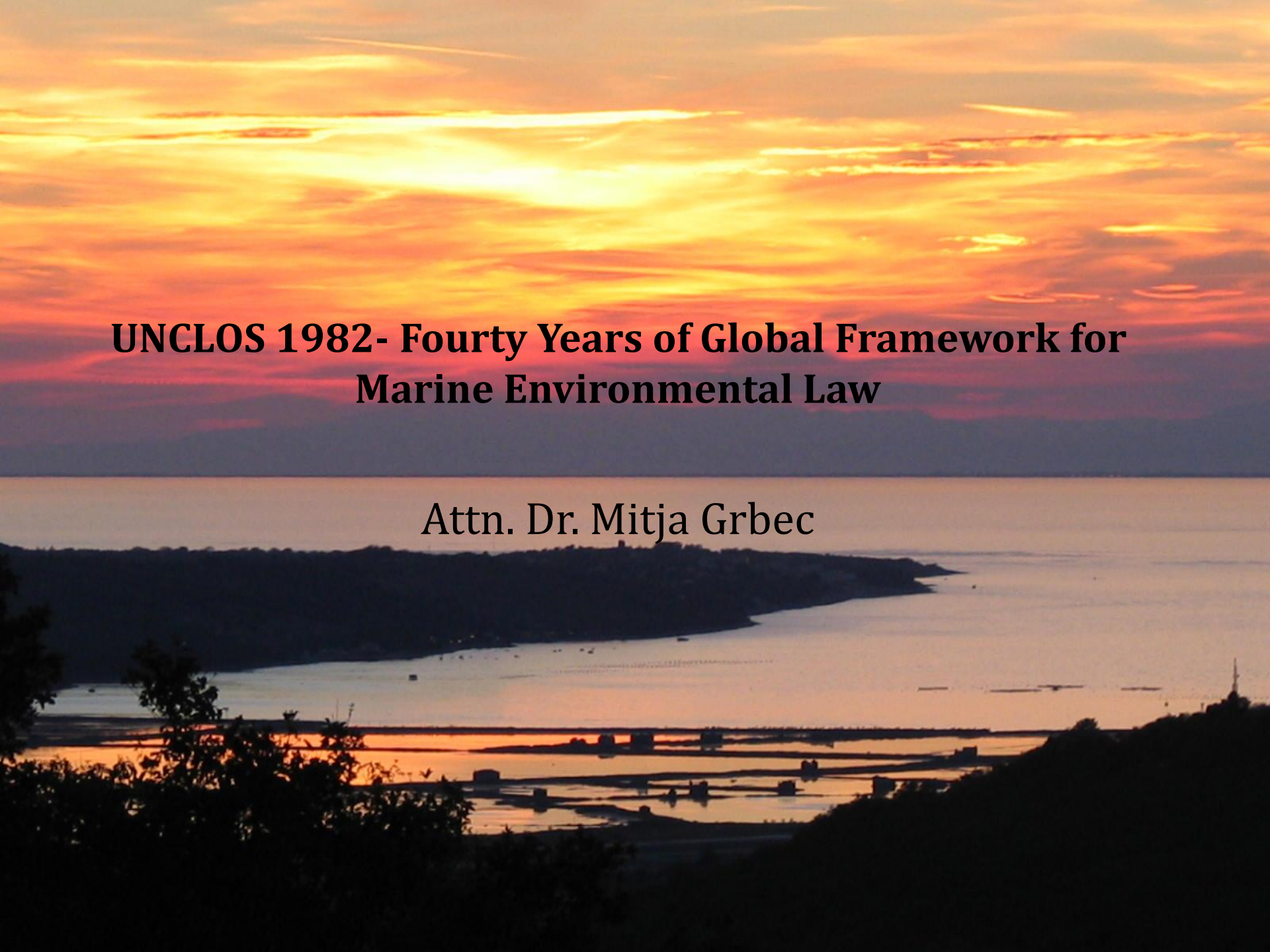

UNCLOS 1982- Fourty Years of Global Framework for Marine Environmental Law

Attn. Dr. Mitja Grbec

SOME AVAILABLE MATERIALS (WEB)

UNCLOS Convention
(https://www.un.org/depts/los/convention_agreements/texts/unclos/part12.htm)

https://iopcfunds.org/publications/iopc-funds-publications/

(text of the CLC & Fund Conventions, Explanatory Notes, Claims Manuals, HNS Convention- Explanatory note)

Lecture Notes (overview):

https://hrcak.srce.hr/20414 - The 2003 Supplementary Fund Protocol: An important improvement to the international compensation system for oil pollution damage (Prof. Marko Pavliha – Dr. Mitja Grbec)

- **UNCLOS as a framework Convention** (general obligations of States in the field of protection of the marine environment)

- **Different types of marine pollution**

- **Liability and Compensation for pollution damage**

- **Relation between UNCLOS and IMO Conventions (IMO- UNCLOS Clause, Art. 237)**

UNCLOS

The Law of the Sea Convention (LOSC) is the most comprehensive global environmental treaty.

The 1982 UNCLOS aims to establish '***a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment" (Preamble)***

The obligation of States to protect and preserve the marine environment **extends to all maritime areas**, both those directly under the jurisdiction of the coastal State and those beyond national jurisdiction in the high seas or the Area (*South China Sea Arbitration)*

Although the Law of the Sea Convention it represent the "Constitution of the Oceans" it is maturing due to its age (40+) into an instrument which requires **additional efforts of interpretation so as to face, fully and adequately, the evolving challenges of today's world.**

Part XII- Protection and Preservation of the Marine Environment (XI. Sections)

I. General Provisions
II. Global and Regional- Cooperation
III. Technical Assistance
IV. Monitoring and Environmental Assesment
V. International Rules and National Legislation to Prevent, Reduce and Control Marine Pollution
VI. Enforcement
VII. Safeguards
VIII. Ice Covered Areas
IX. Responsibility and Liability
X. Sovereign Immunity
XI. Obligations under other conventions on the protection and preservation of teh marine environment

General Provisions (Art. 192 & 193)

Article 192 of the Law of the Sea Convention:

"***States have the obligation to protect and preserve the marine environment***".

The wording may be traced to also to the 1972 Stockholm Declaration, Principle 7, the latter of which reads: "*States shall take all possible steps to prevent pollution of the sea by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea*".

