4.1.3. Case 3: Laden OBO– Aegean Sea .................................................. 20
4.1.4. Case 4: Flat-top barge - Pontoon 300 incident .............................. 21
4.1.5. Case 5: Improper use - Dolly and Zeinab .................................... 23
4.1.6. Case 6: Inland tanker at sea - Al Jaziah 1 .................................... 25
4.1.7. Decisions in the old regime .............................................................. 26
4.2. In the new regime ............................................................................ 28
4.2.1. Case 7: Conclusion of the second intersessional Working Group .... 28
4.2.2. Case 8: Fixed facility - the Slops .................................................. 30
4.2.3. Case 9: Vessels engaged in Ship-To-Ship operation ................... 33
4.3. IOPC Funds’ Guidance for member States ....................................... 34
4.3.1. Illustrative lists of “ship” and non-“ship” ....................................... 36
4.3.2. Grey Areas: Maritime Transport Chain ....................................... 37
5. Analysis of the IOPC Funds’ Guidance .............................................. 39
5.1. Hypothesis ....................................................................................... 39
5.2. Case selection .................................................................................. 40
5.3. Analysis of the Hypothesis ‘A’ ....................................................... 40
5.4. Analysis of the Hypothesis ‘B’ ....................................................... 43
6. Conclusion .......................................................................................... 45
REFERENCES ......................................................................................... 47
LIST OF TABLES

Table 1. Average annual oil spill incidents since the 1970's ........................................... 7
Table 2. Total available amount of compensation under CLC and FUND ................................. 12
Table 3. The limit of liability under LLMC and CLC ............................................................. 15
Table 4. Summary of the Olympic Bravery incident ................................................................. 18
Table 5. Summary of the Santa Anna incident .......................................................................... 19
Table 6. Summary of the Aegean Sea incident ......................................................................... 21
Table 7. Summary of the Pontoon 300 incident ........................................................................ 22
Table 8. Summary of the Dolly incident .................................................................................... 23
Table 9. Summary of the Zeinab incident .................................................................................. 24
Table 10. Summary of the Al Jaziah 1 incident ......................................................................... 25
Table 11. Summary of decisions in the old regime ..................................................................... 26
Table 12. Summary of the Slops incident .................................................................................. 31
Table 13. Judgements of the Greek Courts in the Slops case ..................................................... 32
Table 14. Questions and decisions related to vessels engaged in STS .......................................... 33
Table 15. Result of IOPC Funds' legal study .............................................................................. 35
Table 16. Illustrative lists on the IOPC Funds' Guidance ............................................................ 36
Table 17. Brief summary of the examples of the "Maritime Transport Chain" ......................... 38
Table 18. Examination related to the previous IOPC Funds' decisions ....................................... 40
Table 19. Examination related to the scenarios arisen to IOPC Funds ....................................... 42
LIST OF FIGURES

Figure 1. Scope of the international liability and compensation regime .................. 9
Figure 2. Decision making procedure of IOPC Funds’ Guidance .......................... 36
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>BUNKER</td>
<td>International Convention on Civil Liability for Bunker Oil Pollution Damage</td>
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</table>
| CLC          | International Convention on Civil Liability for Oil Pollution Damage  
- (1969 CLC) CLC, 1969  
| DWT          | Deadweight tonnage |
| FPSOs        | Floating Production Storage and Offloading units |
| FSUs         | Floating Storage Unit |
| FUND         | International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage  
- (1971 FUND) FUND, 1971  
- (SUPPLEMENTARY FUND) Protocol of 2003 to 1992 FUND |
| GT           | Gross Tonnage |
| HNS          | International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea |
| IEA          | International Energy Agency |
| IG P&I Clubs | International Group of Protection and Indemnity Clubs |
| IMCO         | Intergovernmental Maritime Consultative Organization |
| IMO          | International Maritime Organization |
| INTERVENTION | International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties |
| IOPC Funds   | International Oil Pollution Compensation Funds |
| ITOPF        | International Tanker Owners Pollution Federation |
| LLMC         | Convention on Limitation of Liability for Maritime Claims |
- (1976 LLMC) LLMC, 1976

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution from Ships</td>
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<tr>
<td>NM</td>
<td>Nautical Miles</td>
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<tr>
<td>OBO</td>
<td>Ore/Bulk/Oil carrier</td>
</tr>
<tr>
<td>OPRC</td>
<td>International Convention on Oil Pollution Preparedness, Response and Co-operation</td>
</tr>
<tr>
<td>SDR</td>
<td>Special Drawing Right</td>
</tr>
<tr>
<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
</tr>
<tr>
<td>STCW</td>
<td>International Convention on Standards of Training, Certification and Watchkeeping for Seafarers</td>
</tr>
<tr>
<td>STS</td>
<td>Ship-To-Ship oil transfer operations</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>US-EIA</td>
<td>U.S. Energy Information Administration</td>
</tr>
<tr>
<td>VLCC</td>
<td>Very Large Crude oil Carrier</td>
</tr>
<tr>
<td>WRC</td>
<td>Nairobi International Convention on the Removal of Wrecks</td>
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1. INTRODUCTION

1.1. Background

More than 30 ships calls Port of Ulsan in Republic of Korea, one of largest oil hub port in the world, daily to carry various oil cargoes. In 2017, approximately 11,500 ships entered into the port and carried 132 million tons of oil cargo in bulk (Ulsan Port Authority, 2018).

To transport this large volume of international and domestic seaborne oil trade, hundreds of the Very Large Crude Oil Carriers (VLCCs) with capacities over 250,000 deadweight tonnage (DWT) are engaged in importing crude oil from crude oil producing counties in the world. After the refining process of crude oil, thousands of vessels, for instance oil tankers, load various kinds of oil products then depart to their destinations. At the same time, considerable numbers of non-self-propelled crafts such as oil barges are being towed to deliver fuel oil to power plants, and to bunker oil storage facilities. The same is true of all of the big ports not only as well as four biggest oil hub ports such as Huston, Rotterdam, Singapore and Ulsan.

Indeed, a host of terms in necessary to illustrate seaborne oil trade and ships engaging in: VLCC, vessel, oil tanker, craft, barges, inter alia. However, unfortunately, the International Maritime Organization also agrees the fact that there are no uniform legal definitions of ships in IMO instruments (IMO, 2018).

Despite a quantum leap in alternative sources of energy, oil has been the highest ranked energy source since the industrial revolution. Accordingly, the growth of the seaborne oil traffic and enlargement of those ships have been maintained for decades. However, the global oil demand over the past years has also caused unavoidable negative effects, namely oil spilled incident.
The Torrey Canyon incident in 1967, in particular, awakened existential concerns for the safety of ships carrying oil in bulk, jurisdictional restriction of public response against large-scale oil spills, and the absence of an adequate compensation scheme for oil pollution damage.

After that incident, a number of international agreements were established against oil pollution. Most representatively, the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Convention Relating to Intervention on the High Seas in Cases of Oil pollution Casualties (INTERVENTION) were introduced by IMO to prevent and respond to oil pollution from ships.

Nevertheless, the most important IMO conventions, for instance the International Convention for the Safety of Life at Sea (SOLAS), and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), also provide uniform standards for those ships while the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) provides a global oil spill response measures. Furthermore, industry-led standards, most representatively tanker vetting procedures, have a beneficial effect to successful safety record of seaborne oil transportation (Jessen, 2018).

Moreover, IMO also recognized the necessity of an international regime governing liability and compensation matters for oil pollution damage, the inevitable consequence of large-scale oil spill incidents. Accordingly, two international conventions were adopted in 1969 and 1971 to establish an international regime for liability and compensation for oil pollution damage.

The first convention, the International Convention on Civil Liability for Oil Pollution Damage (CLC), imposes legal liability for compensation on the individual shipowner. The second convention, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), provides additional but also limited compensation to supplement CLC if it fail to provide the adequate compensation.

Therefore, under the international liability and compensation regime, a specific shipowner under CLC and all contributors under FUND are liable for oil pollution damage from a ship. To govern the international regime, the International Oil Pollution
Compensation Funds (IOPC Funds) was established in 1978.

However, this international regime does not apply to every oil pollution incidents. The mechanism of liability and compensation is only triggered when a case meets very specific criteria for definitions of ship, “oil” and “pollution damage”. Article I of CLC provides the fundamental criteria for the application of both CLC and FUND by defining some key terms.

Among others, the definition of “ship” is the most fundamental term because the international regime deals with the civil liability and compensation for oil pollution damage caused by ships only when they fall within the definition. It is obvious that the interpretation of the definition of “ship” is not simple because the definition can be interpreted in a variety of ways.

For instance, IOPC Funds decided oil pollution from a barge as an admissible case in its regime but another case caused by another barge was not accepted. The former barge, Pontoon 300, was being towed and carrying “oil” between two ports and the latter barge, the Slops, was anchored for years. Those two barges were typical oil barges and there were “oil” on board, but IOPC Funds considered only the Pontoon 300 to be a “ship” in applying the international regime for oil pollution liability and compensation.

To complicate the issue even more, the continuous expansion of human activities at sea has caused more complexities and challenges for the interpretation. The role of the sea is not only a space for transportation but also for exploration and exploitation. For instance, more than 170 Floating Production Storage and Offloading units (FPSOs) are engaged in oil operation, including the carriage of oil around world (Offshore Magazine, 2016).

The current existing international liability and compensation regime under CLC and FUND cannot provide its compensation mechanism to seaborne oil activities since CLC and FUND were established under the global conscious of the dangers international seaborne oil transportation; pollution damage suffered by oil from ships. Therefore, IOPC Funds had decided that any vessels or crafts involved in seaborne oil activities are not ships under CLC and FUND.

However, it is clear that there is still uncertainty concerning the definition of ship,
even though it is only a single sentence and IOPC Funds has governed it for 40 years. Hence, in 2015, after years of discussion, IOPC Funds decided to adopt the new guidance that introduced an interpretive tool on a case by case basis in case of any “Grey Areas” regarding the interpretation of the definition of ship.

This study will review the elements and conditions of seaborne oil transportation that lead to different interpretations of the definition of ship in the international regime. Accordingly, the new approach of IOPC Funds will be examined by applying its interpretive tool to existing decisions made by IOPC Funds. Consequently, this study will promote a comprehensive understanding of the definition of “ship” in seaborne oil transportation under the international liability and compensation regime, and identify legal limitations on this matter.

