INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 4	IOPC/OCT11/**4/4**	
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1992 Fund Assembly	**92A16**	●
1992 Fund Executive Committee	**92EC53**	
Supplementary Fund Assembly	**SA7**	●
1971 Fund Administrative Council	**71AC27**	

CONSIDERATION OF THE DEFINITION OF 'SHIP'

Note by the Director

Summary: At its October 2010 session, the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, instructed the Secretariat to:

- provide a legal analysis of the extent to which the interpretation of the definition of 'ship' within Article I.1 of the 1992 Civil Liability Convention (1992 CLC) might include floating storage units (FSUs);

- consider the interpretation of the definition of 'ship' by reference only to the 1992 CLC and 1992 Fund Convention, and not to consider other international conventions in its analysis at this stage;

- add to the legal study, the issue of whether to levy contributions for oil carried by 'mother' vessels as described in paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1 submitted by the delegation of Denmark; and

- report back to the 1992 Fund Assembly at its next session.

The Director engaged Professor Vaughan Lowe QC, a practising lawyer and leading academic at the University of Oxford with many years' experience dealing with international treaties and conventions to carry out the study. Professor Lowe's legal opinion and profile are attached to this document at Annexes I and II.

The legal opinion concludes that FSUs are not included within the definition of 'ship' under Article I.1 of the 1992 CLC, and that oil on board the 'mother' vessels as described in paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1, should not be regarded as 'received' contributing oil for the purposes of Article 10 of the 1992 Fund Convention.

The Director has examined the legal opinion and compared it with the policies adopted by the governing bodies of the IOPC Funds over the years on the interpretation of the definition of 'ship' and on the application of the 1992 Conventions to ship-to-ship (STS) oil transfer operations under Article 10 of the 1992 Fund Convention. The results of these comparisons are attached to this document at Annexes III and IV.

The Director considers that the policy adopted by the IOPC Funds' governing bodies on the interpretation of the definition of ship' under Article I.1 of the 1992 CLC, is consistent with Professor Lowe's legal opinion, since the concept of 'carriage' is a fundamental principle of the 1992 Conventions. The Director however, draws the attention of Member States to the practical question of the time period beyond which it would not be reasonable to say that a vessel remains on a voyage, 'carrying' oil.

The Director is of the view that a pragmatic solution needs to be found to this question, and in this regard, the Director, on balance, considers that one year is a reasonable time period to allow for a vessel to remain at anchor, prior to it resuming its voyage 'carrying' oil.

In addition, the Director notes the decision taken by the 1992 Fund Assembly in October 2006 that all contributing oil received by floating tanks (including dead-ships or vessels permanently or semi-permanently at anchor) irrespective of whether the tank is connected with onshore installations via pipeline or not, should be considered as 'received' for the purposes of Article 10.1 of the 1992 Fund Convention, and should therefore be taken into account for the levying of contributions[<1>].

The Director draws the attention of Member States to the question of the time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor for the purposes of levying contributions under Article 10.1 of the 1992 Fund Convention, and is of the view that one year would be an appropriate maximum time period to allow for a vessel to remain at anchor, beyond which, it should be considered as 'permanently or semi-permanently' at anchor for contribution purposes under Article 10 of the 1992 Fund Convention.

Action to be taken: 1992 Fund Assembly

The 1992 Fund Assembly is invited to*:*

(a) confirm its interpretation that floating storage and offloading units (FSOs) and FSUs do not fall within the definition of 'ship' under Article I.1 of the 1992 CLC;

(b) decide whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under Article I.1 of the 1992 CLC, but that, in any event, the decision as to whether the vessel is a 'ship' should be made in the light of the particular circumstances of the case;

(c) confirm also its decision, taken in October 2006, that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS oil transfer operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention;

(d) decide accordingly, since the 'mother' vessels described in paragraphs 5.1 to 5.3 of document IOPC/OCT10/4/3/1, are not 'permanently or semi-permanently' at anchor, whether the oil onboard them qualifies as 'received' contributory oil for the purposes of Article 10 of the 1992 Fund Convention;

(e) decide whether one year is a reasonable time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor, and therefore whether oil received in such vessels should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention. At the same time, decide whether, in any event, the decision as to whether the vessel is 'permanently or semi-permanently' at anchor should be made in the light of the particular circumstances of the case;

<1> 'when operating in the territory, including the territorial waters, of a State party to the 1992 Fund Convention' – see document 92FUND/A.11/35, paragraph 32.20.

	(f) decide whether to instruct the Director to draft an Assembly Resolution containing the above decisions, to be submitted to the next session of the 1992 Fund Assembly. Supplementary Fund Assembly To note the information contained in this document and the decisions taken by the 1992 Fund Assembly.

1 Introduction

1.1 In October 2010, following a request made in October 2009 by the 1992 Fund Assembly and the Supplementary Fund Assembly, the Director presented a document in which he further explored the possibility of a change in the interpretation of the definition of 'ship ', in particular in connection with the question of whether pollution damage caused by floating storage units (FSUs) such as the *Slops* should be covered under the 1992 Fund Convention (cf document IOPC/OCT10/4/3).

1.2 In his document, the Director summarised a report prepared by external consultants Douglas Westwood, who had been commissioned to identify and review the type and number of vessels that could be considered FSUs. A representative of Douglas Westwood also made a presentation to the governing bodies and explained the various forms of operational FSUs worldwide using the following categories:

(1) Floating storage units (FSU)/Floating storage and offloading units (FSO);

(2) Conventional floating production storage and offloading units (FPSO);

(3) Unconventional FPSO/FSO and hybrid systems including:

(a) Floating drilling production storage and offloading (FDPSO) systems;
(b) Cylindrical-hull FPSOs;
(c) Barge FSO and FPSOs; and

(4) Oil tankers deployed as temporary storage systems or (retired) oil tankers used as permanent or semi-permanent storage systems[<2>].

1.3 As a result of the debate which followed the presentation of the Director's document, the 1992 Fund Administrative Council instructed the Director to provide a legal opinion of the extent to which the interpretation of the definition of 'ship' within Article I.1 of the 1992 Civil Liability Convention (1992 CLC) might include FSUs.

1.4 Following the presentation of the Director's document, the delegation of Denmark presented document IOPC/OCT10/4/3/1 which raised questions regarding the coverage under the 1992 CLC and 1992 Fund Convention, in particular regarding how long a vessel, including one involved in ship-to-ship (STS) oil transfer operations, could remain at the same position at anchor before continuing its voyage and still be considered a 'ship' for the purpose of the Conventions.

1.5 The 1992 Fund Administrative Council decided that the scenarios described in paragraphs 3.2-3.5 of document IOPC/OCT10/4/3/1 fell within the current interpretation of the definition of 'ship' under Article I.1 of the 1992 CLC, and that, consequently, oil spills from such ships would be covered under the 1992 CLC and Fund Convention.

[<2>] To avoid confusion, all these categories are hereinafter referred to as FSOs.

1.6 However, following an inconclusive debate in respect of whether to levy contributions for oil carried by 'mother' vessels as described in paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1, the 1992 Fund Administrative Council decided to add this issue to the legal study on the definition of 'ship' and instructed the Director to report back to the 1992 Fund Assembly at its next session.

2 Choice of expert to conduct the legal opinion

The Secretariat consulted extensively with lawyers and the IMO Legal Department in order to identify the most appropriate legal expert to appoint to write the legal opinion. The Secretariat engaged Professor Vaughan Lowe QC, a practising barrister and leading academic at the University of Oxford with many years' experience dealing with international treaty and convention considerations. Professor Lowe's legal opinion and profile are attached to this document at Annexes I and II.

3 The interpretation of the definition of 'ship' under Article I.1 of the 1992 CLC

Conclusion regarding the interpretation of the term 'ship'

3.1 The legal opinion first considered whether in the 1992 CLC and 1992 Fund Convention, the term 'ship' includes vessels that are, for the time being, used for the storage of oil. These vessels are hereinafter referred to collectively as 'Floating Storage and Offloading units' (FSOs).

3.2 The legal opinion concludes that it is clear from the available evidence that the definition of the term 'ship' in Article I.1 of the 1992 CLC, was deliberately linked to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of the ship on a voyage. The legal opinion reaches this conclusion by two methods of analysis.

3.3 The first method of analysis considers the definition and ordinary meaning of the terms within Article I.1, including 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo', and concludes that the references to 'carriage' and 'cargo' in Article I.1, clearly imply that the craft should be constructed or adapted so as to enable it to move oil in bulk from one place to another, and to move oil in bulk *as cargo.*

3.4 The second method considers other relevant definitions within the text of the 1992 CLC, including 'incident', 'pollution damage', and 'oil', when answering the question of whether an incident has occurred which causes (or threatens to cause) 'pollution damage', which in turn requires an escape or discharge from a ship of 'oil', and which is defined in Article I.5 of the 1992 CLC as:

> 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.

3.5 The English, French and Spanish authentic language texts all refer either to the word 'carried' or 'transported', and the definition therefore implies that the ship carrying oil is engaged on a voyage (whether laden or in ballast).It can be read as applying only to oil which is being carried or transported by such a ship.

3.6 Moreover, the legal opinion states that a vessel can satisfy the definition of 'ship' (because it is constructed or adapted for the carriage of oil), but that there is no liability under the 1992 Conventions for pollution resulting from an escape or discharge of oil which the vessel is not transporting either as cargo or bunkers.

3.7 Importantly, the legal opinion states that, on this basis, there would be no liability for pollution resulting from a spill of oil which is on board only for other (non-carriage) purposes, such as storage.

3.8 The legal opinion concludes that the 1992 Conventions apply only to sea-going vessels and seaborne craft constructed or adapted so as to be capable of carrying oil, and apply only when they are either:

(i) actually carrying hydrocarbon mineral oil in bulk as cargo; or

(ii) engaged in a voyage following such carriage and it is not proved that there are no residues of such carriage of oil in bulk aboard the ship.

Conclusion regarding FSOs

3.9 The legal opinion next considered whether FSOs should be considered 'ships'.

3.10 The legal opinion notes, that with the exception of the categories listed at (a)-(c) below, no intention to include FSOs within the definition, or any understanding that FSOs fall within the definition of a 'ship', can be found within the Conventions:

(a) Barges being towed by ships navigating on sea voyages (or temporarily at anchor for purposes incidental to ordinary navigation or force majeure or distress);

(b) Purpose-built FSOs that have their own independent motive power and steering equipment for sea-going navigation so as to be employed either as storage units or carriage of oil in bulk as cargo; and

(c) Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained.