Drawing upon the language of Principle 21 of the Stockholm Declaration, UNCLOS furthermore provides that' ***States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'" (Art. 193)***

MARINE ENVIRONMENTAL LAW:
Marine Pollution

What is marine pollution?

(*plainly pollution that affects the marine environment – sea & coast..)*

Art. 4(1) UNCLOS

...(4) "pollution of the marine environment" means **the introduction by man, directly or indirectly**, of **substances or energy into the marine environment**, including estuaries, which **results or is likely to result** in such deleterious effects as **harm to living resources and marine life**, **hazards to human health**, **hindrance to marine activities**, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;

Marine Environmental Law and UNCLOS

International courts and tribunals have added to the regulatory depth of the various principles and expanded its scope of application. Although the emphasis on pollution is evident in the text of the Convention, the International Tribunal on the Law of the Sea (ITLOS) declared for example in the *Southern Bluefin Tuna* cases that

"*the* ***conservation of living resources of the sea is an element in the protection and preservation of the marine environment***".

This could be an example of **evolutionary interpretation**, based on Articles 31(1) and 31(3)(c) of the Vienna Convention on the Law of Treaties, where the term is construed in light of changing conditions, but with the original intention of the drafters strictly respected and the final result remaining within the confines of the text and not crossing into a tacit modification of the original text.

SOURCES OF MARINE POLLUTION

Art. 194(1)

States **shall** take, **individually or jointly** as appropriate, **all measures consistent with this Convention** that are **necessary to prevent, reduce and control pollution of the marine environment FROM ANY SOURCE**, using for this purpose **the best practicable means at their disposal and in accordance with their capabilities**, and they **shall endeavour to harmonize their policies in this connection.**

Art. 194/2

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

.

Main Sources of Marine Pollution ?

Art. 194(3) UNCLOS

3. (...) These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, **from land-based sources**, **from or through the atmosphere** or by **dumping;**

(b) **pollution from vessels**, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) **pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil**, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

d) **pollution from other installations and devices operating in the marine environment**, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

Section 5: International Rules and National Legislation to Prevent, Reduce and Control Marine Pollution

Pollution from Land based Sources (Art. 207 UNCLOS)

(1) States **shall adopt laws and regulations** to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, **taking into account internationally agreed rules, standards and recommended practices and procedures**.

(…)

(3). States shall endeavour to harmonize their policies in this connection **at the appropriate regional level**.

(…)

(5) Laws, regulations, measures, rules, standards and recommended practices and procedures (…) shall include those designed to minimize, to the fullest extent possible, **the release of toxic, harmful or noxious substances**, especially those which are **persistent,** into the marine environment.

Pollution from seabed activities subject to national jurisdiction (Art.208 UNCLOS)

(1) Coastal States **shall adopt laws and regulations** to prevent, reduce and control pollution of the marine environment **arising from or in connection with seabed activities subject to their jurisdiction** and from **artificial islands, installations and structures under their jurisdiction,** pursuant to articles 60 and 80

(…)

(3) Such laws, regulations and measures **shall be no less effective** than international rules, standards and recommended practices and procedures.

(4) States **shall endeavour** to harmonize their policies in this connection at the **appropriate regional level.**

What is offshore?

Offshore: means situated in the **territorial sea**, the **Exclusive Economic Zone (EEZ)** or the **continental shelf** of a state within the meaning of UNCLOS. *Mostly associated with operations on the CS and/ or within the EEZ.*

Continental Shelf: the ***seabed and subsoil*** of the submarine areas ***that extend beyond its territorial sea*** throughout the natural prolongation of its land territorry to the outer edge of the continental margin, or a **distance of 200 nm from the baselines** where the outed edge of the continental margin does not extend up to that distance *(ipso facto-no need for a specific declaration)*.

EEZ: The exclusive economic zone is an area ***beyond and adjacent to the territorial sea***, subject to the specific legal regime established in this Part (Part V. UNCLOS)… and which „shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured

Risk of transboundary oil pollution' due to geographic and environmental characteristic of many enclosed or semi- enclosed seas (i.e. Mediterranean)

International & Regional Legal Framework for Regulation of Offshore Activities : Including Liability and Compensation

Mediterranean Sea

- UNCLOS

- ***"Offshore Protocol"*** *to the* Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean **(Barcelona Convention)** *in force since 2011, but ratified in the Adriatic (only) by Albania, Croatia and EU)*

- EU law (including ***Directive 2013/30/EU on the safety of offshore oil and gas operations (OSD)***, ***Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage*** **(ELD)**

No global treaty dealing with L&C arising as a result of (transboundary) offshore pollution.. **According to IMO: No compelling need…**

Pollution from activities in the Area (Art. 209)

1. International rules, regulations and procedures **shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area.** Such rules, regulations and procedures shall be re-examined from time to time as necessary.

2. Subject to the relevant provisions of this section, **States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be.** The requirements of such laws and regulations **shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.**

(In its 2011 advisory opinion the ISBA Chamber declared that the ISBA Nodules and Sulphides Regulations have turned the soft-law precautionary approach in Principle 15 of the 1992 Rio Declaration into a hard-law obligation for activities in the Area.)

Pollution by dumping (Art. 210)

What is dumping?

Art. 1(5) of UNCLOS.. (a) "dumping„ means

(i) any **deliberate disposal** of wastes or other matter **from vessels, aircraft, platforms or other man-made structures at sea;**
(ii) any **deliberate disposal of vessels, aircraft, platforms or other man-made structures** at sea;

(b) "dumping" does not include:

(i) the disposal of wastes or other matter **incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment**, other than wastes or other matter transported by or to vessels aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft,platforms or structures;

(ii) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention. (i.e. MSR)

Pollution by dumping (Art. 210)

(1) States **shall** adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.

(…)

(3) Such laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States.

(…)

6. National laws, regulations and measures **shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards.**

WATER
pollution

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Pollution from or through the atmosphere (Art. 212)

(1)States **shall adopt laws and regulations** to prevent, reduce and control pollution of the marine environment from or through the atmosphere**,** applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, **taking into account internationally agreed rules, standards and recommended practices and procedures** and the safety of air navigation.

(…)

(3) States, acting especially through competent international organizations or diplomatic conference, **shall endeavour** to establish **global and regional rules**, standards and recommended practices and procedures to prevent, reduce and control such pollution.