1.2. Objectives

This study aims to examine the adequate interpretation of the definition of “ship” concerning the application of CLC and FUND. Moreover, the study also seeks to identify any limitations of the existing decisions made by IOPC Funds with respect to the interpretation.

To achieve those goals, this dissertation intends to:

- Study the basic concept of the international liability and compensation regime as established by CLC and FUND.
- Review the relation between this regime and other IMO conventions concerning maritime claims, bunker oil pollution and wrecks.
- Analyze the distinguishing elements and conditions causing the different decisions with respect to the interpretation of the definition of “ship”.
- Examine the new approach of IOPC Funds to interpret the definition of “ship” by applying the interpretive tool to a number of cases.
- Identify any inevitable limitations and mitigation methods regarding the interpretation of the definition of ship under the international regime.
1.3. Structure of the dissertation

This dissertation has seven chapters. Chapter 1 introduces the topic of study by introducing the background, objectives and structure of the dissertation.

Chapter 2 reviews trends and threats of seaborne oil transportation, and the fundamental concept of the international liability and compensation regime to identify the legal significance of the definition of “ship” on the application of the international regime.

Chapter 3 also reviews other IMO liability and compensation conventions related to non-“ship” oil pollution, such as the Convention of Liability for Maritime Claims (LLMC), the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) and the Nairobi International Convention on the Removal of Wrecks (WRC) mainly focusing on their relationship with CLC and FUND.

Chapter 4 presents the results of case studies on the existing decisions of IOPC Funds concerning the definition of “ship” to determine critical factors and conditions leading to the decisions. Furthermore, the recent IOPC Funds Guidance on the interpretation of the definition of “ship” will be analyzed.

Chapter 5 examines the validity of the IOPC Funds’ guidance by applying its interpretive tool to existing cases and potential scenarios.

Finally, Chapter 6 embodies the results of the study and presents findings and observations of the interpretation of the definition of ship and its application in the international liability and compensation regime for oil pollution damage.

1.4. Limitation of the Study

The scope is the potential limitation of this study since the vast majority of legal cases are selected only from IOPC Funds’ cases involving IOPC Funds. Therefore, there could be different legal opinions and decisions on the interpretation of the definition of “ship”. So far, IOPC Funds has been involved in 152 cases since its inception in 1978 (IOPC Funds, 2018). However, according to the International Tanker
Owners Pollution Federation (ITOPF, 2018), there have been at least 948 cases in the same period, even though incidents in which less than 7 tonnes of oil spilled have been excluded.

The limitation of universal jurisdiction over the liability and compensation for oil pollution is another important limitation of this study since not every IMO member State is a contracting State to CLC and FUND. As of August 2018, 137 States representing 97.72 percent of world tonnage and 115 States representing 94.76 percent of world tonnage have ratified CLC and FUND, respectively (IMO, 2018). It is especially notable that China and the United States are not member States of FUND. Consequently, none of IOPC Funds’ decisions is legally binding in those two largest crude oil importing countries.
2. International regime for oil pollution damage

2.1. Threat from seaborne oil transportation

Since the industrial revolution, humankind has achieved splendid economy development. As the largest energy source leading global economic growth, oil is the most basic demand of economic growth in all countries, but not all countries have abundant oil supply. According to the International Energy Agency (IEA, 2017), crude oil provided 31.7% of the world’s energy resources in 2016. At the same time, there was difference of 4,442.11 million tonnes between crude oil supply and consumption around the world.

The global imbalance of oil supply and demand has required global oil flows. Since the beginning of international oil trade, the shipping industry has contributed to improving the global imbalance of oil supply and demand. According to the U.S. Energy Information Administration (US-EIA, 2017), international tanker fleets transported more than 60% of the international oil and gas trade in 2015. The volume of seaborne oil trade and number of oil tankers engaged in the trade has increased steadily so far.

As shown Table 1, even with the growing trend of international seaborne oil transportation, the number of oil spill incidents and quantity of spilled oil has been dramatically decreased in the twenty first century. It is clear that a series of IMO instruments in conjunction with port state control and a number of industry efforts have contributed to the decline of oil spill incidents.

Table 1. Average annual oil spill incidents since the 1970’s
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<tr>
<td>No. of oil spill incidents&lt;sup&gt;2&lt;/sup&gt;</td>
<td>81.7</td>
<td>45.3</td>
<td>31.9</td>
<td>16.5</td>
<td>6.3</td>
</tr>
<tr>
<td>Quantity of spilled oil (thousand tonnes)</td>
<td>301.5</td>
<td>103.0</td>
<td>108.7</td>
<td>19.4</td>
<td>4.5</td>
</tr>
<tr>
<td>Seaborne oil trade (million tonnes)</td>
<td>1639.4</td>
<td>2028.1</td>
<td>2488.4</td>
<td>2879.3</td>
<td></td>
</tr>
<tr>
<td>No. of oil tankers</td>
<td>5738.6</td>
<td>6541.8</td>
<td>7040.3</td>
<td>6766.2</td>
<td></td>
</tr>
<tr>
<td>Capacity of oil tankers (million DWT)</td>
<td>244.5</td>
<td>275.5</td>
<td>334.0</td>
<td>424.0</td>
<td></td>
</tr>
<tr>
<td>New IMO conventions</td>
<td>INTERVENTION, CLC, FUND, SOLAS</td>
<td>MARPOL, STCW, LLMC</td>
<td>OPRC</td>
<td>BUNKER</td>
<td>WRC</td>
</tr>
</tbody>
</table>

Source: IMO, ITOPF and UNCTAD
Remark: <1> Data for ‘Seaborne Oil Trade, No. of oil tankers and Capacity of oil tankers’ is the annual average from 1986 to 1990.
<2> Oil spill incidents in which less than 7 tonnes are excluded.

However, oil spill incidents, great and small, cause pollution damage. In particular, a persistent oil spill incident pose a great threat to the marine environment since this oil do not generally evaporate, but literally persist until artificially removed. Consequently, the economic damage caused by a persistent oil spill incident can be extremely high. Crude oil and fuel oil that represent the highest proportion of seaborne oil trade volume.

### 2.2. Concept of the international liability and compensation regime

To provide adequate compensation to victims, CLC and FUND were introduced in seaborne oil transportation. So far, IOPC Funds has paid more than 733 million SDR<sup>1</sup> in compensation for 150 oil spill incidents; even if the total amount of compensation paid under CLC were not applies to aggregates. Furthermore, the Hebei Spirit case highlighted that pollution damages suffered by a single oil spill incident can exceeds

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<sup>1</sup> Based on currency units per SDR on 29 August 2018 (1 SDR = £ 1.086480).
the limit of 1992 CLC and 1992 FUND, namely 203 million SDR.

A shipowner, usually through its insurer, is obliged to pay compensation for oil pollution damage caused by oil from its ship. At the same time, the shipowner is also entitled to limit its liability in accordance with CLC. If this first tier of compensation is inadequate due to its limited liability, IOPC Funds supplements the deficiency up to the maximum available amount under FUND as the second tier. Compulsory contributions are levied on oil receivers, which locate in member and receive a certain quantity of “contributing oil” per year, in accordance with FUND.

Since shipowners and their oil receivers take the burden of compensation together, it is logical that ships carrying “oil” to their receivers are subject to the international liability and compensation regime. Consequently, pollution damage caused by a non-“ship” is not admissible in CLC and FUND.

As shown in Figure 1, the scope of the international liability and compensation regime depends on the definitions of fundamental key terms.

Figure 1. Scope of the international liability and compensation regime
2.3. CLC – the first tier of compensation

As the governing convention to the first tier, CLC provides the definitions and meaning of key terms.

Firstly, according to Article II of 1992 CLC, “sea” means the maritime zones consisting of the territory, the territorial sea and the exclusive economic zone of member States. “Pollution damage” suffered by “oil” that is spilled only at “sea” is exclusively admissible in the international regime. However, any preventive measures taken outside “sea” are exceptionally recognized as “pollution damage”. For instance, economic loss in the high seas is not an admissible claim but reasonable preventive measures in the same areas to minimize economic loss at “sea” can be an admissible claim.

According to Article I.6 of 1992 CLC, “Pollution damage” is defined as “loss or damage” and “the costs of preventive measures” but it has to be caused by “oil” from a “ship”. Any other pollution damage suffered by non-“oil” is not covered by the international regime. Accordingly, the definition of “oil” is one of important elements determining the scope of application. “Oil” is defined by the Article I.5 of 1992 CLC as “any persistent hydrocarbon mineral oil” carried by a “ship” as cargo or its bunker.

Finally, Article I.1 of 1992 CLC defines:

““Ship” means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.”

All these definitions of terms were amended when IMO adopted 1992 CLC, which replaced the old convention, 1969 CLC. It reflects that IMO recognized the difficulties and limitations inherent in the definitions in the old convention and developed these definitions to avoid conflicts concerning the interpretation of the definitions.

According to IOPC Funds (2018), the essential function of CLC is that it governs the shipowner’s strict liability for oil pollution damage. Notwithstanding the absence
of its fault, a registered shipowner is liable for pollution damage suffered by its “ship” in general circumstance.

As mentioned by the United Nations Conference on Trade and Development (UNCTAD, 2012), CLC was also designed to provide a fixed limitation cap or a virtually unbreakable privilege to the shipowner. According to Article V.1 of 1992 CLC, the shipowner’s liability is limited to a certain amount of money based on the tonnage of a “ship”, but not exceeding 89.77 million Special Drawing Right (SDR). This maximum available amount under 1992 CLC is a sixfold increase in comparison with 1969 CLC.

To ensure its strict liability, Article VII of 1992 CLC clearly states that the shipowner is obliged to maintain compulsory insurance or financial security equivalent to the sums of its liability if its ship “carrying more than 2,000 tonnes of oil in bulk as cargo”. Therefore, any victims of oil pollution damage may claim compensation against the shipowner’s insurer directly. To ensure that, a member State of CLC has to determine compliance with insurance or financial security for every registered “ship”.

It is almost impossible to estimate how many oil spill cases have been compensated under CLC since it is usually a private sector matter between a shipowner’s insurer and the claimants usually. However, considering that IOPC Funds has been involved in less than seven percent of oil pollution incidents, it is obvious that the majority compensation cases for pollution damage has been settled by CLC mechanism.