3.11 In respect of these three categories, the elements of *carriage* of oil and undertaking a *voyage* are present, so they can rightly be classed as a 'ship' within Article I.1 of the 1992 CLC.

3.12 The legal opinion states that, in relation to the question of what distinguishes a ship from a FSO, neither the Conventions, nor any associated agreement or practice, establish any criteria to differentiate between them. It is, however, a matter of discretion for Member States to decide on the criteria that will apply, and the legal opinion states that the main criterion implicit in the CLC definition of a ship, is the capacity to navigate at sea, and the interpretative criteria should reflect that fact.

3.13 Importantly, the legal analysis states that a craft that is incapable of navigating at sea cannot be regarded as a craft capable of carrying oil in bulk as a cargo.

Conclusion regarding 'mother' vessels

3.14 The legal opinion next addresses the question concerning the application of the term 'ship' to 'mother' vessels anchored off the Danish coastline, as detailed in paragraphs 3.1-3.8 of document IOPC/OCT10/4/3/1.

3.15 The legal opinion states that the fact that all of the examples detailed in paragraphs 3.1-3.8 of that document are anchored for varying periods of time and that they engage in STS transfer operations would not preclude their being treated as 'ships', because they are in the course of a voyage carrying oil as cargo, which they would continue after the STS transfer.

3.16 However, the legal opinion also states that it is within the discretion of the Member States to decide, if they so wish, the appropriate time period beyond which it would not be reasonable to say that a vessel remains on a voyage, for the carriage of oil by sea as cargo, and thus to deprive a vessel of its character as a 'ship' for CLC purposes, and give the vessel the character of a FSO.

3.17 The legal opinion concludes that all of the 'mother' vessels can properly be described as 'ships' within the 1992 Conventions as there is no doubt that they are *constructed or adapted for the carriage of oil in bulk as cargo* as they all involved tankers sailing to Danish waters and anchoring there before continuing their voyages.

4 Conclusions regarding 'receipt' of oil under Article 10 of the 1992 Fund Convention

4.1 The second main question addressed in the legal opinion is the question of receipt of oil and contributions, viewed in light of the definition of the term 'ship'.

4.2 Article 10 of the 1992 Fund Convention provides:

> Annual contributions to the Fund shall be made in respect of each Contracting State by any person who, in the calendar year referred to in Article 12, paragraph 2(a) or (b), has received in total quantities exceeding 150,000 tons:
>
> (a) in the ports or installations in the territory of that State contributing oil carried by sea to such ports or terminal installations; and
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> (b) in any installations situated in the territory of that Contracting State contributing oil which has been carried by sea and discharged in a port or terminal installation of a non-Contracting State, provided that contributing oil shall only be taken into account by virtue of this sub-paragraph on first receipt in a Contracting State after its discharge in that non-Contracting State.

4.3 Article 1.8 of the 1992 Fund Convention provides:

> 'Terminal installation' means any site for the storage of oil in bulk which is capable of receiving oil from waterborne transportation, including any facility situated off-shore and linked to such site.

4.4 The legal opinion notes that Article 10 makes no reference to 'ships' and that liability to make contributions is defined not by reference to what is or is not a 'ship' but according to whether oil has been 'received' in a Contracting State.

4.5 The legal opinion therefore concludes that the question of what constitutes a 'receipt' of oil for the purposes of contributions under Article 10 of the 1992 Fund Convention, is independent of the question of what constitutes a 'ship', and there is a broad discretion permitted in laying down a precise definition of the circumstances in which oil is considered 'received' for the purposes of Article 10 of the 1992 Fund Convention.

The question of contributions from 'mother' vessels

4.6 The legal opinion next addresses the circumstances in which contributing oil could be said to have been 'received' in relation to the categories of 'mother' vessels as defined in paragraphs 3.2-3.5 of document IOPC/OCT10/4/3/1, presented by the Danish delegation in October 2010.

4.7 In this regard, it was noted that the Danish delegation did not consider that the 'mother' vessels should be considered to be 'permanently or semi-permanently at anchor' or that the oil on board them should be considered as 'received' for contribution purposes.

4.8 However, the legal opinion raises the question of whether there is any period of time after which the mother vessel would be considered to be 'permanently or semi-permanently at anchor'.

4.9 Noting that when the 1992 Fund Assembly discussed this matter in October 2006, it used the phrase 'permanently or semi-permanently at anchor' in reference to vessels which receive oil and subsequently offload it onto other craft at the same location, the legal opinion contends that vessels may fall into this category by virtue of the fact that in the normal course of their operations, they are engaged only in two-way STS transfers of oil and do not depart from their anchorage on a cargo-carrying voyage.

4.10 The legal opinion continues that if it is uncertain whether an anchored vessel will depart on such a voyage, a long period at anchor may create a presumption that no transport of oil by that vessel is intended, in the absence of evidence to the contrary. It is stated that in practice, in many situations the nature of operations and the intentions of those involved will be reasonably clear.

4.11 The legal opinion states that if it is evident that no voyage is intended, there is no reason why the vessel should not, from the outset, be considered 'permanently or semi-permanently at anchor', without any minimum period at anchor being required to demonstrate this fact.

4.12 Conversely, if there is an evident intention that oil loaded onto a 'mother' vessel is to be carried on a voyage (albeit after a period of storage) this may be regarded as a normal STS operation, and not as a receipt of contributing oil, regardless of the time for which the vessel remains at anchor before the voyage begins.

4.13 The legal opinion concludes that the oil on board those vessels which fell into the four scenarios described in paragraphs 3.2-3.5 of document IOPC/OCT10/4/3/1 should not be regarded as 'received' contributing oil, given the evident intention that oil loaded onto the 'mother' vessels is to be carried by those vessels on voyages (albeit after a period of storage), and that therefore the views of the Danish delegation as detailed in paragraph 4.7 above, appear to be consistent with the 1992 Fund policy.

5 The issues of strict liability, compulsory insurance and certification

Strict liability

5.1 The legal opinion considers the implication that FSOs are not 'ships' for the purposes of strict liability and concludes, *inter alia*, that:

> If an incident occurs which causes oil pollution damage for which there is no remedy under the international compensation regime (because the craft is not a 'ship' and/or because the incident does not involve a spill of 'oil' as defined) compensation under the international regime will not be available for the damage, but may be available from the owners of the craft under other national or international laws[<3>];

Compulsory insurance

5.2 The legal opinion considers the implication that FSOs are not 'ships' for the purposes of compulsory insurance and concludes *inter alia*, that:

> The owners of craft that do not count as 'ships' under the 1992 CLC are not bound to maintain insurance in accordance with 1992 CLC Article VII.1[<4>] but may choose to do so or be obliged to do so under other laws. In particular, regardless of whether an offshore craft is defined as a 'ship' under the 1992 CLC, it may be so considered under the Bunkers Convention and therefore subject to its compulsory insurance requirements.

[<3>] Compensation under the Bunkers Convention (if in force in the State affected) would be available on a strict liability basis, although this may not be adequate to meet all claims, as the limitation amount established is not dedicated to pollution claims and there is no second-tier fund available for pollution claims if the liability limit is exceeded.

[<4>] Article VII.1 of the 1992 CLC requires ships carrying more than 2 000 tons of oil in bulk as cargo to maintain insurance to cover shipowner’s liability for pollution damage.

Certification

5.3 The legal opinion considers the implication that FSOs are not 'ships' for the purposes of certification and concludes that:

(i) If a craft is considered not to be a 'ship' as defined by the 1992 CLC, the compulsory insurance and certification provisions of Article VII.1 of the 1992 CLC do not apply.

(ii) Sometimes owners arrange certification in case a vessel engages in the transport of oil by sea, or to avoid differences in opinion with port state control authorities as to the applicability of the Convention. However, a certificate attesting to the existence of insurance cover as required under Article VII.1 of the 1992 CLC, cannot be regarded as conclusive evidence that a vessel is a 'ship' for the purposes of the 1992 Conventions.

6 Director's considerations

6.1 The legal opinion has been drafted by Professor Lowe QC, a highly respected academic and practising barrister who has written extensively on the interpretation of international conventions and treaties. The Director is grateful for the assistance provided by Professor Lowe to the Secretariat in considering the important issues discussed in the legal opinion.

6.2 The legal opinion provides conclusions to the two questions asked by the 1992 Fund Administrative Council in October 2010, regarding the extent to which the interpretation of the definition of 'ship' within Article I.1 of the 1992 CLC might include FSOs, and whether to levy contributions for oil carried by 'mother' vessels as described in paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1.

6.3 Professor Lowe concludes that:

(i) With the exception of the vessel types detailed at paragraph 3.10 (a)-(c) above, FSOs are not 'ships' within the definition of Article I.1 of the 1992 CLC; and

(ii) 'Mother' vessels, as described in paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1 are 'ships' within Article I.1 of the 1992 CLC; and accordingly

(iii) Oil received onboard the 'mother' vessels should not count as 'received' oil for contribution purposes.

6.4 A summary of Professor Lowe's conclusions regarding various types of FSO units and 'mother' vessel scenarios, compared to the 1992 Fund's policies, can be found at Annexes III and IV of this document. The Director considers it encouraging to note that the 1992 Fund's existing policies compare favourably with the conclusions of Professor Lowe.

6.5 In the Director's view, Professor Lowe's conclusions regarding the linking of the term 'ship' in Article I.1 of the 1992 CLC to the carriage of oil in bulk, and that such carriage involves the navigation of the ship on a voyage, are correct. As a consequence, the Director also agrees with Professor Lowe's opinion regarding whether FSOs are ships. In the Director's view, with the exception of those vessel types detailed at paragraph 3.10 (a)-(c) above, FSOs are not ships within the definition of Article I.1 of the 1992 CLC.

6.6 The Director also agrees with Professor Lowe's conclusion that the 'mother' vessels described at paragraphs 5.1-5.3 of document IOPC/OCT10/4/3/1 are 'ships' within Article I.1 of the 1992 CLC.