APL

Pollution from vessels (Article 211)

1. States, acting through the competent international organization or general diplomatic conference, **shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels** and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment (…)

2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. **Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.**

Pollution from vessels (operational v. accidental pollution)

Operational pollution

Pollution which arise **from the (normal) operations of the ship**

- *the discharge of oily waters from ships*
- *Ship exhausts (air pollution)*
- *Discharge of ballast waters …*

Accidental Pollution *(non- deliberate pollution)*

When oil or HNS are **accidentaly discharged into the marine environment** as a result of a ship accidents including:

- Collission, stranding and explosion, structual failure..

Accidental pollution represent cca 10-15% of the overall (oil) pollution worldwide..

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Enclosed or semi-enclosed sea (Part IX UNCLOS)

Article 197 Cooperation on a global or regional basis (Section XII/2)

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features

Article 122 Definition (UNCLOS , Part IX)

For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea *surrounded by two or more States* and *connected to another sea or the ocean by a narrow outlet* or *consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States*.

Mediterranean & Adriatic as juridical (semi) enclosed seas?

Both the Mediterranean and the Adriatic are classified, on the basis of Part IX of UNCLOS (Article 122), as legal enclosed or semi-enclosed seas.

Both seas **are surrounded by more than one State**, are **linked to another sea or ocean through a narrow outlet (or outlets)** and, in case of proclamation of EEZs or other zones of jurisdiction, **their surface would not just primarily, but most likely entirely be made up of EEZs and/or other jurisdictional zones of the surrounding States.**

Article 123 (UNCLOS)

Cooperation of States bordering enclosed or semi-enclosed seas:

States bordering an enclosed or semi-enclosed sea **should cooperate with each other** *in the exercise of their rights and in the performance of their duties under this Convention.*

To this end they **shall endeavour**, directly or through an appropriate regional organization...:

(a) *to coordinate* the management, conservation, exploration and exploitation of the living resources of the sea;....

Article 123 (UNCLOS - continued)

…..(b) *to coordinate* the implementation of their rights and duties **with respect to the protection and preservation of the marine environment;**

(c) *to coordinate* their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

……

The classification of the Mediterranean and Adriatic as ‘juridical’ enclosed or semi-enclosed seas brings with it an enhanced requirement for its coastal States to cooperate **in the implementation of their rights and duties under UNCLOS** with particular emphasis *(but not limited...)* on the areas of cooperation expressly referred to in Article 123.

Is there an obligation to co-operate with regard to offshore exploration and exploitation within the Adriatic Sea?

Liability and compensation?

Section IX: Responsibility and liability (Art 235 UNCLOS)

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. **They shall be liable in accordance with international law.**

2. States s**hall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment** by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect **of all damage caused by pollution of the marine environment**, States **shall cooperate in the implementation of existing international law** and the **further development of international law relating to responsibility and liability** for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as **compulsory insurance or compensation funds.**

Barcelona System: Liability & Compensation

Barcelona Convention (ratified by Adriatic States)

Article 16 of the (framework, 2005**)** ***Barcelona Convention***

> The Contracting Parties *undertake to cooperate* in the *formulation and adoption of appropriate rules and procedures* for the determination of liability and *compensation for damage* resulting *from the pollution of the marine environment* in the Mediterranean Sea Area.

Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area (2008)

- Adopted at the 15th Meeting of the State parties to the *Barcelona Convention* in 2008 (UNEP(DEPI)/MED.IG.17/10, 18 January 2008, p. 133.

... While not having a legally binding character *per se,* these Guidelines are intended ***to strengthen cooperation among the Contracting Parties for the development of a regime of liability and compensation*** for damage resulting from pollution of the marine environment in the Mediterranean Sea Area ***and to facilitate the adoption by the Contracting Parties of relevant legislation****...*

2008 Mediterranean Guidelines…

- The Parties opted for a **soft-law instrument**, therefore for **the voluntary unification of their provision in the field of liability and compensation** through the incorporation into their national legislation of a set of provisions for damage resulting from pollution of the Mediterranean, based as much as possible on the provisions of the Guidelines.

- The latter are of general nature and **may be applied to all areas of marine pollution covered by the Barcelona System**, with the exception of those which have been already regulated at the international level (e.g. *by the CLC and FUNDS Conventions, the Bunkers Convention, HNS*…)

..continued..

It should be noted that liability for damage covered by the Guidelines, which covers also **environmental damage**, is channelled on the **operator.**

The liability of the latter is **strict,** although States may establish limits of liability on the basis of international treaties or relevant domestic legislation.

For the purposes of these Guidelines '**environmental damage**' means a [measurable] adverse change in a natural or biological resource or [measurable] impairment of a natural or biological resource service which may occur directly or indirectly.'

Offshore Protocol (Barcelona Convention)

- Adopted in 1994, entry into force on 24 March 2011 *(ratified so far in the Adriatic by Albania + the EU),*
- the Offshore Protocol is a **comprehensive document** covering areas such as *licensing of operators, contingency planning, mutual assistance in cases of emergency, transboundary pollution and monitoring within the entire Mediterranean Sea*, including the continental shelf ……
- One of the most criticized provision of the Offshore Protocol has been the '***channelling of liability***' on operators and the requirement for them to '***have and maintain insurance cover or other financial security*** *in order to ensure compensation for damages caused by the activities covered by the Protocol*'

Offshore Protocol *(The Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from the Exploration of the Continental Shelf, Seabed and Subsoil)*

Article 27
LIABILITY AND COMPENSATION

1. The Parties ***undertake to cooperate as soon as possible*** in **formulating and adopting appropriate rules and procedures for the determination of liability and compensation** for damage resulting from the activities dealt with in this Protocol, in conformity with Article 16 of the Convention.

How soon is *as soon as possible?*

Offshore Protocol (Art.27)

2. Pending development of such procedures, each Party:….

(a) Shall take all measures necessary to ensure that ***liability for damage caused by activities is imposed on operators***, and they shall be required to ***pay prompt and adequate compensation****;*

(b) Shall take all measures necessary to ensure that operators ***shall have and maintain insurance cover or other financial security of such type and under such terms as the Contracting Party shall specify*** in order to ensure compensation for damages caused by the activities covered by this Protocol.