2.4. FUND – the second tier of compensation

Since FUND was established to supplement CLC in respect of damage in excess of shipowner’s liability, the scope of application of 1992 FUND was broadened in respect of “sea”, “pollution damage”, “oil” and “ship”. To establish this contribution mechanism, 1992 FUND defines “contributing oil” as crude oil and fuel oil in Article 1.3, and stipulates any person in member States receiving more than 150,000 tons of “contributing oil” in the relevant fiscal calendar year as a “contributor”. Therefore, these individual “contributors” are obliged to pay contributions to IOPC Funds.

At the same time, if IOPC Funds pays compensation to victims suffering from “oil pollution damage”, it means that the shipowner’s liability is not enough to satisfy full
compensation for every victim; furthermore, IOPC Funds would be unavailable to provide full compensation due to its limit. According to Jacobsson (Jacobsson, 2016), one fundamental principle of FUND is the equal treatment of all claimants.

In this point, it is noticeable that the maximum available amount of FUND totally depends on the decisions made by respective member States. While 1992 CLC provides the same ceiling of compensation linked to the tonnage of a ship for pollution damage to member States, 1992 FUND provides not only the second tier but also an optional tier to member States, namely, SUPPLEMENTARY FUND; the Protocol of 2003 to 1992 FUND.

For instance, if State ‘A’ ratified 1992 CLC but not 1992 FUND, 89.77 million SDR is the maximum ceiling of compensation in its jurisdiction, while 203 million SDR is the ceiling for State ‘B’, which ratified 1992 CLC and FUND together. Moreover, if State ‘C’ ratified SUPPLEMENTARY FUND, the total available amount of compensation is 750 million SDR for pollution damage from every single incident.

Despite the financial merit of SUPPLEMENTARY FUND, the financial burden on “contributors” also depends on the State’s decision since only “contributors” in contracting States to SUPPLEMENTARY FUND are liable to establish a Supplementary FUND when pollution damage exceeds the limit of 1992 FUND. Indeed, it is a matter for national decision between financial advantage for victims and financial burden on “oil” receivers.

Table 2 highlights the total available amount of compensation under the international liability and compensation regime and the status of the relevant instruments.

<table>
<thead>
<tr>
<th></th>
<th>1992 CLC</th>
<th>1992 FUND</th>
<th>SUPPLEMENTARY FUND</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum amount</td>
<td>89.77 million SDR</td>
<td>203 million SDR</td>
<td>750 million</td>
</tr>
<tr>
<td>No. of member States&lt;1&gt;</td>
<td>137 States</td>
<td>115 States</td>
<td>32 States</td>
</tr>
<tr>
<td>world tonnage</td>
<td>97.72 %</td>
<td>94.76 %</td>
<td>17.50 %</td>
</tr>
</tbody>
</table>

Source: IMO, IOPC Funds
According to Article 4.1 of 1992 FUND, IOPC Fund shall be liable to pay compensation for oil pollution damage even when there is no shipowner’ liability under 1992 CLC. However, IOPC Funds provide compensation virtually for “pollution damage” caused by “oil” from “ships”.

IOPC Funds, as the governing body of the international regime, has been involved in a considerable number of oil spill incidents and has taken a number of decisions to create a uniform interpretation and application of CLC and FUND. However, IOPC Funds also recognized that the competent courts in member States’ might have different legal views on interpretation and application, for instance, the definition of “ship” in case of the Slops incident, despite IOPC Funds’ decision.

In this regard, IOPC Funds adopted the Resolution no.8 on the interpretation and application of 1992 CLC and 1992 FUND to emphasize that the courts of member States should take into account the decisions by IOPC Funds in 2005.
3. Other IMO Conventions on liability matters

3.1. Liability under LLMC

A sea-going ship is easily exposed to various financial risks such as personal injury, cargo loss, and pollution, inter alia. To protect the shipping industry from its financial abandonment, a number of international instruments have been adopted to provide the uniform right to limit shipowners’ liability, such as the international convention for the unification of certain rules relating to the limitation of liability of owners of sea-going vessels, 1924. Moreover, IMO adopted the Convention on Limitation of Liability for Maritime Claims (LLMC).

The essential purpose of LLMC is to provide a generally unbreakable mechanism for shipowners against claims for loss of life or personal injury and for property damage (UNCTAD, 2012). Moreover, according to Article 2.1 (e) and (f) of LLMC, a shipowner is entitled to limit its liability for claims for the removal or rendering harmless of the cargo of the ship, and claims for preventive measures to minimize loss.

According to Article 1.2 of 1992, shipowner means broadly as owner, charterer and operator of a sea-going ship. Therefore, a shipowner of a “ship”, defined in CLC, might enjoy its privilege given by LLMC if its “ship” collides with an “oil” receiver’s terminal and this collision causes claims for property damage of terminal structure.

However, this shipowner is not entitled to limit its liability for any claims for “pollution damage” by the “ship” in accordance with LLMC because those claims are excluded by Article 3 (b) of LLMC. Therefore, LLMC is not the international convention to cover the liability and compensation matters in relation to international seaborne oil transportation by “ships”.

Table 3 illustrates the limit of liability for property claims under two currently
overlapped LLMCs in comparison to 1992 CLC. Moreover, it indicates that the status of ratification of LLMC is not so globally accepted compared to 1992 CLC. Furthermore, there is a big difference between LLMC and 1992 CLC. Under LLMC, shipowners are not legally bound to maintain compulsory insurance to ensure the shipowner’s liability under LLMC.

Table 3. The limit of liability under LLMC and CLC

<table>
<thead>
<tr>
<th></th>
<th>1976 LLMC</th>
<th>1996 LLMC</th>
<th>1992 CLC</th>
</tr>
</thead>
<tbody>
<tr>
<td>50,000 GT</td>
<td>5.6 million SDR</td>
<td>27.5 million SDR</td>
<td>32.9 million SDR</td>
</tr>
<tr>
<td>150,000 GT</td>
<td>16.7 million SDR</td>
<td>40.2 million SDR</td>
<td>89.77 million SDR</td>
</tr>
<tr>
<td>No. of member States</td>
<td>54 States</td>
<td>56 States</td>
<td>137 States</td>
</tr>
<tr>
<td>% of world tonnage</td>
<td>56.61 %</td>
<td>61.70 %</td>
<td>97.72 %</td>
</tr>
</tbody>
</table>

Source: IMO

3.2. Liability under BUNKER

Fuel oil is also an important persistent hydrocarbon mineral oil in shipping since most ships have used this oil as bunker oil at sea. A bunker oil spill can lead to serious pollution damage, considering that the quantity of bunker oil of large sea-going vessels is usually more than 10,000 tonnes during their voyages. This is about the same quantity of oil spilled from the Hebei Spirit in 2007, which was approximately 10,900 tonnes of crude oil.

To provide the adequate liability and compensation mechanism for bunker oil spills, IMO adopted BUNKER in 2001 and this convention has been in force since 2008. According to IMO (IMO, 2018), this convention is a free-standing instrument exclusively covering pollution damage caused by bunker oil, and CLC was the model convention.

Consequently, the basic structure of BUNKER is the nearly the same as CLC. In addition, unlike LLMC, compulsory insurance protection to cover the shipowner’s liability is required by BUNKER if its ship size is over 1,000 GT. Moreover, according to Article 1.1, “any seagoing vessel and seaborne craft” fall within the definition of ship
under this convention. The shipowner’s limit of liability is not exceeding its liability amount under LLMC.

However, according to Article 4.1 of BUNKER, this convention does not cover any liability and compensation matters with respect to “pollution damage” by “oil” from “ships”. Therefore, BUNKER provides the liability and compensation mechanism only to a non-“ship”, falling outside of 1992 CLC. So far, 89 member States representing 92.25 per cent of world tonnage have ratified this convention.

3.3. Liability under WRC

To provide a uniform international instrument to remove shipwrecks, which may cause property damage and marine environmental damage, IMO adopted WRC in 2007 and this convention has been in force since 2015.

WRC governs the shipowner’s obligation for the management and removal of wrecks and requires compulsory insurance protection for ships of 300 GT and above to cover its obligation. Since “wreck” includes any object lost at sea from a ship, the shipowner is liable to remove lost oil cargo from the wreck and to cover payment of compensation for damage and costs suffered by the wreck. At the same, the shipowner is entitled to limit its liability, not exceeding its liability amount under LLMC.

However, according to Article 11.1 of WRC, this convention also does not cover any liability and compensation matters related to CLC. Consequently, “pollution damage” by “oil” from “ship” is not compensated by WRC. So far, only 41 member States representing 72.41 per cent of world tonnage have ratified this convention.

Moreover, it is doubtful that WRC can cover every oil spill incident since the removal of wreck under WRC has to be proportionate to the hazard.
4. Case study on the IOPC Funds’ decisions

4.1. In the old ‘1969 CLC and 1971 FUND’ regime

The old regime of liability and compensation for oil pollution damage, consisting 1969 CLC and 1971 FUND, was established and entered into force more swiftly than other international conventions related to safety, environmental protection, human element and response mechanism regulating seaborne oil transportation, for instance, SOLAS, MARPOL, STCW, and INTERVENTION and OPRC. Therefore, 1969 CLC was one of initial cases to define a “ship” engaging in seaborne oil transportation.

Moreover, it is obvious that 1969 CLC and 1971 FUND had to cover a wide scope of application for the purpose of conventions and adequate compensation. Specialized oil tankers were not only typical ships but ships of various type, for instance ore/bulk/oil carriers (OBO), sea-going oil barges, inter alia.

Therefore, Article I of 1969 CLC provided the wide definition of “ship” in one sentence, wherein:

“1. “Ship” means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo."

It is obvious that the definition laid down in 1969 CLC was appropriate in the initial introduction of the international regime, but this broad definition resulted in a number of cases based on the interpretation and its application. Indeed, one proviso of the definition “whatsoever, actually carrying oil in bulk as cargo” was a conclusive criterion to interpret the definition of “ship” in the old regime.

4.1.1. Case 1: Unladen tanker - Olympic Bravery
In January 1976, only six months after the date of entry into force of 1969 CLC, the Olympic Bravery ran aground on a French island during its maiden voyage in ballast (Trebilcock, 1999). Approximately 1,200 tonnes of its bunker “oil” was spilled leading to serious oil pollution of the islands and adjacent sea. Table 4 summarizes the Olympic Bravery incident regarding liability and compensation matters, and highlights that a VLCC could spilled considerable amount of bunker “oil” even when it was in ballast without “oil” cargo.