6.7 The Director further agrees that oil carried onboard these 'mother' vessels should not be considered 'received' at the vessel for the purpose of Article 10.1 of the 1992 Fund Convention, and therefore should not be taken into account for the levying of contributions, provided the vessels continue on their voyages.

Permitted time period to define 'permanently or semi-permanently at anchor'

6.8 As noted in paragraph 144 of the legal opinion, the question remains as to whether there is any period of time after which a 'mother' vessel would be considered to be 'permanently or semi-permanently' at anchor.

6.9 This question is important as it potentially concerns both coverage under Article I.1 of the 1992 CLC, and the question of contributions from vessels that remain at anchor, acting as FSUs, rather than undertaking a voyage.

6.10 In this regard, Professor Lowe notes at paragraph 110, the possibility of the 1992 Fund Assembly making a decision regarding vessels which remain in place for extended periods conducting STS operations. Professor Lowe considers that one year could be classed as an 'extended period'.

6.11 Regarding this issue, the Director notes the comments of the Danish delegation at paragraph 4.4.27 of the October 2010 Record of Decisions (document IOPC/OCT10/11/1) which states:

> [The Danish] delegation stated that according to some industry sources, it was not unusual for a vessel to remain at anchor, waiting for a more profitable set of market conditions, or for details of its final destination, for periods of six to twelve months. The Danish delegation added however, that in its opinion, a vessel which remained at anchor for more than one year could not be considered as being on a 'voyage'.

6.12 Noting that other delegations did not necessarily share this opinion, the Secretariat has consulted industry sources, specifically two leading ship-broking firms, to ascertain whether they hold information regarding the typical length of time tankers remain at anchor, either awaiting a change in market conditions or further sailing orders. Regrettably, it does not appear that this information is readily collected or available, but further efforts might yet yield results.

6.13 The Director acknowledges that in relation to this issue, a pragmatic solution needs to be found. In this regard, the Director notes paragraph 112 of the legal opinion, where it is stated that:

> …consideration may need to be given to the notion of 'continuing a voyage', a notion which might be stipulated to involve more than moving to a nearby anchorage. Alternatively, the [1992 Fund] Assembly could decide that the decision as to what constituted a 'voyage' should be decided in light of the particular circumstances of the case, in a similar manner to the discretion granted during the 11th session of the 1992 Fund Assembly in October 2006, regarding permanently and semi-permanently anchored vessels engaged in STS oil transfer operations.

6.14 The Director believes that if a reasonable and practical solution can be found, this would help to provide certainty as to the application of the 1992 Conventions and to clarify the decisions made by the 1992 Fund Assembly at its October 2006 session, with regard to the levying of contributions for oil received on board permanently or semi-permanently anchored vessels.

Making an agreed interpretation effective

6.15 The Director notes that Professor Lowe states repeatedly that the IOPC Funds have *broad discretion* to interpret the Conventions on a particular point. The Director considers that the *broad discretion* is limited by the text of the Conventions, and that perhaps the term 'latitude in interpretation' would be more appropriate, but in any event, Member States will have to take decisions on the interpretation of provisions when required, and when the text is not clear, it could be said that the IOPC Funds exercise 'discretion'.

6.16 The Director also notes paragraphs 132-135 of the legal opinion which consider the various methods of ensuring that an agreed interpretation is made effective. Noting that the most effective method would be to amend the relevant parts of the 1992 CLC (ie Article I.1) by means of a Protocol, the

Director considers that this would likely take considerable time, and could lead to a significant administrative and legislative burden for many Member States. It is also likely that not all States parties to the 1992 Conventions would ratify such a Protocol, which would lead to considerable treaty law complications.

6.17 In view of these concerns, the Director considers that the suggestion to adopt by unanimity or consensus, an agreed interpretation of the definition of Article I.1 of the 1992 CLC, by means of an Assembly Resolution, to be the most practical and effective method of addressing the issue of implementing any agreed interpretation.

6.18 The Director does however acknowledge that although the 1992 Fund Assembly may agree an interpretation of the definition of Article I.1 of the 1992 CLC, this may not bind those Member States (currently numbering 19) which are only Party to the 1992 CLC, but not to the 1992 Fund Convention. Those 19 Member States would need to legislate independently and amend their own national laws if they wished to adopt the same interpretation as the 1992 Fund Assembly, pending any subsequent decision to ratify the 1992 Fund Convention.

6.19 Furthermore, the Director notes that Professor Lowe is of the view[<5>] that decisions taken by the 1992 Fund's governing bodies would be considered as a 'subsequent agreement' between the States parties regarding the interpretation of the Conventions, or as 'subsequent practice' in the application of the treaty, establishing agreement between the States parties regarding its interpretation pursuant to Article 31.3 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[<6>].

6.20 Professor Lowe considers that the decisions taken by the 1992 Fund's governing bodies would be likely, in practice, to be applied by national courts.

6.21 However, the Director notes that this matter has been discussed previously by the IOPC Funds' governing bodies, and this view was not necessarily shared. Specifically, when this matter was discussed by the 1971 Fund 7th Intersessional Working Group[<7>], some delegations supported the view that such decisions should be considered as an agreement between State parties under Article 31.3 (a) of the VCLT, but this view was not supported by all Member States attending the Working Group's meeting.

6.22 Similar diverging views were noted regarding the draft Resolution on the interpretation and application of the 1992 Conventions proposed by the 1992 Fund 3rd intersessional Working Group[<8>]. At that time, some delegations expressed hesitation about the draft Resolution because, in their view, it could be interpreted as an attempt to unduly influence courts and that the 1992 Fund's legal representatives should adopt more subtle ways of persuading jurisdictions to uphold the principles of uniform application of the Conventions, for example, through participation in seminars and workshops.

6.23 Conversely, most delegations stated, however, that the aim of the draft Resolution was merely to encourage national courts to take into account the policy decisions of the IOPC Funds on the interpretation and application of the 1992 Conventions, recognising that the courts were the final authorities on such issues. Those delegations pointed out that the Resolution was to be adopted by States, not by courts, and that it was for the States to decide on the most appropriate way of using it.

6.24 The Director endorses the view expressed at paragraph 6.23 above, and also notes that the national courts in some Member States are more inclined to take the decisions of the governing bodies into account than those in other Member States. In the past, Fund Assembly Resolutions and other decisions on the interpretation of the Conventions have been ignored by the national courts of some

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<5> Paragraph 135 of Professor Lowe's legal opinion.

<6> The established and defined approach to the interpretation of conventions or treaties is set out in Articles 31-33 of VCLT, which is referred to in paragraphs 3-6, 10-12, and paragraphs 50-100 of Professor Lowe's legal opinion.

<7> Document 71FUND/WGR.7/10, paragraph 6.2.4.

<8> Document 92FUND/AC.1/A/ES.7/7, paragraphs 8.3 and 8.4

Member States. Regrettably, the Director considers for the reasons detailed in paragraph 6.16 above, that to resolve this issue by a Protocol amending the Conventions is not realistic, at least for the foreseeable future.

6.25 The Director considers, however, that although there is no guarantee that an Assembly Resolution would necessarily be recognised by the national courts of Member States, a decision taken by the 1992 Fund Assembly (preferably in the form of an Assembly Resolution) would at least have a strong persuasive effect in many Member States.

6.26 Accordingly, the Director recommends that the 1992 Fund Assembly decide whether there is any specific period of time beyond which a vessel can be considered 'permanently or semi-permanently at anchor' and that such agreement be recorded by a Fund Resolution. This would assist in providing, so far as is reasonably possible, certainty as to the application of the 1992 Conventions. This would also clarify the decisions made by the 1992 Fund Assembly at its October 2006 session in respect of what constitutes a permanent or semi-permanently anchored vessel for the purposes of levying contributions under Article 10.1 of the 1992 Fund Convention.

6.27 Furthermore, the Director recommends that the 1992 Fund Assembly decide that one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its voyage and still qualify as a 'ship' under Article I.1 of the 1992 CLC, but that the decision as to whether the vessel should still qualify as a 'ship' under Article I.1 of the 1992 CLC should nevertheless be taken in the light of the particular circumstances of the case.

6.28 In addition, the Director recommends that the 1992 Fund Assembly decide that one year is a reasonable time period for a ship to be at anchor, beyond which, it should be considered as 'permanently or semi-permanently' at anchor for contribution purposes under Article 10.1 of the 1992 Fund Convention.

7 Action to be taken

1992 Fund Assembly

7.1 The 1992 Fund Assembly is invited to*:*

(a) confirm its interpretation that floating storage and offloading units (FSOs) and FSUs do not fall within the definition of 'ship' under Article I.1 of the 1992 CLC;

(b) decide whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under Article I.1 of the 1992 CLC, but that, in any event, the decision as to whether the vessel is a 'ship' should be made in the light of the particular circumstances of the case;

(c) confirm also its decision, taken in October 2006, that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS oil transfer operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention;

(d) decide accordingly, since the 'mother' vessels described in paragraphs 5.1 to 5.3 of document IOPC/OCT10/4/3/1, are not 'permanently or semi-permanently' at anchor, whether the oil onboard them qualifies as 'received' contributory oil for the purposes of Article 10 of the 1992 Fund Convention;

(e) decide whether one year is a reasonable time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor, and therefore whether oil received in such vessels should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention. At the same time, decide whether, in any event, the decision as to whether the vessel is 'permanently or semi-permanently' at anchor should be made in the light of the particular circumstances of the case;

(f) decide whether to instruct the Director to draft an Assembly Resolution containing the above decisions, to be submitted to the next session of the 1992 Fund Assembly.

7.2 Supplementary Fund Assembly

The Supplementary Fund Assembly is invited to note the information contained in this document and the decisions taken by the 1992 Fund Assembly.

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REPORT ON THE INTERPRETATION **OF THE TERM 'SHIP' IN THE 1992 CIVIL LIABILITY CONVENTION**

September 2011

Summary: The term 'ship' in the 1992 Civil Liability Convention ('**CLC**') is analysed. It is concluded that that the term was deliberately linked to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of a ship on a voyage. There is no evidence of an intention to include floating storage and offloading units ('**FSO**s') within the definition of a 'ship. A similar conclusion can be reached by the analysis of the definition of 'oil' in the CLC, which refers to oil being carried (*hydrocarbures… transportés*) as cargo or in bunkers.