UNCLOS-IMO CLAUSE (Art. 237 UNCLOS)

Obligations under other conventions on the protection and preservation of the marine environment (Section XI)

1. The provisions of this Part are **without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously** which relate to the protection and preservation of the marine environment **and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.**

2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, **should be carried out in a manner consistent with the general principles and objectives of this Convention.**

UNCLOS-IMO CLAUSE (Art. 237 UNCLOS)

The latter establishes a general "**without prejudice rule"** that allows States to conclude special or regional agreements "in furtherance of the general principles set forth in the Convention", provided that obligations assumed under such agreements are:"***carried out in a manner consistent with the general principles and objectives"*** of the Convention."

The outer limit of this freedom is prescribed in Article 311:

- such agreements must "***not relate to a provision derogation from which if incompatible with the effective execution of the object and purpose of the Convention***",
- do "***not affect the application of the basic principles embodied herein***" and
- "***do not affect the enjoyment by other State Parties of their rights or the performance of their obligations under the Convention***.

UNCLOS-IMO CLAUSE (Art. 237 UNCLOS)

At the same time, IMO has adopted the practice of including **non-prejudice provisions in its instruments**, to ensure that:

- "*their text did not prejudice the codification and development of the law of the sea in UNCLOS or any present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.*"

Hence, instruments that were developed under the auspices of IMO, both pre-existing and subsequently developed, operate within the framework of UNCLOS.

UNCLOS-IMO CLAUSE (Art. 237 UNCLOS)

UNCLOS functions as the "Constitution convention" (Framework Convention) that establishes a legal framework for States and competent international organizations (IMO).

- IMO, as a specialised agency of the United Nations, exercises „quasi-legislative" function to implement UNCLOS through adopting and developing international rules and standards.

- All IMO instruments function within the legal framework of UNCLOS, and do not prejudice the codification and progressive development of the law of the sea.

International compensation system for oil pollution damage

As a general rule, torts or wrongs committed by or in relation to ships would be governed by the same rules of tort as govern other persons or entities.

The **burden of proof would normally be on the party that claims compensation** (i.e.. the victim of oil pollution).

Such person would **have to prove all the elements of tort**.

In ship related incidents the most probable scenario would be the **tort of negligence**. In order to prove such tort the claimant would generally have to prove:

- that there was a **duty of care;**
- **that the duty of care was breached** and **that**
- **damage resulted from such breach**

International compensation system for oil pollution damage

However, even in the case that the **claimant managed to prove all the elements of the torts**, including the quantification of the damage (not an easy task),

….the claimant **would still have to take into account some specific rules of (general) maritime law**, as for example the right of the carrier (shipowner) to limit or even in certain cases to exclude its liability.

It could well happen that under general rules, the victim of oil pollution managed to prove all the elements of the tort, including the quantification of the damage, **but he could not recover the loss due to the right of the shipowner, charterer or operator to limit or exclude its liability…**

Torrey Canyon Accident (1967)

It is interesting that oil pollution was not deemed to be a huge problem during the first half of the previous century.

This changed dramatically in **March 1967**, when the Liberian registered tanker **Torrey Canyon** went aground off the south west coast of the United Kingdom.

The spill was the largest spill in maritime history up to that point in time and it triggered a reaction from media and legislators comparable to that of the Titanic accident in 1912 (*or the Erika and Prestige accidents in 1999 and 2002).*

More than 100.000 tonnes of crude oil was spilled into the marine environment causing extensive pollution along the British and French coast..

Implications of the Torrey Canyon Accident (1967)

The accident brought to light **a number of shortcomings both in public and private international law.**

These were subsequently addressed at the international level with a set of international conventions (***1969 CLC, 1969 Intervention Convention, 1971 FUND..)*** – *TITANIC EFFECT?*

Main questions *(inter alia):*

- Not clear (at that time) whether the costal state had a righ to intervene against the stricken ship on the high seas in case of a threat against it coast and related interest.

- Who is the responsible person? Whom to sue?

- Is there a right of the responsible person to exclude and/or limit its liability?

- Court jurisdiction?

Torrey Canyon Accident

The lack of clarity in the legal framework for dealing with the legal consequences of this disaster led to a lively public/media debate:

- The first practical result of the accident was the **creation of the Legal Committee of the IMO** (at that time IMCO) with the mandate of studying the public and private law issues raised by this incident.

- An important part was played **by the CMI**, which turned its attention mainly to private law issues having to do with liability and compensation.

The result of the joint work of the two bodies were two draft conventions (**the CLC and Intervention Convention**), which together laid the foundation internationally, for response to oil pollution accidents..