Table 4. Summary of the Olympic Bravery incident

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Olympic Bravery, VLCC, 126,588 GT, Liberia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Grounding, 24 January 1976, France</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>Bunker “oil”, 1,200 tonnes</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Liberia), 1971 FUND (not entered into force yet&lt;1&gt;)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>No information (if applicable, 15 million SDR&lt;2&gt; under CLC 1969)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>Not available</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Not available</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, UN
Remark: <1> France had accede to FUND 1971 on 11 May 1978 but FUND 1971 was in force on 16 October 1978.
<2> Based on Resolution No. 1 of IOPC Funds, 15 Francs equaled to 1 SDR

Even though the Olympic Bravery was a VLCC, a typical oil tanker for decades, no compensation mechanism of 1969 CLC intervened in this case (Wang, 2011). Because the old CLC did not recognize an oil tanker as a “ship” if it is not “actually carrying oil in bulk as cargo” when the incident occurred.

4.1.2. Case 2: Residues – Tolmiros and Santa Anna

In September 1987, a number of Swedish islands and coasts were polluted by oil, but the source of oil was unidentifiable. The Tolmiros had been suspected as the source of oil pollution and the coastal State had initially taken legal action. But the coastal State withdrew its legal action against the Tolmiros four years later because
the wind and current at the time of the incident indicated that the Tolmiros could not be the source.

Up to the withdrawal, the shipowner and its P&I insurer protested that the Tolmiros was in ballast after discharging “oil”. On the contrary, the coastal State cast doubt upon the possibility of remaining “oil” after discharge, and the use of cargo gears to discharge it.

In this case, IOPC Funds considered that, even if the Tolmiros had caused that pollution, IOPC Funds were not obliged to compensate since the Tolmiros was not a “ship” under the old regime. Specifically, IOPC Funds concluded that any residues or slops were not carried as cargo, and were not intended to be transported between the cargo owner and its receiver (IOPC Funds, 1991).

It is debatable whether residues or slops, whatsoever called, are “oil” or not. However, it is clear that the Tolmiros was not a “ship” according to 1969 CLC if the residues were not “oil” as cargo in bulk.

There was another case related to IOPC Funds’ in respect of an unladen tanker and its residues. In January 1998, the oil tanker Santa Anna in ballast ran aground on the coast of the United Kingdom and it caused some damage to its hull. During the incident and refloating work, no “oil” was escaped but the coastal State mobilized response resources to prepare for possible oil pollution since there were 270 tonnes of bunker “oil” on board. Table 5 summarizes the Santa Anna incident and highlights that the tanker was registered to a member State of 1969 CLC, but the incident happened in jurisdiction of a member State of 1992 FUND.

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Santa Anna, oil tanker, 17,135 GT, Panama</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Grounding, 1 January 1998, the United Kingdom</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>No oil pollution (270 tonnes of bunker “oil” on board)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Panama), 1992 FUND (the United Kingdom)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available under 1969 CLC (10.2 million SDR if 1992 CLC applicable), the West England P&amp;I Club</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>135 million SDR under 1992 FUND&lt;sup&gt;1&lt;/sup&gt;</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Unknown (out of court settlement)</td>
</tr>
</tbody>
</table>
Compared to other cases involving IOPC Funds, the Santa Anna incident was a relatively minor case, and no claims were submitted to IOPC Funds. However, the case brought attention to IOPC Funds since the international regime was undergoing a significant transition at that time.

Indeed, in this case, the coastal State was a contracting State both of 1992 CLC and 1992 FUND, but the flag State was a contracting State of the old regime. Due to different jurisdictions, there were differing opinions on governing conventions. IOPC Funds’ took a positive position to applying the new regime; in contrast, the P&I insurer argued that the application of 1992 CLC had to be respected according to the contracting convention of flag State (IOPC Funds, 1999).

If 1992 CLC applied as the governing convention of the case, the Santa Anna was a “ship” since the definition of “oil” in the new regime has been expanded to accept residues as “oil”. In contrast, the Santa Anna could not be considered as a “ship” if 1969 CLC applied to the case since IOPC Funds had already decided that residues were not “oil” in the Tolmiros case. In that case, shipowner and its insurer were not obliged to pay compensation under 1969 CLC requiring a higher amount of liability than LLMC.

IOPC Funds closed the case since the P&I insurer and the coastal State had settled the case out of court. There was no decision made by IOPC Funds; however, the legal issue on the interpretation of the definition of “ship” in respect of its residue had been brought up to IOPC Funds but not solved.

4.1.3. Case 3: Laden OBO– Aegean Sea

In December 1992, the OBO Aegean Sea ran aground off Spain and 73,500 tonnes of crude oil was spilled, while the broken ship and spilled oil caught fire and seriously contaminated adjacent areas. Table 6 summarizes the Aegean Sea case and highlights that this OBO carried “oil” in bulk as cargo at the time of incident.
### Table 6. Summary of the Aegean Sea incident

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Aegean Sea, OBO, 57,801 GT, Greece</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Grounding, 3 December 1992, Spain</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>Crude oil, 73,500 tonnes</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Greece), 1971 FUND (Spain)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>7.7 million SDR, UK Club</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>60 million SDR under 1971 FUND</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 57.8 million SDR&lt;1&gt; (pesetas 9,169.6 million)</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, UN  
Remark: <1> In this case, 1 SDR equals to 158.56 Pesetas (Spanish former monetary unit).

The Aegean Sea incident has been the fifteenth worst ship-sourced oil pollution case in terms of quantity so far, but this incident resulted the largest amount of compensation paid by IOPC Funds until that time (Maura, 2003). The magnitude of pollution and damage led to a number of civil and criminal actions. Therefore, IOPC Funds had to be involved in a number of legal disputes; it could finally close the case in 2014, twelve years after the incident.

Despite the complexity of the incident and the significant financial burden to IOPC Funds, no debate was aroused in IOPC Funds. This is in spite of the fact that the oil pollution and subsequent compensation were a result of the incident involving Aegean Sea, which was not a typical oil tanker. The Aegean Sea was built as an OBO but it was laden with crude oil when it ran aground. A number of OBO had been engaged in oil trade from the 1950s until those fleets lost economic competitiveness in the 1990s (Stopford, 2009).

The Aegean Sea case clearly shows that the type of ship was not a conclusive factor interpreting the definition of “ship” when “pollution damage” caused by a “ship”. This fundamental concept has been valid since the old regime.

### 4.1.4. Case 4: Flat-top barge - Pontoon 300 incident

In January 1998, the barge Pontoon 300 sank six nautical miles (NM) off the coast
of the United Arab Emirates while the barge was being towed by a tug in heavy weather conditions. Approximately eight thousand tonnes of fuel oil cargo was spilled and contaminated over 40 kilometres of coastline. Table 7 summarizes the Pontoon 300 incident and highlights that no P&I insurer was available in this case.

### Table 7. Summary of the Pontoon 300 incident

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Pontoon 300, a flat-top barge, 4,233 GT, St. Vincent and the Grenadines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Sinking, 7 January 1998, United Arab Emirates</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>Fuel oil, 8,000 tonnes</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (St. Vincent and the Grenadines), 1971 FUND (United Arab Emirates)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available (if applicable, 3 million SDR)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>60 million SDR under 1971 FUND</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 1.3 million SDR&lt;sup&gt;1&lt;/sup&gt; (£ 1.2 million)</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, and UN
Remark: <1> Based on the exchange rate on 29 August 2018 (1 SDR = £ 1.086480).

After the incident, experts of ITOPF reported that the Pontoon 300 was built as a flat-top barge for deck cargoes with a number of buoyancy tanks. During its last voyage, those buoyancy tanks were used as loading spaces for “oil” in bulk as heretofore. Moreover, the barge had not had any compulsory insurance or other financial security for its liability under 1969 CLC even though the flag States had ratified 1969 CLC in 1989 (ITOPF, 1998).

The barge had not been built to carry oil in bulk originally and the shipowner had never maintained a financial safeguard against oil pollution. It meant that even though civil liability under 1969 CLC was not available in the incident, IOPC Funds still had the obligation to provide compensation for oil pollution damage caused by the Pontoon 300 if it fell within the definition of a “ship”. In this case, 1969 CLC and 1971 FUND were the governing conventions.

Concerning the application of 1971 Fund, the majority of member States agreed to the Director’s view that the Pontoon 300 had to be considered a “ship” under the
international regime. It was difficult to deny the fact that the Pontoon 300 fell within the definition of “ship” under the governing 1969 CLC, which stipulated the definition of “ship” more simply than 1992 CLC. Accordingly, IOPC Funds decided to provide compensation for damage caused by the Pontoon 300. (IOPC Funds, 1998).

This case shows that the proviso of “actually carrying oil in bulk as cargo” in the definition of “ship” is the most important factor under 1969 CLC. However, one question still remained regarding the capability of the Pontoon 300 since the barge was never built nor converted to carry oil in bulk.

However, it is doubtful whether the Pontoon 300 can be an admissible case in the present international regime. The proviso in Article 1.2 of 1992 CLC is “constructed or adapted for the carriage of oil in bulk as cargo”. When the incident happened, the Pontoon 300 was a sea-going vessel or seaborne craft and carried oil in bulk, but it was never constructed or adapted to satisfy this proviso.

4.1.5. Case 5: Improper use - Dolly and Zeinab

In May 1999, the general cargo ship Dolly sank in a port in Martinique, which is an insular region of France, in the Caribbean Sea. At that time, the Dolly carried bitumen in its special tank. Fortunately, no “oil” escaped from the Dolly but preventive measures were conducted by the coastal State. Table 8 summarizes the Dolly incident and highlights that the compensation for preventive measures was less than 1969 CLC limit.

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Dolly, general cargo ship, 289 GT, Dominican Republic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Sinking, 11 May 1999, Martinique</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>No oil pollution (200 tonnes of Bitumen remained on board)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Dominical Republic), 1992 FUND (France)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available (if applicable, 3 million SDR)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>135 million SDR under 1992 FUND</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 1.8 million SDR (€1.5 million)</td>
</tr>
</tbody>
</table>
However, shipowner’s liability mechanism could not provide any compensation because it did not have any financial securities as required by 1969 CLC. Consequently, IOPC Funds had to get involved in the incident.