There is, however, no established criterion for distinguishing between a ship and an FSO. The IOPC Fund has a broad discretion to lay down such a criterion for its own purposes. Some suggestions are offered on approaches to the framing of a criterion, perhaps in a Protocol, and on ways of encouraging a uniform application of the term in national courts.

The definition of a 'ship' under the 1992 Civil Liability Convention has no necessary relationship with the definition of a 'contribution' under the 1992 Fund Convention. Delivery to a craft anchored offshore might be counted as a 'receipt' of oil under the Fund Convention even though the craft is regarded as a 'ship' for CLC purposes. Again, the IOPC Fund has considerable discretion in deciding what will count as a 'receipt' of oil.

The implications of the conclusion that FSOs are not 'ships' under the CLC are considered in the contexts of the coverage of strict liability regimes, compulsory insurance, and the certification of FSOs.

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INTRODUCTION

1. This paper addresses two main questions. The *first* is whether the term 'ship' in the 1992 Conventions on (i) Civil Liability for Oil Pollution Damage ('the **Civil Liability Convention**' or '**CLC**') and (ii) the Establishment of an International Fund for Compensation for Oil Pollution Damage ('the **Fund Convention**'– the two Conventions are referred to collectively as 'the **1992 Conventions**') includes vessels that are for the time being used for the storage of oil. A vessel put to such use will be referred to as a 'floating storage and offloading unit' ('**FSO**').[1] The *second* main question is what constitutes a 'receipt' of oil for the purposes of the making of contributions in accordance with Article 10 of the Fund Convention. Certain specific questions arising from the two main questions are addressed at the end of this paper. It is right that I should record immediately the invaluable assistance of Mr Colin de la Rue, Mr Andrew Taylor, and of the IOCP Funds' Secretariat in preparing this paper.

2. The term 'ship' is defined in both of the 1992 Conventions as follows:

> "*Article I*
>
> *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*."

3. There is no single internationally-accepted definition of the term 'ship'. This is not a deficiency in international law. What counts as a ship may vary from one context to another. The relevant question is, what is the meaning of the term 'ship' as it appears in the Civil Liability Convention and the Fund Convention?

4. There may be a range of views as to what that term does mean or should mean. It is, however, possible to determine that certain interpretations of the Convention in particular cases are clearly right or wrong. The correct interpretation of a treaty term is a technical matter – and a specifically *legal* matter – on which there are legal rules to be followed. The Conventions, correctly interpreted, have a specific meaning which may or may not be the same as the meaning that the current Contracting Parties (or some of them) now wish or believe them to have. Indeed, it may be different from the meaning which some participants at the 1992 conference wished or believed them to have.

5. The well-established and well-defined approach to the interpretation of conventions or treaties (the terms are interchangeable for practical purposes) is set out in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties ('**VCLT**'). That approach would be adopted by any international tribunal adjudicating on this question. The approach is also commonly used in national courts and tribunals when determining the meaning of international treaty texts (although it may not always be adopted by national courts when interpreting national legislation).[2]

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1 The term FSO is explained in 92FUND/A/ES.3/17, 16 April 1998, and 92FUND/WGR.2/2/2, 9 April 1999.

2 See paragraphs 132 – 135, below.

6. At several points the conclusion is reached that the IOPC Funds have wide discretion in the interpretation of a particular provision. That does not mean that the provision can mean whatever anyone wishes it to mean, or that a national court would be unable to give an interpretation of it. A national court would give an interpretation, if required to, using the approach referred to in the previous paragraph. But in the case of a treaty administered by an organization established for that purpose by the States Parties, the court would pay special attention to the practice of the organization and States Parties in the implementation of the treaty. If there is an agreed interpretation which all of the States Parties have expressly or tacitly accepted, it is highly unlikely that a national court would adopt a different interpretation. The agreed interpretation would be the correct interpretation, which States Parties would be obliged to apply. In VCLT terms, this would be regarded as the taking into account of a subsequent agreement between the parties regarding the interpretation, or as subsequent practice in the application of the treaty establishing the agreement of the parties regarding its interpretation, under VCLT Article 31(3). [3] The IOPC Funds could, accordingly, agree upon an interpretation of the CLC and the Fund Convention, and that agreed interpretation would for practical purposes be regarded as authoritative by a national court.[4]

7. The broad conclusion on the first main question is that the term 'ship' in the 1992 Conventions was not intended to apply and does not apply to FSOs. That leaves the problem of deciding whether a particular craft, such as a tanker anchored for a very long time in one place, should be treated as a ship or as an FSO. That problem is also addressed below.

8. The second main question is whether loading or unloading oil onto or from such a craft counts as a 'receipt' of oil under Article 10 of the Fund. The conclusion is reached that there is no necessary connection between the characterization of a craft as a 'ship' and the question of contributions. A particular craft anchored offshore might be regarded for CLC purposes as a 'ship', but unloading oil into it could still be regarded as a receipt of oil for Fund contribution purposes. It is for the IOPC Funds to decide as a matter of policy where to draw the lines.

9. At the end of the paper, the implications of the conclusion that FSOs are not 'ships' for the purposes of the 1992 Conventions are considered in relation to questions of (i) strict liability, (ii) compulsory insurance, and (iii) certification of FSOs.

THE APPROACH TO THE INTERPRETATION OF THE 1992 CONVENTIONS

10. The principles of international law applicable to the interpretation of treaties are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties. In very broad terms, one must consider the context in which the term appears in the treaty and the object and purpose of the treaty, taking into account any express or implied agreement concerning the meaning, and then give the term its 'ordinary' meaning. That meaning can be confirmed or, if the answer is ambiguous or absurd, clarified, by considering the record of the negotiations – the *travaux préparatoires*.

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[3] See further Anthony Aust, *Modern Treaty Law and Practice*, (2nd ed., 2007), pp.238–243, 395–396; Richard Gardiner, *Treaty Interpretation*, (2008), pp. 226–249. Note, however, that the possibility of an international court ruling that a particular interpretation of a treaty by an international organization is incorrect cannot be entirely ruled out: see the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO)*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 66, at pp. 74–75, 82–83, 203, 219.

[4] See further paragraphs 132 – 135, below.

11. VCLT Articles 31-33 read as follows:

" **SECTION 3. INTERPRETATION OF TREATIES**

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages.

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

12. There is no evidence that the Parties to the 1992 Conventions intended that a special meaning should be given to any of the terms that make up the definition of the term 'ship'[5] – vessel, carriage, etc. – and so the interpretation of these terms is to proceed in accordance with the normal VCLT approach, beginning by looking to the ordinary meaning of the terms in their context and in the light of the treaty's object and purpose. The context includes agreements and other instruments relating to the Convention and made in connection with its conclusion: VCLT Article 31(2). (A Protocol or Exchange of Notes accompanying a treaty would be a typical example.) There are, however, no such agreements or instruments relating to the 1992 Conventions. It is to the 1992 Conventions alone that one must look.

THE INTERPRETATION OF 'SHIP' IN THE CLC AND THE FUND CONVENTION

13. The term 'ship' is defined in both of the 1992 Conventions as follows:

"***Article I***
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."

14. The first part of that definition constitutes the definition of the term 'ship' for the purposes of the 1992 Conventions. It stipulates that a 'ship' is "*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo*". This first part itself has two elements: one is the concept of a "sea-going vessel [or] seaborne craft" in general terms; and the other is the precise definition of the kind of sea-going vessels and seaborne craft to which the Conventions apply, limiting them to those vessels and craft that are "constructed or adapted for the carriage of oil in bulk as cargo".

15. The second part of the definition identifies a sub-category of 'ships' to which a proviso ('**the proviso')** attaches: "*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*."

16. These elements of the definition will be addressed in turn.

"… any sea-going vessel and seaborne craft of any type whatsoever …"

17. The term 'ship' is actually defined in the CLC, but it is worth noting that the definition is consistent with the ordinary meaning of the word 'ship'. The 'ordinary meaning' of 'ship' in everyday speech connotes a craft that navigates at sea. The Oxford English Dictionary

[5] See VCLT Article 31(4).

definition of the meaning of the word 'ship' is "a large sea-going vessel", and that is typical of dictionary definitions. That is spelled out in the 1992 definition, which refers to 'any sea-going vessel'.

18. A 'vessel' might be said to have the connotation of a hollow container – something that carries cargo within it in contrast to, for example, a raft.[6] But the 1992 definition refers also to 'any … seaborne craft of any type whatsoever'.

19. There are limits to what would count as a 'seaborne' craft: for example, the position of craft designed and suited only for inland navigation might be controversial.[7] There are also limits to what counts as a 'craft'. 'Craft' is, again according to the Oxford English Dictionary, a generic term for vessels for water carriage.[8] The notion of movement on water is an essential part of the definition. A purpose-built and immobile storage tank secured to the shore or to the seabed in order to contain liquids would therefore not be a 'craft': it might be described more properly as an offshore structure or installation.[9] That could exclude some kinds of 'fixed' offshore storage facility.

20. This first element of the definition of a 'ship' is, however, very broad. The reference to "craft of any type whatsoever" is so wide that it appears to permit the exclusion from the category of 'ships' only of floating installations or structures that are fixed in one place. Such installations and structures are not the focus of concern in this paper.

"… constructed or adapted for the carriage of oil in bulk as cargo"

21. The second element of the definition of a 'ship' requires that the sea-going vessel or craft be "constructed or adapted for the carriage of oil in bulk as cargo". It establishes a limitation on the class of vessels or craft (and for convenience, the term '**craft'** will be used to refer to both) to which the 1992 Conventions apply. Passenger ships and tugs are, for example, obviously not within the CLC definition of a 'ship'.

22. The references to 'carriage' and to 'cargo' in Article I.1 in the English text clearly imply that the craft should be constructed or adapted so as to enable it to move oil in bulk from one place to another, and to move oil in bulk as cargo. Similarly, the Preamble to the Civil Liability Convention refers to "the dangers of pollution posed by the worldwide maritime carriage of oil in bulk".

23. The same implication arises from the French text (which refers to "*tout bâtiment de mer ou engin marin, quel qu'il soit, construit ou adapté pour le transport des hydrocarbures en vrac en tant de cargaison"* and, in the Preamble, to "*des risques de pollution que crée le transport maritime international des hydrocarbures en vrac.*"), and from the Spanish text (which refers

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6 Cf., the approach of the English courts in *Steadman* v *Scofield* [1992] 2 Lloyds Rep 163 (Sheen J, holding that a jet ski was not a 'ship'); and see *R* v *Goodwin* [2005] EWCA Crim 3184; [2006] 1 W.L.R. 546.