Marine Environmental Law- International Conventions

1. **PREVENTION OF MARINE POLLUTION**

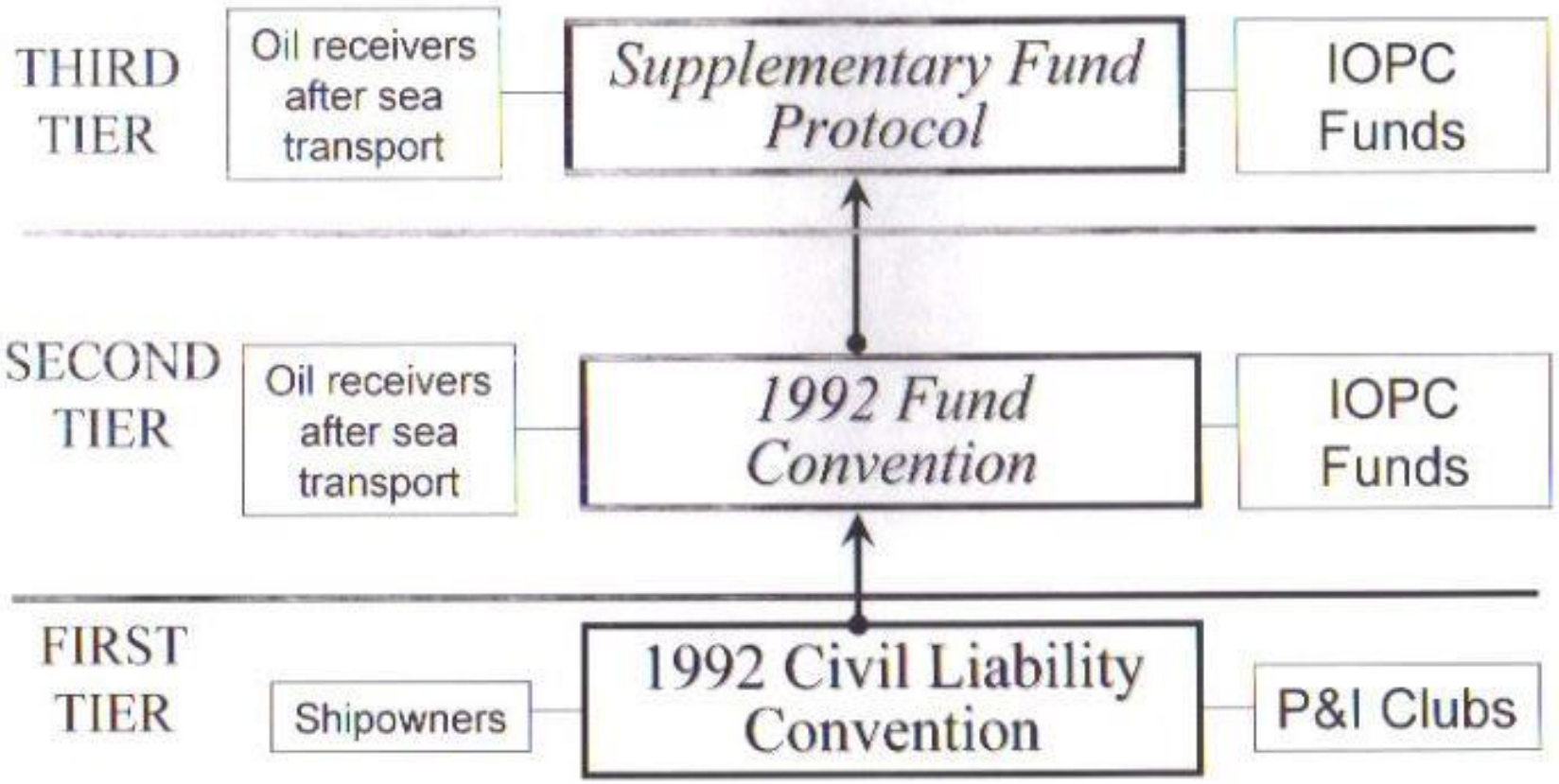
(MARPOL, SOLAS, LOADLINES, LONDON CONV., AFC, BALLAST WATER CONV, HONG KONG SHIP RECYCLING, OPRC…)

2. **LIABILITY AND COMPENSATION** (https://iopcfunds.org/publications/iopc-funds-publications/)

- **International Convention on Civil Liability for Oil Pollution Damage (1969, 1992);**
- **International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971, 1992); 2003 Supplementary Fund Protocol**
- **International Convention on Civil Liability for Bunker Oil Pollution**
- **Damage (2001)**
- **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS 1996, 2010- not yet in force).**

POLLUTER PAYS PRINCIPLE!! IMPORTANT TO UNDERSTAND THE SCOPE OF APPLICATION AND THE INTERELATION BETWEEN CONVENTIOS

THE THREE TIER SYSTEM



States Parties to the 1992 Civil Liability Convention but not to the 1992 Fund Convention

as at 31 March 2022

(and therefore not Members of the 1992 Fund)

24 STATES FOR WHICH 1992 CIVIL LIABILITY CONVENTION IS IN FORCE			
Azerbaijan	Honduras	Myanmar	Solomon Islands
Chile	Indonesia	Pakistan	Togo
China	Jordan	Peru	Turkmenistan
Egypt	Kuwait	Republic of Moldova	Ukraine
El Salvador	Lebanon	Romania	Viet Nam
Guatemala	Mongolia	Saudi Arabia	Yemen

2 States which have deposited instruments of accession, but for which the 1992 Civil Liability Convention does not enter into force until date indicated

Democratic People's Republic of Korea	13 July 2022
Iraq	30 September 2022

States Parties to the 1969 Civil Liability Convention

as at 31 March 2022

32 STATES PARTIES TO THE 1969 CIVIL LIABILITY CONVENTION		
Azerbaijan	Equatorial Guinea	Maldives
Benin	Georgia	Mongolia
Brazil	Ghana	Peru
Cambodia	Guatemala	Saint Kitts and Nevis
Chile	Guyana	Sao Tomé and Principe
Costa Rica	Honduras	Saudi Arabia
Côte d'Ivoire	Indonesia	Senegal
Dominican Republic	Kazakhstan	Syrian Arab Republic
Ecuador	Kuwait	Turkmenistan
Egypt	Lebanon	United Arab Emirates
El Salvador	Libya	

States Parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention
as at 31 March 2022
(and therefore Members of the 1992 Fund)

118 STATES FOR WHICH 1992 FUND CONVENTION IS IN FORCE		
Albania	Greece	Palau
Algeria	Grenada	Panama
Angola	Guinea	Papua New Guinea
Antigua and Barbuda	Guyana	Philippines
Argentina	Hungary	Poland
Australia	Iceland	Portugal
Bahamas	India	Qatar
Bahrain	Iran (Islamic Republic of)	Republic of Korea
Barbados	Ireland	Russian Federation
Belgium	Israel	Saint Kitts and Nevis
Belize	Italy	Saint Lucia
Benin	Jamaica	Saint Vincent and the Grenadines
Brunei Darussalam	Japan	Samoa
Bulgaria	Kenya	Senegal
Cabo Verde	Kiribati	Serbia
Cambodia	Latvia	Seychelles
Cameroon	Liberia	Sierra Leone
Canada	Lithuania	Singapore
China[1]	Luxembourg	Slovakia
Colombia	Madagascar	Slovenia
Comoros	Malaysia	South Africa
Congo (the)	Maldives	Spain
Cook Islands	Malta	Sri Lanka
Côte d'Ivoire	Marshall Islands	Sweden
Croatia	Mauritania	Switzerland
Cyprus	Mauritius	Syrian Arab Republic
Denmark	Mexico	Thailand
Djibouti	Monaco	Tonga
Dominica	Montenegro	Trinidad and Tobago
Dominican Republic	Morocco	Tunisia
Ecuador	Mozambique	Turkey
Estonia	Namibia	Tuvalu
Fiji	Nauru	United Arab Emirates
Finland	Netherlands	United Kingdom
France	New Zealand	United Republic of Tanzania
Gabon	Nicaragua	Uruguay
Gambia (the)	Nigeria	Vanuatu
Georgia	Niue	Venezuela (Bolivarian Republic of)
Germany	Norway	
Ghana	Oman	

2 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated

San Marino	19 April 2022
Costa Rica	19 May 2022

[1] <

CIVIL LIABILITY CONVENTION

The CLC Convention is an excellent example of a successful application of what is sometime referred to as the "Titanic effect".