IOPC Funds decided that the Dolly had to be considered a “ship” under 1969 CLC since the Dolly had been constructed as a general cargo ship but also adapted to load “oil” before the incident. Decisively, the general cargo ship carried “oil” during its last voyage. Accordingly, IOPC Funds paid compensation for preventive measures despite no oil having escaped from the Dolly.

In June 2001, a similar incident occurred. The general cargo ship Zeinab sank 16 NM off the United Arab Emirates coastline with 1,500 tonnes of fuel oil as cargo. At that time, the Zeinab had been arrested and escorted by the Multinational Interception Force under suspicion of smuggling oil against UN sanctions (BBC, 2001). Table 9 summarizes the Zeinab incident and highlights the similarity between the Dolly case and this case.

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Zeinab, general cargo ship, 2,178 GT, Georgia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Sinking, 14 April 2001, United Arab Emirates</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>400 tonnes of fuel oil</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Georgia), 1971 &amp; 1992 FUND (United Arab Emirates)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available (if applicable, 3 million SDR)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>135 million SDR under 1992 FUND</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 1.0 million SDR&lt;sup&gt;1&lt;/sup&gt; (£ 0.9 million)</td>
</tr>
</tbody>
</table>

This incident was coterminous with the Dolly case. For instance, neither ship had any valid financial securities to provide compensation for oil pollution. However, IOPC Funds upheld its decision on the Dolly case since the Zeinab had been adapted to...
load “oil”, and then carried “oil” at sea. Accordingly, IOPC Funds decided to consider that this incident was an admissible case under 1969 CLC and 1971 FUND. Therefore, IOPC Funds paid compensation for the cost of cleanup and removal operations.

4.1.6. Case 6: Inland tanker at sea - Al Jaziah 1

In January 2000, the tanker Al Jaziah sank five NM off the coast of the United Arab Emirates and about 100 to 200 tonnes of fuel oil was spilled and contaminated some islands and sand banks. Table 10 summarizes the Al Jaziah incident and highlights that pollution damage could be covered by 1969 CLC if the shipowner upheld its obligation under the international regime.

Table 10. Summary of the Al Jaziah 1 incident

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Al Jaziah 1, inland waters tanker, 681 GT, Honduras</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Sinking, 24 January 2000, United Arab Emirates</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>Fuel oil, 100-200 tonnes</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1969 CLC (Honduras), 1992 FUND (United Arab Emirates)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available (if applicable, 3 million SDR)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>135 million SDR under 1992 FUND</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 1.54 million SDR&lt;sup&gt;1&lt;/sup&gt; (USD 1.1 million)</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, UN
Remark: <sup>1</sup> Based on the exchange rate on 29 August 2018 (1 SDR = USD 1.400150).

IOPC Funds was informed that the Al Jaziah 1 was frequently engaged in international oil transportation at sea but it had originally been inspected and used for inland water navigation. The tanker did not have any valid certificates for international oil transportation or any proper insurance or financial security requiring by 1969 CLC, even though the flag State was a contracting State to this convention (IOPC Funds, 2001).

In this case, the proviso of “any seagoing vessel and any seaborne craft of any type” in Article 1.1 led to debates in IOPC Funds since the tanker was an inadequate ship
to navigate at sea. The shipowner had violated a number of compulsory instruments applicable to sea-going oil tankers. Moreover, the Al Jaziah was not registered to the flag State as an oil tanker.

However, IOPC Funds decided that the Al Jaziah 1 was also a “ship” and decided to compensate for the pollution damage from the incident since the tanker had actually been carrying “oil” in bulk as cargo at “sea” when the incident happened.

4.1.7. Decisions in the old regime

The proviso “whateover, actually carrying oil in bulk as cargo” of Article I.1 of 1969 CLC was the most important factor in interpreting the definition of “ship” in the old regime as shown in Table 11. IOPC Funds considered the Pontoon 300, Dolly, Zeinab and Al Jaziah 1 as “ships” despite their improper usage. On the contrary, IOPC Funds did not consider the VLCC Olympic Bravery as a “ship” as laid down in the old regime.

<table>
<thead>
<tr>
<th>Decision</th>
<th>Cargo “oil”</th>
<th>Case</th>
<th>Critical problem</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Ship”</td>
<td>Laden</td>
<td>Aegean Sea</td>
<td>None</td>
</tr>
<tr>
<td>“Ship”</td>
<td>Laden</td>
<td>Pontoon 300</td>
<td>Structural capability - not constructed nor adapted to carry “oil” as cargo</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Dolly, Zeinab</td>
<td>Structural capability – illegally adapted to carry “oil” as cargo</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Al Jaziah 1</td>
<td>Out of scope – illegally operated at sea</td>
</tr>
<tr>
<td>Not decided</td>
<td>Unladen</td>
<td>Santa Anna</td>
<td>Different opinions</td>
</tr>
<tr>
<td>Not decided</td>
<td>Unladen</td>
<td>Olympic Bravery</td>
<td>Potential risk of oil pollution from tankers (bunker “oil”)</td>
</tr>
<tr>
<td>Non-“ship”</td>
<td>Unladen</td>
<td>Tolmiros</td>
<td>Potential risk of oil pollution from tankers (“oil” residues)</td>
</tr>
</tbody>
</table>

Despite the improper use of the Pontoon 300, Dolly, Zeinab and Al Jaziah 1, IOPC Funds decided that all these ships fell within the definition of “ship” under 1969 CLC since they had “oil” as cargo in bulk at the times of incidents. On the contrary, the VLCC Olympic Bravery was not identified as a “ship” by IOPC Funds since there was
no “oil” on board.

It is obvious that illegal use of a ship and illicit oil transportation, violating international instruments, has to be prohibited and sanctioned. However, this illegality and illicitness have not been constituted as crucial factors in interpret the definition of “ship” by IOPC Funds since its inception. The legal basis of the interpretation of the definition of “ship” has to be the provision of Article I.1 of 1969 CLC; hence, it is not an issue of rationality nor legitimacy.

In the Zeinab case, there were arguments that the unduly lenient decision against the illegal use of the ship might not correspond with the international efforts to eliminate sub-standard ships (IOPC Funds, 2001). Therefore, it was a reasonable question but not a legal matter with respect to the application of the international regime.

Moreover, it has to be taken into account that the most fundamental role of the international regime is to provide the adequate liability and compensation but not to determine the illegal act nor punish it. Therefore, IOPC Funds had provided compensation for oil pollution damage with respect to the Pontoon 300, Dolly, Zeinab, and Al Jaziah 1 cases after decisions on the definition of “ship”. It then also took civil recourse actions against shipowners and their insurers to recover its payments.

On the other hand, the Olympic Bravery, Santa Anna and Tolmiros cases proved fundamental limits to the definition of “ship” laid down in 1969 CLC. Even though a ship had been built or converted to carry “oil”, there was no legal basis to consider it a “ship” under the old regime if there was no “oil” as cargo at the time of incident.

At the time, the Olympic Bravery incident drew international attention because the pollution damage caused by bunker oil not cargo “oil”, and as a result, no international regime could cover the pollution damage (Dupuy & Vignes, 1991). It was a serious matter because the incident illustrated that bunker oil of VLCC, which is one type of largest ship as ever, could lead to an oil pollution disaster even though there was no “oil” cargo on board.

Moreover, the Tolmiros case showed the strictly limited interpretation by the oil regime in respect of the definition of “ship”. If this interpretation were the conclusive and final decision made by IOPC Funds or the competent court, the old regime would
not provide any compensation for oil pollution from a “ship” in ballast.

4.2. In the new regime

Under the new regime, practical scope of application became an issue in IOPC Funds, especially with respect to an unladen tanker, and FSUs and FPSOs.

Firstly, Article I.1 of 1992 CLC provides a more detailed but complicated definition of “ship” in comparison with the old regime. The most important difference between the old and the new definition is an expansion of the definition to cover a wider application. If an unladen tanker is interpreted as a “ship” under this new definition, any “pollution damage” caused by this unladen tanker can be covered by the new regime, whether the source of “oil” is its cargo, residues or bunker. On the contrary, if an unladen tanker interpreted as not a “ship”, nothing could change concerning the scope of “ship”.

The second issue is about the expansion of the international regime to FSUs and FPSOs since a considerable number of FSUs and FPSOs has been used for decades, without any universal compulsory liability and compensation regime. However, this was not a simple issue since there are a number of similarities and differences between “ships” and those units.

4.2.1. Case 7: Conclusion of the second intersessional Working Group

To examine the definition of “ship” under the new regime, in April 1998, IOPC Funds decided to establish its second intersessional Working Group and to assign it two mandates to study:

“(i) the circumstances in which an unladen tanker would fall within the definition of ‘ship’; and

(ii) whether, and if so to what extent, the 1992 Conventions apply to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).”
A number of IOPC Funds member States, non-member States, including China and the United States, and intergovernmental and non-governmental organizations participated in the second Working Group. It indicated that the matter of the definition of "ship" causes global concern.

The first mandate is related the proviso of Article I.1 is that "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". With respect to this mandate, in October 2000, IOPC Funds endorsed the conclusion of the second Working Group that an unladen tanker would fall within the definition of "ship" in the new regime in the concerning circumstances in which:

"i) the word 'oil' in the proviso in Article I.1 of the 1992 Civil Liability Convention means persistent hydrocarbon mineral oil, as defined in Article I.5 of the Convention;

ii) the expression 'other cargoes' in the proviso should be interpreted to mean non-persistent oils as well as bulk solid cargoes;

iii) as a consequence the proviso in Article I.1 should apply to all tankers and not only to ore/bulk/oil ships (OBOs);

iv) the expression 'any voyage' should be interpreted literally and not be restricted to the first ballast voyage after the carriage of a cargo of persistent oil;

v) a tanker which had carried a cargo of persistent oil would fall outside the definition if it was proven that it had no residues of such carriage on board; and

vi) the burden of proof that there were no residues of a previous carriage of a persistent oil cargo should normally fall on the shipowner."

According to this decision, an unladen vessel or craft, for instance the Tolmiros and the Santa Anna, also falls within the definition of "ship" unless a shipowner provides any evidence that there was no residues on board. Practically, it means that a shipowner of an "oil" tanker which is engaged in international oil transportation has to maintain its insurance or other financial security in accordance with Article VII.1 of 1992 CLC, except if no residues on board.