7 Cf., the *Al Jaziah I* incident in January 2000: 92FUND/EXC.6/3, 10 February 2000; the *Victoriya* incident in August 2003, 92FUND/EXC.26/3, (2004) .

8 The equivalent terms in the French ("*engin marin*") and Spanish ("*artefacto flotante en el mar*") texts may be wider in their connotations; but, as VCLT Article 33(4) makes clear, where there are differences in meaning in different authentic language texts, "the meaning which best reconciles the texts" should be adopted. Here, that points to the need to constrain the interpretation of the French and Spanish texts so as not to force the English text to carry an unnatural meaning. I cannot comment on the Arabic, Chinese or Russian texts.

9 'Structure' and 'installation' are terms used in the UN Convention on the Law of the Sea: see Article 60.

to "*toda nave apta para la navegación marítima y todo artefacto flotante en el mar, del tipo que sea, construido o adaptado para el transporte de hidrocarburos a granel como carga*" and, in the Preamble, to "*los peligros de contaminación creadas por el transporte marítimo internacional de hidrocarburos a granel*.")

24. The key idea is that of the carriage (le transport; el transporte) – transportation, movement – at sea of oil in bulk as cargo (cargaison; carga).

Other relevant CLC definitions – "incident", "pollution damage", "oil"

25. The notion of carriage, transport and movement is inherent also in the definitions of other terms in the CLC which are likely to be relevant in the context of the question whether a particular vessel falls within the definition of 'ship'. Usually the context has been the need to decide whether liability arises under the 1992 Conventions to pay compensation for oil pollution from the vessel. However liability does not depend on this issue alone. The key questions are whether an "incident" has occurred which causes (or threatens to cause) "pollution damage". This requires an escape or discharge from a "ship" of "oil". "Oil" is defined in CLC Article 1.5 as "any persistent hydrocarbon mineral oil … whether carried on board a ship as cargo or in the bunkers of such a ship." Whilst the English text refers to it being "carried" by the ship, the French and Spanish texts refer to it being "transported" ("transportés"; "transporten"). The definition implies that the ship carrying the oil is engaged on a voyage (whether laden or in ballast), and it can be read as applying only to oil which is being carried or transported by such a ship.

26. It is therefore possible to conclude that a vessel satisfies the definition of "ship" (because it is constructed or adapted for the carriage of oil), but that there is no liability under the 1992 Conventions for pollution resulting from an escape or discharge of oil which it is not transporting either as cargo or bunkers. On this basis there would be no liability for pollution resulting from a spill of oil which is on board only for other (non-carriage) purposes, such as storage. This analysis reaches by a different route the same result as that achieved by regarding a vessel as a "ship" only when engaged on voyages (such as those set out in the proviso to CLC Article I.1). It may be the preferred analysis in the event of dispute as to whether the proviso applies to the vessel concerned, and as to whether it is permissible to regard it as a "ship" at some times but not others.

Fixed storage structures and installations are not 'ships'

27. A structure or installation that is designed and constructed to function as a stationary facility floating upon the sea in one place in order to hold or store or process oil is not the same as a craft "constructed or adapted to carry oil in bulk as cargo". The element of construction or adaptation to move oil as cargo is absent.

28. Floating production, storage and offloading units ('**FPSOs'**) are a clear case. In addition to the fact that they may fall outside the definition of a ship because they may not qualify as 'sea-going vessels or seaborne craft', purpose-built FPSOs are not "constructed or adapted" for the carriage of oil. Oil is held on them for the purpose of processing it and storing it, rather than carrying it. Such FPSOs hold the oil in one location: they do not carry it as 'cargo'. For this reason, too, purpose-built FSOs are not "ships" within the meaning of the term as it is used in the 1992 Conventions.

Purpose-built FPSO connected to sea-bed pipelines are not 'ships'

29. Indeed, if such FPSOs are connected to seabed pipelines, the practice (which is in accordance with the position under international law) is moving towards treating them as part of the offshore exploration and exploitation operation, under the jurisdiction of the coastal State, rather than as seagoing 'ships' under the jurisdiction of the flag State.[10] There is in my view no doubt that such a purpose-built FPSO connected to a seabed pipeline is not a ship for the purposes of the 1992 Conventions.[11]

30. That conclusion holds good even if the FPSO is moving or being moved into port for maintenance or to another offshore site. In neither case does the fact that it can move or be moved (as it must, in order to reach its operational location at sea), and that it may have oil or residues of oil upon it when it does move, mean that it was constructed or adapted in order to carry oil as cargo.[12]

31. The same would be true of any FSO designed and constructed as an immobile tank fastened to the shore or to the seabed in order to contain liquids as a stationary storage facility floating upon the sea, but not to process them. It would not be a 'craft'; and it would not be constructed or adapted to carry oil in bulk as cargo.

The Article I 'proviso' and the special case of combination carriers

32. CLC Article I applies a proviso to ships that are "capable of carrying oil and other cargoes" (emphasis added). There has been much discussion in the IOPC Funds of the meaning of the proviso, focused on the question whether the word 'oil' in the proviso includes only 'any persistent hydrocarbon mineral oil … carried on board a ship as cargo or in the bunkers of such a ship' (which is the definition of the word 'oil' in CLC Article I.5).

33. The problem arises because any ship capable of carrying persistent hydrocarbon mineral oil is also capable of carrying non-persistent hydrocarbon mineral oil – i.e., a cargo other than 'oil', as 'oil' is defined in CLC Article I.5. This appears to indicate that the 'proviso' would apply to all ships, including purpose-built oil tankers. If that is correct, it would have been pointless framing the final phrase in Article I.1 as a proviso, rather than as a part of the general definition embracing all 'ships'. It would have been more accurate to say that "'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, (i) when it is actually carrying persistent hydrocarbon mineral oil in bulk as cargo, and also (ii) during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard."

34. Much of the discussion during the drafting of the CLC concerned combination oil-bulk-ore carriers ('**OBOs'**), and they are probably the typical case to which the proviso was

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10 See 92FUND/A/ES.3/17, 16 April 1998; 92FUND/WGR.2/2, 31 March 1999. Cf., Article 60 of the 1982 UN Convention on the Law of the Sea.

11 That conclusion is consistent with the position taken at the Fourth Session of the 1992 Fund Assembly: see 92FUND/A.4/32, 22 October 1999, paragraphs 24.3, 24.10.

12 This is consistent with the approach adopted in other instruments, such as the amendment made in 1999 to the (non-governmental) Offshore Pollution Liability Agreement ('**OPOL**'), which treats FPSOs as a part of the facilities for offshore oil exploration and exploitation. See < http://www.opol.org.uk/agreement.htm >. The Agreement was made in 1974 and has been amended several times.

addressed.[13] Read in this way the definition of a ship in Article I.1 makes good sense: a combination carrier or chemical tanker is only a 'ship' for the purposes of the 1992 Conventions when it is actually carrying oil (and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard). But whatever those negotiating the CLC may have had in mind, CLC Article I.5 clearly stipulates what 'oil' means; and there is nothing in the Convention that would permit the non-application of the definition of 'oil' to the instances of the use of the term in Article I.1.

35. The result is that the 1992 Conventions apply only to sea-going vessels and seaborne craft constructed or adapted so as to be capable of carrying oil, and apply only when they are either (i) actually carrying hydrocarbon mineral oil in bulk as cargo, or (ii) engaged in a voyage following such carriage and it is not proved that there are no residues of such carriage of oil in bulk aboard the ship.

36. This reading of the proviso is the one that is directed by the express words of the 1992 Civil Liability Convention, and the result is not manifestly absurd or unreasonable.[14] It evidences (with the benefit of hindsight) the poor drafting of the Convention; but as a matter of law poor draftsmanship is not a sufficient reason for disregarding the plain words of a binding legal instrument, even though those words may not have achieved the aim that the delegates wished them to achieve.[15]

37. The rationale for this principle of interpretation is that courts, tribunals and others faced with the task of interpreting a treaty may not have access to the full record of the negotiations, and are entitled to assume that clear provisions in a treaty mean what they say. Indeed, some of the Contracting States may not have attended the drafting sessions of the provisions concerned. But in any event, debates over the meaning of the proviso do not invalidate Article I.1 as a whole; and in particular they do not call into question the validity of the general definition of a ship in the opening words of Article I.1.

Craft excluded from the CLC definition of a 'ship'

38. The analysis so far shows that on a plain reading of the words of the Article I.1 the term 'ship' does not include the following:

(i) any structure or installation floating at sea that is not a sea-going vessel or seaborne craft;
(ii) any sea-going vessel or seaborne craft which, though capable of carrying persistent hydrocarbon mineral oil in bulk as cargo has in fact never done so;
(iii) any sea-going vessel or seaborne craft which has in the past carried persistent hydrocarbon mineral oil in bulk as cargo but is proven not to have residues of such carriage of oil in bulk aboard.

That conclusion excludes certain clear cases from the category of 'ships'. Notably, it excludes purpose-built FSOs designed not to navigate across the seas carrying oil in bulk as a cargo, but to provide fixed storage facilities for oil in one particular place.

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[13] See the remarks of the USSR Government, quoted at paragraph 88 below, and the discussion in IMO Doc. LEG/CONF.6/C.2/SR.2, 26 March 12, *Official Records vol 2*, p. 326, at pp. 330-336, paragraphs 10 – 44.

[14] See VCLT Article 32.

[15] See Richard Gardiner, *Treaty Interpretation* (OUP. 2008), pp. 316-323.

39. The conclusion does not answer the question of the status of tankers that are being used for the time being as storage facilities. Similar considerations apply to specialised units that are designed to operate primarily over well-heads in storage and production mode, but are also constructed or adapted to have the capability of carrying oil as cargo to or from a port or terminal outside the oil field in which they normally operate. In order to decide on their status it is necessary to look beyond the express words of Article I.

40. Under VCLT Article 31(3), in interpreting a treaty provision one must also take into account any subsequent agreement between the parties relating to the interpretation or application of the treaty, and any subsequent practice in its application which establishes the agreement of the parties regarding its interpretation.