- **provides straight answers to specific (legal) problems** raised by the Torrey Canyon incident,

- **has been used as a model for all subsequent conventions** in this field (*HNS, Bunkers, Wreck Removal..)*

It DOES NOT cover all types of pollution damage caused by oil, but only persistent oils carried as cargo.

The CLC Convention addressed three main questions, which arose as a result of the Torrey Canyon accident: ***a.) Whom to sue?; b.) The right of the shipowner to limit or exclude his liability; (c) Jurisdiction of the Court?***

Whom to sue ?

One of the main improvements of the Civil Liability Convention is the incorporation of the principle of ship owner's strict liability. The purpose of such "channelling" of liability is obviously to help victims of oil pollution to easily find the liable party.

According to the CLC Convention (1969 and 1992) claims for pollution damage can be made only against the **owner of the ship concerned (Art. III-1).** The owner is therefore liable **irrespective of the existence of any fault or negligence (*Channeling of liability*)**

Claims against **servants or agents of the ship owner are**, according to the 1969 CLC Convention, **expressly prohibited (1969 CLC).**

The 1992 Protocol is still clearer in this regard. It prohibits not only claims against the servants or agents of the owner, but also claims against the **pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures (Art. 3-4).**

Right of the shipowner to exclude or limit his liability

The shipowner **is exempt from liability under the CLC Convention** only **<u>if he proves</u>** that the damage:

(a) resulted from an **act of war,** hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character **(ACT OF WAR)**, or

(b) was wholly caused by an act or omission done with intent to cause damage by a third party **(ACT OF THIRD PARTY),** or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function **(NEGLIGENCE BY THE GOVERNMENT) (Art. 3(2)**

Otherwise, the owner is **strictly liable**, however, he can **<u>limit his liability to an amount which is linked to the tonnage of the vessel..</u>**

Limits of Liability of the Shipowner (Art. 5-1)

1. The owner of a ship **shall be entitled to limit his liability** under this Convention in **respect of any one incident** to an aggregate amount calculated as follows **(SDR)** :

(a) **4,510,000 units of account** for a ship not exceeding **5,000 units of tonnage;**

(b) for a ship with a tonnage in excess thereof, **for each additional unit of tonnage**, 631 units of accounts in addition to the amount mentioned in sub-paragraph (a);

provided, however, that this aggregate amount shall not in any event exceed **89,770,000 units of account** (*1969 CLC-14 mio SDR).*

Compulsory Insurance & Right to a Direct Action

The owner of a tanker **carrying more than 2 000 tones of persistent oil as cargo** is obliged to maintain insurance to cover his liability under the applicable CLC Convention (Art. 7.1)

Under the CLC Conventions claims for pollution damage can be brought **directly against the insurer**. The victim of oil pollution can therefore pursue its claim against the registered shipowner, its insurer or both.

Duty of the State part to issue and of the ship to carry on board a relevant certificate (CLC certificate) attesting coverage (Art. 7.3-4).

RIGHT TO A DIRECT ACTION AGAINST THE INSURER!

(departure from the P&I „Pay to be paid“ rule)

Breaking the shipowners right of limitation (Art. 5.2)

As a result of the increased limits of liability, the test for breaking the ship owner's right of limitation has moved from "**actual fault or privity**" of the ship owner, which was incorporated in the 1969 CLC Convention, to the concept of "**wilful misconduct of the ship owner**".

Therefore, according to the 1992 CLC Convention, the ship owner is deprived of his right to limit his liability **only if it is proved that the pollution damage resulted from the ship owner's personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.**

Unbreakable test ?

Jurisdiction of the Court (Art. 9)

The jurisdiction of the court is provided by article IX of the CLC Convention, according to which **court action must be brought in a State or States where the pollution damage occurred.**

If the pollution damage occurred in the EEZ (or equivalent zone) of a State A, court action must be brought only in front of the competent court of that State.

If the pollution damage affected more than one State, for example State A and State B, **then the court action must be brought in one of the two affected states, at the claimant's choice.**

Limitation Fund (Art. 5-3)

If the ship owner is entitled to limitation, **he must constitute a limitation fund in the competent court of a State party to the CLC where the pollution damage occurred.**

The constitution of the limitation fund result in the **protection of the ship owner's other assets and the release of any of his ships that may have been arrested.** In other words, after the constitution of the limitation fund, claims can be submitted only against that fund.

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Prescription periods (Art. 8)

Rights of compensation under this Convention shall be extinguished **unless an action is brought thereunder within three years from the date when the damage occurred.**

However, **in no case shall an action be bought after six years from the date of the incident which caused the damage.**

Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Same prescription periods as in the Fund Convention.

Scope of Application (Definitions- Article 1 CLC)

Article 1 (For the purposes of this Convention:)

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

2. “**Person**” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

3.“**Owner**” means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship’s operator, “owner” shall mean such company.

4. “**Oil**” means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.

Continued…

(6) **Pollution damage**" means:

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(b) the costs of preventive measures and further loss or damage caused by preventive measures.

7. "**Preventive measures**" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

8. "**Incident**" means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

Territorial Scope of Application (Art.2)

This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the **territory,** including the **territorial sea**, of a Contracting State, and

(ii) in the **exclusive economic zone of a Contracting State**, established in accordance with international law, or, if a Contracting State has not established such a zone, **in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law** and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to **preventive measures, wherever taken**, to prevent or minimize such damage.