With respect to the second mandate, IOPC Funds maintained its conservative
position concerning the application of the international regime for FSUs and FPSOs based on the conclusions of the second Working Group. Indeed, the second Working Group mainly focused on the fact that there had been no discussion on the application to FSUs and FPSOs so far, even though a number of Diplomatic Conferences had discussed matters of the definition and the scope of the international regime. Therefore, IOPC Funds decided that:

“(a) Offshore craft should be regarded as 'ships' under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate.

(ii) Offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather.”

According to these decisions, FSUs and FPSOs could not fall within the definition of “ship” while those offshore craft operate as oil storing units or oil producing units under their original purposes. IOPC Funds indicated that FSUs and FPSOs would be considered as “ships” only when those units are engaged in seaborne “oil” transportation such like “oil” tankers.

Though the majority of member States agreed to the decision, there was also some concern about uncertainty in the near future. Therefore, IOPC Funds also decided to reconsider this issue if required.

4.2.2. Case 8: Fixed facility - the Slops

In June 2000, many tonnes of oil and oily water spilled from the Slops, a waste oil reception facility, when it exploded and caught fire at an anchorage in Greece. A number of adjacent port facilities and islands were polluted: accordingly, cleanup operations were carried out. Table 12 summarizes the Slops incident, and the Slops was one type of FSUs and the shipowner did not maintain any insurer or financial security to cover its liability under CLC.
Table 12. Summary of the Slops incident

<table>
<thead>
<tr>
<th>Name, type, GT, flag</th>
<th>Slops, waste oil reception facility, 10,815 GT, Greece</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incident: cause, date, location</td>
<td>Fire, 15 June 2000, Greece</td>
</tr>
<tr>
<td>Oil: type, quantity</td>
<td>Oily water mixed with “oil”, estimated 1,000-2,500 tonnes of “oil” escaped from the Slops</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>1992 CLC and 1992 FUND (Greece)</td>
</tr>
<tr>
<td>CLC limit, insurer</td>
<td>Not available (if applicable, 8.2 million SDR)</td>
</tr>
<tr>
<td>CLC + FUND Limit</td>
<td>135 million SDR under 1992 FUND&lt;sup&gt;1&lt;/sup&gt;</td>
</tr>
<tr>
<td>Compensation under CLC+FUND</td>
<td>Approximately 4.8 million SDR&lt;sup&gt;2&lt;/sup&gt; (€ 4.0 million)</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, UN

Remark: <1> The incident happened before amendments of compensation limits under 1992 FUND.
<2> Based on the exchange rate on 29 August 2018 (1 SDR = € 1.200810)

The Slops had been originally built and registered as an oil tanker to carry oil cargo and it had an engine and propeller. However, its propulsion system was removed in 1995. The Slops then took its position at the anchorage until the incident happened in 2000. The Slops had not been engaged in seaborne oil transportation as a “sea-going vessel” nor “seaborne craft” to carry “oil” as cargo from ‘A’ to ‘B’. Actually, the Slops had been used as oil residues receiving and processing facility to produce low-grade fuel oil.

Moreover, the operational function of the Slops indicated that it was included in the FSUs, namely offshore craft, category. In this circumstance, IOPC Funds decided already that this craft could be considered as a “ship” when it was “on a voyage to or from a port or terminal” only one year before the incident.

Consequently, the Slops did not fall within the definition of “ship” under the international regime from the point of IOPC Funds policy. Therefore, IOPC Funds decided that the Slops would not fall within the definition of “ship” under the new regime in July 2000.

Since the flag State of the Slops was a member State of 1992 CLC, its shipowner had to maintain any compulsory insurance or financial security required by the
convention. However, the Slops could not be covered by such a mechanism and the shipowner failed to pay cleanup costs. Consequently, legal actions against IOPC Funds were taken in Greece by the cleanup companies.

The Court of Appeal considered that the Slops was not a “ship” under 1969 CLC while the Court of first instance had ordered that IOPC Funds had to pay compensation for cleanup costs due to the shipowner’s financial incapacity. However, the Supreme Court decided finally that IOPC Funds was obliged to pay compensation in this case even though a minority of judges had the same opinion as IOPC Funds (Mensah, 2007).

Table 13 highlights the decisions made by the respective Greek Courts regarding the definition of “ship” with respect to the Slops case. Consequently, IOPC Funds paid its compensation for cleanup costs caused by the Slops oil pollution upon the judgement of the Greek Courts.

<table>
<thead>
<tr>
<th>Judgement</th>
<th>Plaintiff</th>
<th>The interpretation of the Court on “ship”</th>
</tr>
</thead>
<tbody>
<tr>
<td>The first instance court (December 2002)</td>
<td>Cleanup companies</td>
<td>• Any type of floating unit originally constructed as a sea-going vessel for the purpose of carrying oil.</td>
</tr>
<tr>
<td>The Appeal court (February 2004)</td>
<td>IOPC Funds</td>
<td>• A seaborne craft which carries oil from place A to place B for purpose of transporting oil in its tanks.</td>
</tr>
<tr>
<td>The Supreme Court (June 2006)</td>
<td>Cleanup companies</td>
<td>• The Slops had the character of seaborne craft - functional ability to stored “oil” in bulk - operational ability to move by towing during the carriage of “oil” in bulk</td>
</tr>
</tbody>
</table>

Source: IOPC Funds, Mensah

From the Slops case, IOPC Funds recognized the possibility of a wider interpretation of the definition of “ship” by the competent courts in the member States. It meant that there could be different judicial decisions between a wider and narrow interpretation in respective member States. It also meant that the universal application of the international regime could fail.

Despite several decisions to examine its policy on the definition of “ship”, particularly FSUs, and to determine the risk of unequal treatment, IOPC Funds could
not reach a conclusion for years. Finally, IOPC Funds decided to establish its seventh intersessional Working Group to deal with this pending issue in October 2011.

4.2.3. Case 9: Vessels engaged in Ship-To-Ship operation

The uncertainty of IOPC Funds’ policy on FSUs related to the Slops case raised another concern of member States about the admissibility of the international regime to vessels engaged in STS (Ship-to-Ship operation). Table 14 summarizes the questions and IOPC Funds decision on it.

<table>
<thead>
<tr>
<th>Question</th>
<th>Conditions</th>
<th>Decision</th>
</tr>
</thead>
</table>
| Malaysia | • typical (phased out) single hull tanker  
• permanently at anchor but maintains its navigational function and carries compulsory certificates required to an oil tanker including CLC insurance  
• engages in STS as an “oil” loading, blending and unloading facility | not decided |
| Denmark  | (scenario 1) • (condition 1) typical “oil” laden tanker  
• (Condition 2) semi-permanently anchored at the same position (for up to 12 months then continues its voyage)  
• not engage in STS  
(scenario 2) • (condition 1) and (condition 2)  
• engages in single STS to load “oil”  
(scenario 3) • (condition 1) and (condition 2)  
• engages in a number of STS to load “oil”  
(scenario 4) • (condition 1) and (condition 2)  
• engages in a number of STS to load and unload “oil” | “ship” |

Source: IOPC Funds

In 2005, a real case arose in Malaysia requesting IOPC Funds’ decision as to whether a vessel permanently at anchor and involved in STS, namely a mother vessel, falls within the definition of “ship” under 1992 CLC.

IOPC Funds considered that a vessel engaged in STS operated as typical tanker
occasionally, but there was no noticeable distinction between this vessel and, FSUs and FPSOs when it was anchored to engage in STS. Therefore, in October 2006, IOPC Funds introduced the concept of “permanently and semi-permanently anchored vessels engaged in STS” and decided to apply the same decision to FSUs and FPFOs, but also to take account of particular circumstances on a case by case basis.

In October 2010, four scenarios were created by Denmark to request whether those vessels involved in STS fell within the definition. The vessels in those four scenarios were typical “oil” tankers that commonly fall within the definition of “ship” under the international regime. In the same meeting, IOPC Funds decided that any vessels in those scenarios fell within the current interpretation of the definition of “ship”.

However, IOPC Funds’ decision on the scenarios was not clear because it was concluded on the premise stated in the scenarios about the period of time at anchor (“for up to 12 months”) and the continuation of voyage (“then continues its voyage”).

According to Stopford (2009), a number of oil traders buy and sell oil on the spot; moreover, large volumes of “oil” are traded during oil transportation and a number of “oil” tankers are chartered on a voyage demand. Furthermore, many traders bought oil tankers to use them as temporary floating storage while awaiting higher market prices (Atkins, 2016).

Therefore, in certain circumstances, it can be impossible to decide whether those “ships” are under circumstances in which the exactly period at anchor and the continuation of voyage can be estimated. For instance, if a vessel in scenario 4 caused an oil spill incident after 9 months of anchoring, this vessel has no fixed schedule in the near future. Therefore, IOPC Funds’ decision on vessels engaged in STS cannot be available in this case.

4.3. IOPC Funds’ Guidance for member States

After the Greek Supreme Court’s judgement on the Slop case, IOPC Funds engaged to carry out a legal study on “the interpretation of the term ‘ship’ in 1992 CLC”. According to the report of the study (Lowe, 2011), the terms of “carriage of oil” and “voyage” were the fundamental elements to consider when deciding whether the
legal term “ship” is fulfilled or not. The study also highlighted that it is not clear to identify the distinction between a “ship” and any vessels used for oil storage, namely Floating Storage and Offloading units (FSOs). Table 15 summarizes the result of IOPC Funds’ legal study related to the pending issues.

**Table 15. Result of IOPC Funds’ legal study**

<table>
<thead>
<tr>
<th>Cases</th>
<th>Result of the study</th>
</tr>
</thead>
<tbody>
<tr>
<td>FSOs carrying oil during present voyage</td>
<td>“ship”</td>
</tr>
<tr>
<td>- Barges on sea voyages (or temporarily at anchor)</td>
<td></td>
</tr>
<tr>
<td>- FSOs employed as storage units or carriage of “oil” as cargo</td>
<td></td>
</tr>
<tr>
<td>- FSOs with capacity to navigate at sea</td>
<td></td>
</tr>
<tr>
<td>Craft incapable of navigating at sea</td>
<td>non-“ship”</td>
</tr>
<tr>
<td>Mother vessels engaged in STS (four scenarios by Denmark)</td>
<td>“ship”</td>
</tr>
<tr>
<td>Source: IOPC Funds</td>
<td></td>
</tr>
</tbody>
</table>

Based on the study, IOPC Funds discussed the matter of “permanently and semi-permanently anchored vessels engaged in STS” since FSOs and “mother vessels” were other terms for it. Accordingly, IOPC Funds debated again on the period of anchoring, specifically one-year, up the next voyage. Finally, IOPC Funds decided to establish the seventh intersessional Working Group to examine IOPC Funds’ policy on the definition of “ship”.