41. There is no explicit 'subsequent agreement' between the Contracting States on the interpretation of the term 'ship' in the 1992 Conventions; but there is some subsequent practice.

42. It might be argued that the IOPC Funds' Secretariat papers and discussions in the 1992 Fund Assembly[16] and other committees (notably those following the *Santa Anna* incident in 1998,[17] and the *Slops* incident in 2000,[18] and the work of the Second Intersessional Working Group[19]) and Decisions of the IOPC Funds Assembly should all be considered together, and that cumulatively they constitute 'subsequent practice' in the interpretation and application of the term 'ship'.

43. There are, indeed, several indications of support in the IOPC Funds for the view that FSOs and FPSOs should be regarded as 'ships' only when they are carrying oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. This was the conclusion of the Working Group and Assembly in 1999.[20] It cannot, however, be pretended that those episodes put an end to the debate or represented an interpretation that has already been agreed by the Contracting Parties. On the contrary, the inconclusive discussions within the IOPC Funds make it plain that there is no such agreement.[21] If there had been an agreement, the present exercise would have been otiose.

44. Moreover, the decision of the Greek Supreme Court in the *Slops* case[22] is to the contrary effect. It treated a decommissioned ship used as a storage facility for waste oil as a 'ship' within the meaning of the 1992 Conventions, even though it was not carrying oil as cargo on a voyage. That decision represents the considered view of one Contracting State and is, as far as is known, the only decision of a national court or tribunal directly on the point. It cannot be ignored.

45. In reaching this conclusion the majority of the Court took the view that in order to fall within the definition of "ship" it was sufficient for seaborne craft to have the capability of movement

16 The question of the meaning of the term 'ship' arose during the third extraordinary session of the Assembly: see 92FUND/A/ES.3/17, 16 April 1998; 92FUND/A/ES.3/21, 1 May 1998; 92FUND/A.3/18, 25 September 1998; 92FUND/A.3/27, 30 October 1998, paragraphs 20.1 – 20.14.

17 See 92FUND/EXC.1/7, 26 October 1998, and 92FUND/WGR.2/3.

18 See 92FUND/EXC.8/8, 6 July 2000, paragraphs 4.3.1 – 4.3.8; 92FUND/EXC.20/6, 9 January 2003; 92FUND/EXC.24/6, 19 February 2004; 92FUND/A.10/36, 28 September 2005; 92FUND/EXC.34/7, 15 August 2006.

19 See 92FUND/WGR.2/1, 12 March 1999.

20 See, e.g., 92FUND/A.4/32, 22 October 1999, paragraph 24.3; 92FUND/EXC.8/8, 6 July 2000, paragraphs 4.3.4, 4.3.8.; 92FUND/A.11/30, 10 August 2006.

21 See, e.g., 92FUND/A.11/30, 10 August 2006, paragraphs 1.1-1.5.

22 See 92FUND/EXC.34/7, 15 August 2006.

by self-propulsion or by way of towage, as well as the ability to carry oil in bulk as cargo. It was not also necessary for the incident to have occurred during the carriage of oil in bulk as cargo, i.e. during a voyage: that requirement was considered to apply only to ships falling within the proviso to Article I.1, which in the Court's view was concerned only with combination carriers. On this basis the Court held that the Fund was liable to pay compensation for pollution claims caused by a spill from the *Slops*.

46. For the reasons discussed in paragraphs 32 – 36 above it can be argued that this is too narrow an interpretation of the proviso, which should be regarded as applying not only to combination carriers (oil/bulk/ore carriers) but also to any tanker capable of carrying both persistent and non-persistent oils. If a craft such as the *Slops* were to fall into that category, it should be regarded as a "ship" only when engaged on a voyage as described in the proviso. If it did not fall into that category, the same result would be reached by the analysis outlined in paragraphs 25 – 26 above, i.e. by concluding that there is no liability for pollution resulting from an escape or discharge of oil which is not being transported by a ship as cargo or bunkers, on the grounds that this falls outside the definition of "oil", and that consequently the spill does not cause "pollution damage". On either basis, there would be no liability for pollution from the ship unless it occurred during a voyage.

47. There is therefore much force in the conclusions of the Working Group and Assembly in 1999. However, there is nothing approaching a sufficient body of concordant practice to establish an implied agreement between the parties on the meaning of the term 'ship'. The meaning resulting from the application of VCLT Article 31 remains obscure.

48. The critical questions are (1) whether a craft originally designed and operated (or capable of being operated) as a tanker transporting oil in bulk as cargo ceases to be a 'ship' when it is no longer engaged in navigation at sea but is being used as a storage facility, and if so (2) how it is to be determined that the craft is indeed no longer engaged in navigation at sea, but is being used as a storage facility. These questions are addressed in paragraphs 102 – 128 and 143 – 144, below.

49. The 'ordinary meaning' of the terms of the Article I.1 definition are not clear on these questions. One might take the view "once a ship, always a ship." There may be no physical change in the craft as its function changes from transportation to storage; and one might conclude that it therefore remains a 'ship'. On the other hand, the fact that the 1992 Conventions were aimed at the problem of pollution arising from the maritime carriage of oil might be said to indicate that stationary craft used to store oil are no longer engaged in activity of the kind that the Conventions were intended to cover, and that accordingly they should not be considered to be 'ships' within the meaning of the 1992 Conventions.

50. Accordingly, in order to determine the meaning of the definition of 'ship' in Article I.1 of the 1992 CLC it is necessary to have recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion": VCLT Article 32.

The preparatory work of the 1992 Civil Liability Convention

51. The wording of the 1992 Conventions evolved from that of their predecessors, the 1969 International Convention on Civil Liability for Oil Pollution Damage ('**1969 CLC'**), and the1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the '**1969 Intervention Convention**') which was negotiated at the same time as the 1969 CLC. It is therefore helpful to begin the account of the drafting of the 1992 Conventions by considering the drafting of the 1969 Conventions, which were drafted in

response to the legal shortcomings revealed by the grounding of the tanker *Torrey Canyon* on the high seas between the UK and France and the consequent pollution of British and French coastlines.

The 1969 Intervention Convention

52. The broad concern of the 1969 Intervention Convention was to address the problem of dealing physically with oil pollution from foreign ships on the high seas, so as to minimise its harmful consequences. It would not be expected in this context that the drafters would have intended to exclude a particular kind of merchant vessel from the scope of the Conventions.

53. The records of the 1969 conference bear this out. The first draft of Article II of the 1969 Intervention Convention provided that

> " "ship" means – any sea-going vessel of any type whatsoever, and
> – any floating craft, with the exception of an installation or device engaged in the exploration or exploitation of the natural resources of the sea-bed and subsoil."[23]

54. The Federal Republic of Germany suggested that:

> " the definition of "ship" in this Convention [sc., the 1969 Intervention Convention] and in the Convention on Civil Liability for Oil Pollution damage should not be different. Both definitions ought to be brought in line with that of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954."[24]

55. The definition in Article I of the 1954 Convention read as follows:

> " "Ship" means any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage; and 'tanker' means a ship in which the greater part of the cargo space is constructed or adapted for the carriage of liquid cargoes in bulk and which is not, for the time being, carrying a cargo other than oil in that part of the cargo space."

56. The idea in the 1954 definition that a ship was any kind of vessel <u>making</u> a sea voyage indicated a functional approach to the concept. Rather than trying to define a ship by reference to the manner in which, or the purpose for which, it was constructed, or by reference to its design or other physical characteristics, the definition referred to what the thing was doing – the function that it was performing – the relevant function being "making a sea voyage."

57. That functional approach was evident in the first draft of Article II of the 1969 Intervention Convention, which included all vessels with the exception of those "engaged in the exploration or exploitation of the natural resources of the sea-bed and subsoil". It was thus the function of the vessel that brought it within the exception.

58. This point was noted at the time. The German representative at the conference observed, in relation to the 1954 definition, that

> "[t]he term 'making a sea voyage', as used in that definition, would rule out the need for the exceptions listed in the Legal Committee's draft. There would be an additional

[23] IMCO Doc. LEG/CONF/3, September 1969, at p. 189 of the *Official Records* of the Conference.
[24] IMCO Doc. LEG/CONF/3/Add.1, at p. 239 of the *Official Records* of the Conference

advantage in also having the same definition in three Conventions that were closely linked in substance."[25]

59. That point was made even clearer in a proposed amendment put forward by Australia to delete all the words in the first draft after "floating craft" and replace them with the following:

"with the exception of an installation or device used in the exploration or exploitation of the natural resources of the sea-bed and subsoil whilst actually engaged in that exploration or exploitation." (emphasis added)[26]

60. It is evident that the German and Australian amendments did not command general support. The reason for opposition to them is apparent from an exchange between the Canadian and Polish representatives:

"Mr MacANGUS (Canada), while agreeing that there might be some attraction in having identical definitions in such closely related Conventions, pointed out that the restriction to craft making a sea voyage would exclude such floating craft as might, in the future, be anchored on the high seas for the purpose of serving as oil reservoirs. Such exclusion might be cause for regret later.

Mr GORALCZYK (Poland) shared Canada's view. There had been lengthy discussion in the Legal Committee, which had been concerned not to narrow the definition unduly. His delegation would therefore prefer the draft as it stood."[27]

61. This appears to be the only explicit indication of an intention to assimilate FSOs to 'ships'. There is no evidence that the assimilation was envisaged as operating beyond the scope of the question addressed by the Intervention Convention, i.e., the question of the right of States to take physical action to deal with pollution threats on the high seas.

62. Both the German and the Australian proposals were withdrawn, and the second draft of the definition, prepared in November 1969, did not materially change the definition of a ship from that in the first draft.[28] That definition was taken into the final text of the 1969 Intervention Convention without further change, where it appears as Article I(2):

" "Ship" means:

(a) any sea-going vessel of any type whatsoever, and
(b) any floating craft, with the exception of an installation or device engaged in the exploration or exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof."

63. It is thus clear that the intention was to keep as wide as possible the category of 'ships' to which the 1969 Intervention Convention was applicable. In contrast, this intention to adopt a broad definition of 'ship' was not evident during the drafting of the CLC and Fund Conventions.

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25 IMCO Doc. LEG/CONF/C.1/SR.7, 15 November 1969, at p. 319 of the *Official Records* of the Conference.