1992 Fund Convention

The **1969 CLC Convention** solved most of the legal problems which arose as a result of the Torrey Canyon accident, albeit not to the principal one felt by victims of oil pollution - **the right of the shipowner to limit or in certain cases to exclude its liability.**

The CLC Convention was therefore **complemented in 1971 with another Convention, which created an international fund (organization), from which victims of oil pollution can claim compensation in cases where the shipowner is able to limit or completely exclude its liability (1971 IOPC Fund).**

The 1992 Protocol functions as a self standing conventions (**1992 IOPC Fund**)

With the entry into force of the **2003 Supplementary Fund Protocol in 2005**, a third international tier (or fund) providing compensation to victims of oil pollution was established **(THREE TIER SYSTEM)**

IOPC Funds

The function of the Funds ***is to provide compensation to victims of oil pollution in a State party to the relevant Fund Convention in cases where the victims do not obtain full compensation under the applicable CLC Convention*** *(exclusion or limitation of liability by the shipowner, the owner and/or his insurer are financially incapable of meeting their obligations in full..)*

However, even the liability of the IOPC Fund is limited. The total amount available under the 1992 Conventions increased from 135 million to **203 million SDR**, and if three States contributing to the Fund receive more than 600 million tones of oil per annum, the maximum amount is raised to 300.740.000 SDR (Art. 4.4)

The IOPC Funds do not pay compensation if the damage occurred in a State **which was not a member of the respective Fund at the time of the accident, if it proves that the pollution damage resulted from an act of war or was caused by a spill from a warship or if the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in the applicable convention (Art. 4-2)**

Contributors to the IOPC Fund (Art. 10)

Contributors are not States, but persons (mostly oil companies), **which have received in the relevant calendar year more than 150.000 tons of crude oil or heavy fuel oil (contributing oil):**

- In ports or terminal installations in a State which is a member of the relevant Fund, after the carriage by sea or,

- in any instalation situated in the territory of that Contracting State contributing oil which has been carried by sea and discharged in a port or terminal instalation of a non-Contracting State. (Art. 10-1)

The relevant element is the **carriage of oil by** sea and not the carriage of oil from one State to another.

Contributors to the IOPC Fund (continued)

….The obligations to pay contributions also arises in cases where oil is transported between two ports or terminals within the same State or transported by ship from an offshore production rig.

Contributions are paid by the individual contributors directly to the IOPC Fund; however the **State shall communicate every year to the relevant Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person (submission of oil report) (Art. 15)**

If the total amount of claims exceeds the total amount of compensation available under the CLC and Fund Convention, the compensation paid to each claimant would be reduced **proportionately (PRORATA payment).**

2003 Supplementary Fund Protocol

The main reason for creating a new international Fund was to avoid "**pro rata payments**" in cases of major accidents *(i.e. Erika, Prestige..)*.

The participation within this Fund is optional and is open to all States, which are States parties to the 1992 CLC and FUND Conventions.

Accordingly, in order for a state to join the 2003 Supplementary Fund, it must first be a state party to the 1992 CLC and Fund Convention. The three conventions are therefore closely interrelated.

The function of the 2003 Fund protocol is to supplement the functioning of the 1992 CLC and Fund Conventions, but only in States which are parties to the Protocol.

The 2003 is a separate legal entity (international organization) with its own organs (Assembly, Director, …)

Supplementary Fund Protocol

Since the entry into force of the Supplementary Fund in 2005, the total amount of compensation payable for any one incident **has been limited to a combined total of 750 million Special Drawing Rights (SDR) including the amount of compensation payable under the existing 1992 CLC/Fund Convention**)

An obvious conclusion is therefore, that in order to get full (financial) protection for damages arising out of a spill of oil from tankers, a State should join both the 1992 IOPC Fund and the 2003 Supplementary Fund Protocol *(if we leave aside the Bunker Convention and the HNS..)*

The main function of the Supplementary Fund is to pay additional compensation to any person suffering pollution damage if that person has been unable to obtain full and adequate compensation for an '**established claim**' **under the terms of the 1992 Fund Convention.**

States Parties to the Supplementary Fund Protocol

as at 31 March 2022

(and therefore Members of the Supplementary Fund)

32 STATES PARTIES TO THE SUPPLEMENTARY FUND PROTOCOL		
Australia	Greece	Norway
Barbados	Hungary	Poland
Belgium	Ireland	Portugal
Canada	Italy	Republic of Korea
Congo (the)	Japan	Slovakia
Croatia	Latvia	Slovenia
Denmark	Lithuania	Spain
Estonia	Montenegro	Sweden
Finland	Morocco	Turkey
France	Netherlands<2>	United Kingdom
Germany	New Zealand	

Supplementary Fund Protocol

If the victim of oil pollution **has been unable to obtain full compensation from the shipowner, his insurer and the 1992 IOPC Fund**, and if the damage has occurred within the EEZ, territorial sea, internal waters or territory of a State party to the 2003 Supplementary Fund protocol, then the victim is entitled to compensation for the remaining difference from the 2003 Supplementary Fund. **(Top up compensation)**

The 2003 Fund may be obliged to pay compensation because either:

(i) the **total damage exceeds**, or

(ii) **there is a risk that it will exceed, the applicable limit of compensation laid down in the 1992 Fund Convention in respect of any one incident** (203 million SDR.

Victims of oil pollution cannot claim compensation automatically from the 2003 Supplementary Fund, as two other requirements are needed:

(i) there must be an **established claim** and

ii.) in practice there must be a **final or temporary decision of the Assembly of the 1992 IOPC Fund** that payment will be made only for a portion of the claim.

Established Claim (Art.1.(8))

- A mere assertion or claim that the damage has occurred is not enough. In most cases the IOPC will recognize a certain claim with **an out of court settlement.** In some other cases, especially where the victim of oil pollution and the 1992 Fund could not agree on the existence or extent of the damage, the final decision will be reached by the **judgment of a competent court(s) in a state party, which shall not be subject to ordinary forms of reviews (established claim).**

- The second requirement for the payment of compensation is that the 1992 IOPC Fund considers **that the total amount of the established claims exceeds,** or **there is a risk that the total amount of established claims will exceed,** the aggregate amount of compensation available under the 1992 Fund Convention and as a consequence the 1992 Fund (its Assembly) has decided provisionally or finally that payments will only be made for a proportion of any established claim

Payment of compensation

In such cases the 2003 Supplementary Fund is liable to pay the ***remaining compensation*** (the difference between the established claim and the amount recovered under the 1992 CLC & Fund Convention),

….as well as in cases where the Assembly of the 1992 IOPC Fund has decided **just provisionally**, in order to protect the interest of all claimants , also future, to undertake a "pro rata payment"

The 2003 Supplementary Fund retains the right of subrogation against the 1992 Fund, in cases the later increases the level of payment or pays the entire damage

Contributors to the 2003 Supplementary Fund Protocol

The 2003 Supplementary Fund protocol **is an amendment to the 1992 Fund** Convention and not to the CLC Convention. This legaly means that it should be financed by oil interests (receivers of oil) and not by the shipowning interest (shipowner, P&I Clubs).