In October 2015, IOPC Funds decided to endorse the conclusion of the seventh intersessional Working Group and to provide a guidance document for Member States. Finally, IOPC Funds decided to approve the Guidance for Member States: Consideration of the definition of ‘ship’ and it was published in 2016.

As shown in Figure 2, IOPC Funds’ Guidance adopted the hybrid approach to the interpretation of the definition of “ship”. The interpretive tool, namely “Maritime Transport Chain” was introduced to interpret any cases in “Grey Areas” between the categories of “ship” and non-“ship”.

| Illustrative list of “ship” | Any cases in “Grey Areas” | Illustrative list of non-“ship” |
4.3.1. Illustrative lists of “ship” and non-“ship”

According to the IOPC Funds’ Guidance (IOPC Funds, 2016), there are clear categories of both “ship” within the definition of 1992 CLC and non-“ship” outside the definition. Table 16 quotes its illustrative lists.

Table 16. Illustrative lists on the IOPC Funds’ Guidance

<table>
<thead>
<tr>
<th>Illustrative list of vessels falling clearly within the definition of ‘ship’</th>
<th>Illustrative list of craft which clearly fall outside the definition of ‘ship’</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) A seagoing vessel or seaborne craft constructed or adapted for the carriage of oil in bulk as cargo when it is actually carrying oil in bulk as cargo; 2) A seagoing vessel or seaborne craft in ballast following a voyage carrying oil with residue of oil onboard; 3) A craft&lt;sup&gt;1&lt;/sup&gt; carrying oil in bulk as cargo being towed (or temporarily at anchor for purposes incidental to ordinary navigation or force majeure or distress); 4) A ship capable of carrying oil and other cargoes (i.e. an Oil Bulk Ore carrier (OBO)) 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; 5) Offshore craft&lt;sup&gt;2&lt;/sup&gt; that have their own independent motive power, steering equipment for seagoing navigation and seafarer onboard so as to be employed either as storage units or carriage of oil in bulk as cargo and that have the element of carriage of oil and undertaking a voyage; and 6) Craft that are originally constructed or adapted (or capable of being operated) as vessels for carriage of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained and with seafarer onboard and that have the</td>
<td>1) Barges certified or classed only for use on inland water ways; 2) Vessels which are not constructed or adapted for the carriage of oil in bulk as cargo. Such categories include ‘non-tanker’ vessels, such as: (a) Container vessels; (b) Cruise Ships; (c) Tugs; (d) Dredgers; (e) General cargo vessels; (f) Diving support vessels; (g) Bulk carriers; (h) Passenger vessels; (i) Car carriers; (j) Fishing vessels; and (k) Ferries. 3) Vessels or craft involved in: (a) Exploration, for example jack-up rigs or Mobile Offshore Production Units (a jack-up platform whether or not it carries oil, gas and water separation equipment); or (b) The production or processing of oil, for example Drill-ships, FDPSOs, and FPSOs, including separation of water and gas, and its management.</td>
</tr>
</tbody>
</table>

---

<sup>1</sup>Maritime Transport Chain

<sup>2</sup>Seafarer onboard

---
The IOPC Funds’ Guidance indicates clearly that any shipowners of a “ship” have to maintain the compulsory insurance or financial security, and draws member States’ attention to the 1992 CLC certificate in accordance with Article VII. It also highlights that these obligations do not apply to a non-“ship”.

However, the IOPC Funds’ Guidance does not provide an explanation concerning its decision concerning unladen vessels or crafts without oil residues which fall outside the definition in accordance with its previous decision. Moreover, a term of ‘non-tanker’ vessels in can be misleading since an unladen tanker without any oil cargo and its residues is also generally called as a ‘tanker’ not a ‘non-tanker’.

4.3.2. Grey Areas: Maritime Transport Chain

The IOPC Funds’ Guidance indicates that IOPC Funds will interpret whether a vessel or craft in the “Grey Areas” falls within the definition of “ship” by using the “Maritime Transport Chain” on a case by case basis. The mechanism of this interpretive tool is addressed as follows:

“5.3 The maritime transport chain commences after the loading of oil and concludes when the oil is finally discharged into a port or terminal installation as defined in Article 1.8 of the 1992 Fund Convention. This maritime transport chain includes maritime operations or transportation of oil. Maritime operations include ship-to-ship (STS) operations; periods of waiting; storage (excluding those without navigational capability)<3>; and anchoring pending final delivery to a port, terminal installation or final consumer/recipient)<4>.

<3> The maritime transport chain terminates at storage facilities without navigational capability and another maritime transport chain begins when the oil is loaded from such storage facilities to a vessel.

<4>
<4> It could be fuel oil delivered from a ship that is storing it for transfer to a ship that will use it for its engines. In this case, the maritime transport chain would finalise when the oil is transferred to the ship that uses it.”

To explain the concept of the “Maritime Transport Chain”, the guidance provides three examples in detail. Table 17 summarizes those examples briefly.

Table 17. Brief summary of the examples of the “Maritime Transport Chain”

<table>
<thead>
<tr>
<th>Examples</th>
<th>“Maritime Transport Chain”</th>
</tr>
</thead>
</table>
| 1. Loading oil from an onshore source | • From: when “oil” is loaded into a seagoing or seaborne craft  
• To: when “oil” is discharged in a port or terminal installation |
| 2. Loading oil from a unit which received from an offshore source | • From: when oil is loaded into a vessel except when oil is received directly from the subsea well (the activities of exploration, drilling, production or processing) i.e.) FPSO, FOPSO, Jack up rigs, FSO, inter alia.  
• To: when “oil” is discharged in a port or terminal installation |
| 3. Loading oil from a mooring or platform which received oil from an offshore source | • From: when oil is loaded into a seagoing or seaborne craft  
• To: when “oil” is discharged in a port or terminal installation |

Remark: Maritime operations or transportation of oil such like STS are included to the “Maritime Transport Chain”.

Source: IOPC Funds

Since the publication of IOPC Funds Guidance, no issue has so far been raised to IOPC Funds related to the definition of “ship”.

38
5. Analysis of the IOPC Funds’ Guidance

5.1. Hypothesis

According to ITOPF (ITOPF, 2018), the average number of oil spills from “ships” that are greater than seven tonnes per decade, has dropped significantly from 78.8 cases in the 1970s to 6.6 cases in the 2010s. Furthermore, quantities of oil spilt also have also decreased from 3,195 thousand tonnes in the 1970s to 47 thousand tonnes in the 2010s.

However, it is clear that there is always the possibility of oil spills while seaborne oil transportation exist. Particularly, many incidents involving IOPC Funds showed that matters relating to liability and compensation usually arose when the mechanism of CLC was not available.

As the governing body of the international regime, IOPC Funds has been involved in a number of incidents and has decided its fundamental policies to ensure the universal application of CLC and FUND. Therefore, the IOPC Funds’ guidance is an essential criterion to its member States.

Furthermore, this guidance is the only document to provide official information with respect to the definition of “ship”. Therefore, this guidance also provides the scope of “ship” which is obliged to be covered by the adequate insurance scheme.

The most import mandate of the seventh intersessional Working Group was to seek “uniform approach to the interpretation of the definition of ‘ship’”. Consequently, IOPC Funds’ guidance is to achieve this mandate.

From these grounds, this study will analyses the hypothesis that:

A. the IOPC Funds’ Guidance provides the conclusive tool to interpret the definition
of “ship” in 1992 CLC and 1992 FUND:

B. Other IMO conventions covering liability and compensation matters provides an adequate mechanism to non-“ships” outside of 1992 CLC and 1992 FUND if there is any legal gaps existing in the IOPC Funds’ Guidance:

5.2. Case selection

To analyze hypothesis ‘A’ of this study, the cases and scenarios in Chapter 4 will be used. These cases and scenarios may not be exhaustive sample to evaluate the IOPC Funds’ Guidance; however, it is necessary that the Guidance provides clear criteria for the issues that have already been raised.

Furthermore, to examine hypothesis ‘B’ of this study, vessels illustrated in the IOPC Funds’ Guidance will be selected. Even though those vessels cannot exactly represent all types of vessels, it is also necessary that IMO conventions provide certain liability and compensation schemes for “oil” pollution damage caused by those vessels.

5.3. Analysis of the Hypothesis ‘A’

Firstly, to examine the hypothesis ‘A’, the various cases in Chapter 4.1 and the Slop case in Chapter 4.2 are chosen because the “Maritime Transport Chain” is not essential in these cases. All cases in Table 18 are practical examples of seaborne oil transportation, ironically within the “Maritime Transport Chain”, except the Slop case.

Table 18. Examination related to the previous IOPC Funds’ decisions

<table>
<thead>
<tr>
<th>Case</th>
<th>Circumstance</th>
<th>IOPC Funds’ Guideline [relevant Article]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olympic Bravery</td>
<td>• No “oil” nor residues on board (maiden voyage) • Bunker “oil” on board</td>
<td>• Not clearly illustrated</td>
</tr>
<tr>
<td>Tolmiros&lt;sup&gt;15&lt;/sup&gt;</td>
<td>• No “oil” nor residues on board</td>
<td>• Not clearly illustrated</td>
</tr>
<tr>
<td></td>
<td>• Bunker “oil” on board</td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Santa Anna</td>
<td>• No “oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Residues and Bunker “oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• “Ship” corresponding to [3.1.2]</td>
<td></td>
</tr>
<tr>
<td>Aegean Sea</td>
<td>• “Oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• OBO</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• “Ship” corresponding to [3.1.4]</td>
<td></td>
</tr>
<tr>
<td>Pontoon 300</td>
<td>• “Oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Flat-top barge (illegal use)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• “Ship” corresponding to [3.1.3]</td>
<td></td>
</tr>
<tr>
<td>Dolly, Zeinab</td>
<td>• “Oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• General cargo ship but adapted to carry “oil” (illegal use)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• “Ship” corresponding to [3.1.4]</td>
<td></td>
</tr>
<tr>
<td>Al Jaziah 1</td>
<td>• “Oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Inland taker at sea (illegal use)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• “Ship” corresponding to [3.1.1]</td>
<td></td>
</tr>
<tr>
<td>Slops</td>
<td>• “Oil” on board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Fixed FSOs for the production or processing of oil</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Non-“ship” corresponding to [4.1.3] (b)</td>
<td></td>
</tr>
</tbody>
</table>

Remark: <1> The Tolmiros was convinced of oil spill incident (see 4.1.2) but this case is used to examine the case of no residues on board.