26 IMCO Doc. LEG/CONF/3/Add.1, 15 October 1969, at p. 237 of the *Official Records* of the Conference

27 IMCO Doc. LEG/CONF/C.1/SR.7, 15 November 1969, at p. 320 of the *Official Records* of the Conference.

28 IMCO Doc. LEG/CONF/C.1/WP.20. This draft replaced the words "natural resources of the sea-bed and subsoil" with the words "resources of the sea-bed and the ocean-floor and the subsoil thereof."

The 1969 Civil Liability Convention

64. The drafting of the 1969 CLC Convention began with a definition of the term 'ship' which was quite different from that in the Intervention Convention and was evidently intended from the outset to limit the application of the CLC to ships engaged in the bulk oil trade. The first draft provided that:

"For the purposes of this Convention:

1. "Ship" means any sea-going vessel and any seaborne craft, of any type whatsoever, actually carrying oil in bulk as cargo or constructed or adapted so that the greater part of its cargo space can carry, and usually does carry, oil in bulk as cargo."[29]

65. That definition contains two alternative definitions: one is functional ("*sea-going vessel ….. actually carrying oil*"), one is a hybrid design-based and functional ("*sea-going vessel ….. constructed or adapted so that the greater part of its cargo space can carry, and usually does carry, oil in bulk as cargo*"). The hybrid definition would have included ships that were so constructed or adapted even when they were not actually carrying oil.

66. This first draft was the subject of comment from a number of States. The Netherlands proposed a simpler definition, which read:

"1. 'Ship' means any sea-going vessel and any seaborne craft, carrying oil in bulk as cargo."[30]

Ireland[31] and the Federal Republic of Germany[32] made similar proposals.

67. Australia

"suggested that the definition of 'ship' could well be extended to cover not only vessels that carry oil in bulk as cargo, but also all vessels that carry more than 2,000 tons of oil as bunkers."[33]

The implication appears to be that even if the Australian proposal were adopted only (a) ships carrying oil as cargo, and (b) ships carrying more than 2,000 tons of oil as bunkers, would fall within the definition of a ship.

68. Even that was too wide for some States. The United Kingdom put forward the Netherlands proposal (which the UK understood might not be moved by the Netherlands itself) in order

"to ensure that bunker oil comes within the scope of the Convention only when it is carried as fuel in a ship actually carrying oil in bulk as cargo."[34]

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29 IMCO Doc. LEG/CONF/4*, September 1969 (Draft Text, Article I).

30 IMCO Doc. LEG/CONF/4*, September 1969 (Draft Text, Article I); at p. 452 of the Official Records of the Conference ('*Official Records*'); and cf., LEG/CONF/4/Add. 5, 12 November 1969, *Official Records* page 538.

31 IMCO Doc. LEG/CONF/4/Add.1, 17 October 1969, *Official Records* page 504.

32 See Article III (10) of the Draft, IMCO Doc. LEG/CONF/4*, September 1969, at p. 469 of the *Official Records* of the Conference.

33 LEG/CONF/4/Add. 1, 17 October 1969, *Official Records* p. 503.

34 IMCO Doc LEG/CONF/C.2/WP.18, *Official Records* p. 575.

69. The negotiating record shows that the focus of the participants at the conference was upon ships engaged in the trade of the carriage of oil in bulk by sea. This appears, for example, from the fact that possession of an insurance certificate was envisaged as a condition for ships to be permitted to trade,[35] and permitted to enter or leave a port in the territory of a Contracting State.[36] Similarly, the emphasis upon the role of the shipper pointed to the context as one of carriage of bulk oil as cargo.[37]

70. Questions were raised as to the application of that definition to public (State-owned) ships including warships.[38] But all of those who spoke in the discussion of draft Article I (1) were of the view that it should apply only to ships (and it was common at the conference to refer to them as 'tankers') engaged in the carriage of oil in bulk as cargo.[39] A Netherlands amendment that would have made "oil tankers sailing in ballast subject to the provisions of the Convention" was defeated.[40]

71. The draft of the Convention dated 21 November 1969 reflected this view. Article I (1) was amended to read:

> "1. 'Ship' means any seagoing vessel and any seaborne craft, of any type whatsoever, actually carrying oil in bulk as cargo."[41]

That text was adopted unchanged in the final Convention.[42]

72. A comparison of the definitions of a 'ship' in the 1969 Intervention Convention and the 1969 CLC is instructive. The definitions read as follows:

1969 Intervention Convention	**1969 CLC**
"Ship" means: (a) any sea-going vessel of any type whatsoever, and (b) any floating craft, with the exception of an installation or device engaged in the exploration or exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof.	'Ship' means any seagoing vessel and any seaborne craft, of any type whatsoever, actually carrying oil in bulk as cargo.

35 See Article III (10) of the Draft, IMCO Doc. LEG/CONF/4*, September 1969, at p. 469 of the *Official Records* of the Conference.

36 See Article III (11) of the Draft, IMCO Doc. LEG/CONF/4*, September 1969, at p. 469 of the *Official Records* of the Conference.

37 See, e.g., IMCO Doc. LEG/CONF/C.2/SR. 4, 13 November 1969, *Official Records* page 635 (Mr McGovern, Ireland).

38 See, e.g., IMCO Doc. LEG/CONF/C.2/SR. 13, 20 November 1969, *Official Records* pp. 696-697.

39 It is tempting to refer to ships engaged in the trade of carrying oil from one place to another, but that would excludes movements of oil otherwise than for the purposes of trade: for example, off-loading of oil onto tankers in order to minimise pollution damage following an incident at sea. There is no indication in the *travaux préparatoires* of any of the conventions discussed in this paper of any intention to exclude such activities from the scope of provisions otherwise subject to the carriage of oil by sea.

40 IMCO Doc. LEG/CONF/C.2/SR. 14, 21 November 1969, *Official Records* pp. 710-711.

41 IMCO Doc. LEG/CONF/C.2/WP.22, 22 November 1969, *Official Records* pp. 576-577. The same text appeared in IMCO Doc. LEG/CONF/C.2/WP.22/Rev. 1, 25 November 1969, *Official Records* p. 583.

42 IMCO Doc. LEG/CONF/C.2/SR. 20, 26 November 1969, *Official Records* pp. 757-756

73. It is clear that the 1969 Conference deliberately limited the category of vessels to which the 1969 CLC (as distinct from the 1969 Intervention Convention) applied by requiring that they be ships "actually carrying oil in bulk as cargo". As the terms 'carrying' and 'cargo' imply, the definition applies to vessels engaged in the shipment of oil. While there was no explicit agreement on the point, the discussion in the conference suggests that "carrying oil in bulk as cargo" was understood in the sense of ships carrying oil as cargo from one place to another. The reference to vessels 'of any type whatsoever' is a reference to the fact that not all such vessels are oil tankers: tankers may carry cargoes other than oil, and other types of ship, such as oil/bulk/ore ships ('**OBOs**') may carry oil.

74. There is nothing in the record of the negotiation of the 1969 CLC that suggests that the definition of 'ship' in Article I was intended to apply either (i) to stationary craft that are used to store oil but not to carry it as cargo, or (ii) to any other vessels that are not engaged in the carriage of oil from one place to another.

The 1971 Fund Convention

75. In 1971, IMCO (as the IMO then was) convened a conference for the drafting of what became the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the '1971 Fund Convention'). Work started with a Draft Text which provided, in Article 1 (2), that

> "2. 'Ship', 'Person', 'Owner', 'Oil', 'Pollution Damage', 'Preventive Measures', 'Incident' and 'Organization', shall have the same meaning as under paragraphs 1 – 9 of Article 1 of the Liability Convention, provided that whale oil shall not be included in any of these terms."[43]

76. This clearly reflected the "principle … that the International Compensation Fund is complementary to the 1969 Convention."[44] The design of the scheme was that the term 'ship' should mean the same thing in the 1969 CLC and in the 1971 Fund Convention.

77. No material change was made or suggested to this position during the conference, and the final text in Article 1 of the Fund Convention reads as follows:

> "2. 'Ship', 'Person', 'Owner', 'Oil', 'Pollution Damage', 'Preventive Measures', 'Incident' and 'Organization', have the same meaning as in Article 1 of the Liability Convention, provided, however, that for the purposes of these terms, 'oil' shall be confined to persistent hydrocarbon mineral oils."

The 1984 Protocols and Conventions

78. In 1984 Protocols were adopted to amend the 1969 CLC and the 1971 Fund Convention. The Conventions as amended were to be named the International Convention on Civil Liability for Oil Pollution Damage, 1984 (the '**1984 CLC**') and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984 (the '**1984 Fund Convention**'). The Protocols did not enter into force, but they must be considered because they are the key step in the drafting of Article 1 of the 1992 CLC.

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[43] IMCO Doc. LEG/CONF.2/3, 1 October 1971, *Official Records* p. 42. The 'Liability Convention' is the 1969 CLC.

[44] IMCO Doc. LEG/CONF.2/C.1/WP.12, 2 December 1971, *Official Records* p. 251.

79. As was the case with the 1969 CLC and the 1971 Fund Convention, the definition of a ship was the same in the 1984 CLC as it was in the 1984 Fund Convention.[45] The definition was, however, a revised version of the 1969 / 1971 definition.

80. The Draft Protocol with which the 1984 conference began its work provided, in Article 2, that

"Article 1 of the 1969 Liability Convention is amended as follows:

1. Paragraph 1 is replaced by the following text:

1. 'Ship' means any sea-going vessel and sea-borne 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 and during [the][any] voyage following such carriage [unless it is proved that it has no residues of such carriage of oil in bulk aboard][if it has residues of such carriage of oil in bulk still on board]."[46]

81. While the bracketing of phrases in that draft indicates a lack of consensus over certain aspects of the proposed text for a revised definition, there is no indication of any lack of consensus over the use of the concept of the carriage of oil as the foundation of the definition.