Anual contributions to the Fund should be made in respect of each Contracting State, **by any person who, in any calendar year, has received total quantities of oil exceeding 150,000 tons**. Contributors to the 2003 Supplementary Fund are therefore **the same** as with regard to the 1992 CLC Fund.

This in turn means that contributors (in most cases oil companies) have to pay two separate contributions, **the first to the 1992 IOPC Fund and the second under the 2003 Supplementary Fund Protocol.**

„Membership Fee“ (Art. 14)

An interesting feature of the **1992 Fund Convention** is the fact, that in the absence of contributors (*therefore if there are no companies receiving more than 150.000 tones of persistent oil in a State party)*, the coverage provided by the 1992 IOPC is a “free service”.

Differently, **Article 14 of the 2003 Supplementary Fund Protocol** provides for what is nowadays referred to as the “**membership fee”.** According to the mentioned article there must be a **minimum aggregate receipt of 1,000,000 tons of contributing oil in each Contracting State.**

This means that, if the actual receipts of contributing oil in a State are less than 1 million tons, **there is deemed to be a minimum receipt of 1 million tons of contributing oil in that State**, and the Contracting State which chooses to become a party in such circumstances to the Protocol **assumes the liability to pay the contribution based on the deemed 1 million tons receipt** or the diference.

Jurisdiction of the Court (2003 Supplementary Fund Protocol)

Jurisdiction is dealt with in Article 7 of the Protocol and for the most part mirrors the provisions of the 1992 Fund Convention.

As a general rule, the **competent court should be a Court of the State where the pollution damage occurred** and where **the shipowner established a limitation fund (Art. IX CLC)**

What might happen in practice is **that the pollution damage affects more than one State *(transboundary pollution)* and that an action against the shipowner and the 1992 Fund has been brought in front of a competent court of a State**, which is a State party to the 1992 CLC (and 1992 FUND) Convention, but not to the 2003 Supplementary Fund Protocol.

In such cases, victims of oil pollution **may claim compensation either before a court of the State where the Supplementary Fund has its headquarters (UK)** or before **any court of a Contracting State to the 2003 Protocol, competent under Article IX of the 1992 CLC.**

Balance of Contributions

The 2003 Supplementary Fund Protocol is an amendment to the 1992 Fund Convention and accordingly it should be financed by "oil receivers" (persons) in State parties to the 2003 Supplementary Protocol. **The 2003 Protocol therefore does not impose any additional financial burden on shipowners and their insurers.**

Some other States (and particularly shipowners) were worried that the **reopening and substantial amendment of the Civil Liability Convention** could endanger the functioning of the entire international system, which has worked quite well for almost forty years

Nonetheless, the shipowning interests *(shipowners and insurers)* were well aware that it is crucial to maintain an equitable balance between the burdens imposed on the two industries. They argued that a **voluntary increase of the limits of liability of the shipowner,** without the formal amendment of the 1992 CLC Convention should be the way forward.

STOPIA 2005 (Small Tanker Oil Pollution Indemnification Agreement)

At the March 2005 IOPC Fund Assembly session, the ***International Group P&I Clubs*** indicated that it decided to increase, on a voluntary basis, the limitation amount for small tankers, by means of an agreement to be known as the **STOPIA *(Small Tankers Oil Pollution Indemnification Agreement)***.

A voluntary increase of liability, in order to prevent the amendment of a certain international regime (convention) is definitely a new approach in international maritime law.

The main reason for the devising of STOPIA were data from various studies (some of them undertaken by the Fund itself), according to which the **main imbalance between the contributions paid by the oil industry and shipowning interests is seen with regard to small tankers** (less than 30.000 GT).

The STOPIA 2005 was basically a proposal for a voluntary increase in the limit of liability for small tankers (up to 29,548 GT) under CLC which would be applied only for "oil pollution damage" in state parties to the 2003 Protocol.

STOPIA 2006 & TOPIA 2006 (as amended 2017)

STOPIA 2006 and TOPIA 2006 are **contractually binding agreements between shipowners (P&I) and IOPC Funds**, which nonetheless give to the relevant IOPC Fund **the right of enforcement.**

The shipowners therefore have still the right to limit their liability or exclude their liability according to the limits embodied in the 1992 Civil Liability Convention, while on the other hand the victims must still claim compensation from the 1992 and 2003 Funds accordingly.

However, the TOPIA and STOPIA **give to shipowners an enforceable right to claim reimbursement from the P&I Clubs up to the limits envisaged by the two voluntary schemes.**

The aim of the new package is clearly to achieve **a balance of contributions** between the oil industry and the shipowning interests, both with regard to accidents which would occur in State parties to the 1992 CLC and Fund Conventions (**STOPIA 2006**) and in cases where the 2003 Supplementary Fund is involved (**TOPIA 2006**).

STOPIA 2006 (as amended in 2017)

STOPIA 2006 applies for pollution damage in States for which the 1992 Fund Convention is in place.

The said agreement is a contract between owners of small tankers (of 29.548 GT or less) to increase, **on a voluntary basis, the limitation amount applicable to the tanker under the 1992 Civil Liability regime.**

The contract will apply to **small tankers entered in one of the P&I Clubs** which are members of the **international group** and **reinsured through the pooling agreement of the International group.**

The effect of STOPIA is therefore that the maximum amount of compensation payable by owners of all ships of 29.548 GT or less would be **20 million SDR** (instead of 4.510.000 SDR for tankers of less that 5000 GRT).

TOPIA 2006 (as amended 2017)

TOPIA DOES NOT apply only to small tankers (as is the case with STOPIA) **but to all tankers entered in one of the P&I Clubs**, which **are members of the International Group** and **reinsured through the pooling agreement.**

Under TOPIA 2006, **the owner of the ship involved in an incident within a State Party the 2003 Supplementary Fund Protocol, shall indemnify the Supplementary Fund for 50 % of the compensation the Fund pays** under the Supplementary Fund Protocol.

Therefore, if the incident involves a ship to which TOPIA 2006 applies, the Supplementary Fund will be entitled to indemnification by the shipowner of **50 % of the compensation payments it had made to claimants.**

Text of both agreemens (TOPA and STOPIA) available at: https://www.shipownersclub.com/stopia-2006-as-amended-2017-and-topia-2006-as-amended-2017-2017-amendments/