Firstly, most of the cases studied in Chapter 4.1 are reflected in the “illustrative list of vessels falling clearly within the definition of ‘ship’” of IOPC Funds’ Guidance. Furthermore, the Slops case in Chapter 4.2 is explained in the “illustrative list of craft which clearly fall outside the definition of ‘ship’”. However, the two cases are not clearly illustrated in the IOPC Funds’ Guidance.

The first case is the case of Olympic Bravery representing a typical “oil” tanker prior to the carriage of “oil”. Under the 1969 CLC regime, IOPC Funds decided the Olympic Bravery was not a “ship”, falling within the definition of “ship”. This case does not fulfill the definition of “ship” in the 1992 CLC regime because this tanker vessel was never carrying “oil” at the time of incident.

The second case is the case of Tolmiros, representing without any residues on board. According to the definition of “ship” of 1992, this case is not an admissible case under the new international regime if “it is proved that it has no residues” on board.

Under the 1992 CLC regime, an unladen ship cannot fall within the definition of “ship” if there is no oil cargo nor residues on board. It is the fact that there is no liability of a shipowner under the new regime if no oil nor residues were on its vessel or craft of “any type whatsoever” at the time of incident.
Consequently, the shipowner of a ship, which is in ballast without any residues, is not liable under 1992 CLC to pay compensation for victims suffering from pollution damage cause by its bunker oil. Furthermore, IOPC Funds is not obliged to pay compensation for victims, even if the 1992 CLC mechanism failed to pay compensation, since this vessel or craft does not fall within the definition of “ship”.

Indeed, there is a certain legal gap. For instance, if a newly built oil tanker caused pollution damage during its maiden voyage from a shipbuilding yard to its first loading port, the 1992 CLC and 1992 FUND regime is not available to provide the adequate compensation to victims.

It is also considerable that the tank cleaning and gas freeing operations including the removal of “oil” residues are the standard procedures in dry dock or other operational reasons of ship. For instance, if there was an bunker oil spilled from a OBO which is no cargo and its residues on board, as the result of dry docking for regular inspection, it is not clear that which conventions governs liability and compensation matters for “pollution damage” caused by its bunker “oil”.

Secondly, various scenarios in Chapter 4.2 are chosen to examine hypothesis ‘A’ because the “Maritime Transport Chain” has be applied in these STS cases.

Table 19. Examination related to the scenarios arisen to IOPC Funds

<table>
<thead>
<tr>
<th>Scenarios</th>
<th>Circumstance</th>
<th>IOPC Funds’ Guideline</th>
</tr>
</thead>
<tbody>
<tr>
<td>By Malaysia</td>
<td>• Permanently at anchor&lt;br&gt;• Maintained navigational function and CLC insurance&lt;br&gt;• Under purpose of “oil” receiving, blending, and discharging</td>
<td>• Falls outside “ship” because it:&lt;br&gt;- was involved in the processing of receiving “oil”&lt;br&gt;- But may also fall within “ship” if it has the element of undertaking a voyage&lt;br&gt;⇒ Decision will be made by IOPC Funds using the “Maritime Transport Chain” on a case-by-case</td>
</tr>
<tr>
<td>By Denmark (scenario 1)</td>
<td>• Typical “oil” laden tanker&lt;br&gt;• Semi-permanently anchored</td>
<td>• Falls within “ship” if:&lt;br&gt;- discharged “oil” in a port of terminal installation in the territory of a member State.&lt;br&gt;- Even if the final destination remains unknown</td>
</tr>
<tr>
<td>(scenario 2 and 3)</td>
<td>• Typical “oil” laden tanker&lt;br&gt;• Semi-permanently anchored&lt;br&gt;• Engages in STS to load “oil”</td>
<td></td>
</tr>
<tr>
<td>(scenario 4)</td>
<td>• Typical “oil” laden tanker&lt;br&gt;• semi-permanently anchored</td>
<td>• But may also fall outside “ship” if:&lt;br&gt;- involved in the activities of exploration,</td>
</tr>
</tbody>
</table>
As shown in Table 19, IOPC Funds Guidance highlights that only a ship engaged in the “Maritime Transport Chain”, in other words, seaborne oil transportation, can fall within the definition of “ship”, while a ship engaged in any activity of “oil” exploration, drilling, production or processing cannot fall within the definition of “ship”.

IOPC Funds recognized that the “Maritime Transport Chain” cannot be an absolute standard to interpret the definition of “ship” but also recognized the necessity to distinguish between a “ship” and a non-“ship” as far as possible (IOPC Funds, 2015).

IOPC Funds will decide whether a vessel fell within the definition of “ship” on a case-by-case if necessary. However, a case that is needed to apply the “Maritime Transport Chain” may be a real oil pollution disaster at “sea” if there is no available mechanism to provide an adequate liability and compensation regime.

Collectively, the IOPC Funds’ Guidance provides a comprehensive tool; however, it cannot be the conclusive tool to interpret the definition of “ship” the definition.

5.4. Analysis of the Hypothesis ‘B’

For the purpose of the Hypothesis ‘B’, the result of the analysis of Hypothesis ‘A’ highlights that the 1992 CLC and 1992 FUND regime does not provide any liability and compensation scheme to;

i) a non-“ship” listed in the “illustrative list of craft which clearly fall outside the definition of ‘ship’”;

ii) any ship in “Grey Area”; and,

iii) a “ship” in ‘clean condition’ which means no oil and its residues on board.

It is clear that a non-ship falling into the first category is not subject to the 1992 CLC and 1992 FUND regime. However, there are certain legal gaps concerning the second
and third categories.

Firstly, “the Maritime Transportation” will be used by IOPC Funds in case of the second category. If IOPC Funds decides that this ship fall within the definition of ship, IOPC Funds will pay compensation for victims suffering pollution damage from the ship even if the shipowner does not maintain insurance or other financial security. However, if the opposite decision has been taken by IOPC Funds, there will be none of liability and compensation mechanism for pollution damage.

From a logical standpoint, LLMC, BUNKER and WRC can provide a certain degree of liability and compensation mechanisms on this occasion since the shipowner is entitled to limit its liability against any third party claims in accordance with LLMC and BUNKER if the shipowner has financial abilities or maintains insurer.

Furthermore, it means that victims suffering from pollution damage cannot obtain full compensation providing under 1992 CLC and 1992 FUND, in addition SUPPLEMENTARY FUND if it is available due to the uncertainty caused by this legal gag.

Secondly, in case of the third category, BUNKER can provide the right of shipowner to limit its liability and a certain level of compensation for victims. In practice, the Maritime and Port Authority of Singapore requires a compulsory certificate of the Civil Liability for Bunker Oil Pollution damage under BUNKER to oil tankers in clean condition (MPA, 2008). As a classification society, the Indian Register of shipping provide a relevant technical information (IRCLASS, 2016).

However, it is not clear that all concerned parties involving in seaborne oil transportation, including shipowners, its insurers, member States of 1992 CLC and 1992 FUND and inter alia, are all aware of this information and its consequences including a significant less amount of compensation for victims. Moreover, there is no the second tier of compensation in the LLMC and BUNER regime.
6. Conclusion

The result of this study illustrates that there are certain legal gaps related to the definition of “ship” in the international liability and compensation regime for seaborne oil transportation.

Definitely, IOPC Funds had devoted its efforts to provide a clear definition of “ship” to the shipping industry since there were a number of cases requiring a more clear definition in the old regime, such as the Olympic Bravery case and the Tolmiros case. To solve this matter, IMO introduced a more detailed definition of “ship” into the new regime.

Another legal conflict occurred from the interpretation of the definition of “ship”. The judgement rendered by the competent courts in the Slops case highlighted that there is a possibility of different opinions on the definition. Accordingly, IOPC Funds adopted the Resolution on the interpretation and application of the international regime to ensure equal treatment in any oil spill case for member States.

The result of hypothesis ‘A’ of this study highlights that some legal gaps might still existed, particularly concerning the newly built “ship” and the “ship” which has no residues on board for operational reasons. In addition, the increased complexity of seaborne oil transportation comparing to the traditional seaborne oil transportation from oil exporting country to receiving country, for instance STS, demands a clearer decision on the definition. Therefore, IOPC Funds introduced its Guidance but it is not enough to provide a clear list of “ships” governed by the international regime.

Even though IMO introduced LLMC, BUNKER and WRC, the result of hypothesis ‘B’ of this study also highlights that there might be an absence or lack of liability and compensation mechanisms. Furthermore, different approaches of States to all those
relevant conventions might be a more critical obstacle to establishing the uniform international regime.

Consequently, the legal gaps in the international regime might be directly lead to failure of the protection of shipowners and adequate compensation for victims suffering from “pollution damage” caused by seaborne oil transportation.

It is clear that the international liability and compensation regime consisting of 1992 CLC and 1992 FUND has been introduced to provide a uniform scheme and to remove any uncertainty of its practical application. However, through this study, a more effective approach to achieving the purpose of the international regime would be established if a clearer interpretation of the definition of “ship” was provided.

To solve this problem, the shipowner engaged in seaborne oil transportation has to maintain its compulsory insurance despite the uncertainty of application. But IOPC Funds also has to continue its discussion on the definition of ship to remove the uncertainty imposed on shipowners.

Furthermore, efforts from each member State should be made to ensure the uniform interpretation in accordance with IOPC Funds decisions in its jurisdiction, at least to provide adequate compensation for potential victims suffering from pollution damage caused by seaborne oil transportation.
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47

IOPC Funds. (2015). Record of decisions of the October 2015 sessions of the IOPC Funds' governing bodies. IOPC Funds.