82. The Legal Committee had proposed the Draft Protocol in the light of an informal meeting held in Stockholm in December 1981 at which the following text had been prepared:

> " 'Ship' means any sea-going vessel and any sea-borne craft of any type whatsoever, constructed or adapted for the carriage of oil in bulk as cargo, [a ship capable of carrying oil and other cargoes being included only when it is actually engaged in such carriage and during any voyage following such carriage unless it is proved that it has no residues of such carriage aboard][whether or not it is actually so carrying oil.]"[47]

83. That definition, too, was based upon the notion of carriage; and the Legal Committee recorded that:

> "[t]here was no support in the Legal Committee for the extension of the conventions to cover pollution damage caused by oil from ships other than tankers, as presently defined, or combination carriers."[48]

84. The debate was not over the possibility of extending the definition of the term 'ship' to include craft other than tankers or combination carriers: the notion of carriage remained central and undisputed. The debate was over whether the Conventions should apply to 'ships' – i.e., tankers and combination carriers – when they are not carrying oil in bulk as cargo but have on board only bunkers or oily residues.[49]

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45 See IMO Doc. LEG/CONF.6/9, 13 February 1984, *Official Records vol 1,* p.274 (Annex I, paragraph 3).

46 IMO Doc. LEG/CONF.6/4, 12 January 1984, *Official Records vol 1,* pp. 57-58.

47 IMO Doc. LEG/CONF.6/7, 12 January 1984, *Official Records vol 1,* p. 133.

48 IMO Doc. LEG/CONF. 6/7, 12 January 1984, *Official Records vol 1,* p. 134.

49 See, e.g., the comments by Germany (IMO Doc. LEG/CONF.6/17, 5 March 1984, *Official Records vol 1,*p. 295), France (IMO Doc. LEG/CONF.6/19, 6 March 1984, *Official Records vol 1,* p. 303), Sweden (IMO Doc. LEG/CONF.6/30, 16 March 1984, *Official Records vol 1,*p. 336), Norway (IMO Doc. LEG/CONF.6/32, 16 March 1984, *Official Records vol 1,*pp. 345-346), USSR (IMO Doc. LEG/CONF.6/41, 23 March 1984, *Official Records vol 1,*pp. 358-359), and the UK (IMO Doc. LEG/CONF.6/50, 6 April 1984, *Official Records vol 1,*pp. 364-365).

85. The Government of Poland put forward a detailed comment on the question of 'carriage'. It observed that the purpose of the Conventions was to identify a class of persons on whom liability for oil pollution would be imposed. Shippers, carriers, cargo-owners and ship-owners were among the possibilities. In relation to the notion of 'carriage', Poland said:

> "3. The word 'carriage' is used in the titles of the international conference concerned and the first draft convention to be presented for consideration and adoption. It can be theoretically understood as a technical operation, as a field of economic activity or as a legal relation. Under existing circumstances it must be deemed here as a legal relation only. It is clear that before considering a legal relation the parties thereto must be defined. 'Carriage by sea' must now concern not only a period of time, but also a service rendered to the cargo, a displacement thereof from the point of loading to the point of discharge. A new wording of that definition must be therefore proposed as follows:
>
> 9. '*Carriage by sea*' means the displacement operation of the hazardous substances between the point of loading on the ship and the point of discharging therefrom; it comprises also the period from the time when the hazardous substances enter on board ship on loading, to the time they cease to be present on board ship on discharge." "[50]

86. There was no opposition to the idea that 'carriage' meant the displacement (movement) of cargoes from one place to another. Rather the focus of discussion was on whether the legal regime should be extended to ships other than oil tankers. A Swedish paper noted that:

> "During the preparatory work the question has been raised whether the regime should be extended to cover also damage caused by escape of oil from non-tankers. The general view has been that there is no need for making the international regime applicable to non-tankers."[51]

87. Discussions of the possibility of extending the regime were focused upon its extension to vessels other than laden tankers. For example, a Norwegian paper said:

> "The Norwegian Government is in favour of extending the definition of ship to unladen tankers. This concept should also, under certain conditions, cover 'combination carriers'. This Government prefers the alternative under which a combination carrier will be regarded as a ship unless it is proved that it has no residues of an earlier carriage of oil in bulk aboard."[52]

88. The observations of the USSR on the Draft Protocol reflect the same view:

> "The provision according to which a vessel will fall into the scope of the Convention only when it is actually carrying oil in bulk or has residues of such carriage of oil on board during a voyage following such carriage, refers exclusively to vessels capable of carrying not only oil but other cargoes as well, i.e., combination carriers. This provision does not refer to tankers and other vessels capable of carrying oil cargoes only. Therefore these vessels fall into the definition in Article 2.1 even when they do not have oil as cargo and residues of oil aboard. This contradicts the main idea of the

50 IMO Doc. LEG/CONF.6/25, 14 March 1984, *Official Records vol 1,* p. 321.
51 IMO Doc. LEG/CONF.6/30, 16 March 1984, *Official Records vol 1,* p. 333 at 336.
52 See the observations of Norway: IMO Doc. LEG/CONF.6/32, 16 March 1984, *Official Records vol 1,*p. 343 at 345-346.

> Convention which is aimed at ensuring compensation for pollution damage caused during carriage of oil by sea."[53]

89. Similarly the United Kingdom said:

> "The UK favours extension of the scope of the Convention to cover unladen tankers and considers that the definition of ship should cover 'combination carriers' when engaged in the oil trade. The UK would be opposed to the imposition of a test which would be very difficult to establish in practice."[54]

90. This understanding of the scope of the Convention as being limited to ships carrying oil as cargo from one place to another is evident in other submissions to the 1984 Conference. The International Shipowners' Association said

> "CLC 1969 should apply to tankers and OBO ships carrying oil cargoes, unladen tankers with oil-cargo residues on board, OBO ships in voyages next after oil carriage, provided oil-cargo residues from preceding voyage were left on board. The Convention should not apply however to the pollution by oil-bunkers from dry-cargo ships, or tankers, or OBO ships, when oil-cargo residues were not on board the two latter types of vessels."[55]

91. The reason for this view was plain. As the International Chamber of Shipping observed, the 1971 Fund Convention had "introduced the principle of sharing the cost of pollution compensation between the carrier and the cargo owner."[56] The legal regime was understood to be premised upon the existence of two parties – the carrier, and the owner of the cargo that the carrier was paid to carry – and the sharing of the cost between them.

92. Debate at the 1984 Conference focused upon the question of the application of the Convention to unladen tankers and to the burden of proving that a craft had oil cargo residues on board 'during a voyage'.[57] There was, however, no suggestion that the Convention should apply to craft that are not engaged in voyages. It was against this background that the final text of the revised definition in the 1984 Protocol was adopted:[58]

> "Article 1 of the 1969 Liability Convention is amended as follows:
>
> 1. Paragraph 1 is replaced by the following text:

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53 IMO Doc. LEG/CONF.6/41, 23 March 1984, *Official Records vol 1,* p. 358. Cf., IMO Doc. LEG/CONF.6/C.2/SR.2, 26 March 12, *Official Records vol 2,* p. 326, at p. 331, paragraph 12.

54 IMO Doc. LEG/CONF.6/50, 6 April 1984, *Official Records vol 1,* p. 363 at 364.

55 IMO Doc. LEG/CONF.6/10, 28 February 1984, *Official Records vol 2,* p. 3. Cf., the remarks of the International Group of P and I Associations, IMO Doc. LEG/CONF.6/47, 2 April 1984, *Official Records vol 2,* p. 51 at p. 52, and of INTERTANKO, IMO Doc. LEG/CONF.6/INF.2/Rev.1, 8 May 1984, *Official Records vol 2,* p. 77 at p. 92.

56 IMO Doc. LEG/CONF.6/12, 27 February 1984, *Official Records vol 2,* p. 4 at p. 5.

57 IMO Doc. LEG/CONF.6/C.2/SR.1, 26 March 1986 (sic – the meeting took place on 8 May 1984), *Official Records vol 2,* p. 311, at p. 323 paragraph 57; IMO Doc. LEG/CONF.6/C.2/SR.2, 26 March 1984 (sic – the meeting took place on 8 May 1984)), *Official Records vol 2,* p. 326, at pp. 330-336, paragraphs 10 – 44; IMO Doc. LEG/CONF.6/C.2/SR.3, 26 March 1986 (sic – the meeting took place on 9 May 1984)), *Official Records vol 2,* p. 337, at pp. 333-339, paragraphs 1-6; IMO Doc. LEG/CONF.6/C.2/SR.18, 14 August 1986 (sic – the meeting took place on 18 May 1984)), *Official Records vol 2,* p. 505, at pp. 508-510, paragraphs 12-32.

58 IMO Doc. LEG/CONF.6/C.2/SR.26, 8 August 1986 (sic – the meeting took place on 24 May 1984)), *Official Records vol 2,* p. 584, at p. 587, paragraphs 16-18; IMO Doc. LEG/CONF.6/C.2/SR.27, 8 August 1986 (sic – the meeting took place on 24 May 1984)), *Official Records vol 2,* p. 598, at p. 604, paragraph 44.

1. 'Ship' means any sea-going vessel and sea-borne 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."[59]

The 1992 Civil Liability Convention

93. The records of the conference at which the 1992 revision of the Civil Liability Convention was drafted do not reveal any discussion of the definition of 'ship'. The text of the definition in the 1984 Protocol was reproduced verbatim.[60]

94. The *travaux préparatoires* of the CLC thus lend support to the view that FSOs are not 'ships'; but they do not clarify the precise nature of the distinction between ships and FSOs.

Other Conventions and Industry Agreements

95. There are other international instruments which, while not setting out agreed interpretations of the word 'ship' in the 1992 Conventions, were intended to complement the coverage of the 1992 Conventions or their predecessors. Two instruments are particularly relevant: the 1977 London Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources ('the **1977 Convention**'),[61] and an industry agreement, the 1974 Offshore Pollution Liability Agreement ("**OPOL**") (as amended). They do not count as "subsequent agreements" between the CLC Parties relating to the interpretation or application of the CLC, because they do not specifically address the meaning of the terms 'ship' in the 1992 CLC. Nonetheless, they might be counted as part of the 'circumstances of its conclusion', and taken into account under VCLT Article 32. They indicate the thinking of the time in the relevant industry, which appears to distinguish between ships and offshore installations, making separate provision for pollution liability in relation to each, and explicitly providing for FSOs in the context of the legal regimes applicable to offshore installations.

96. The 1977 Convention provides that

"Article 1
For the purposes of this Convention
…..
2. 'Installation' means:
(a) any well or other facility, whether fixed or mobile, which is used for the purpose of exploring for, producing, treating, storing, transmitting or regaining control of the flow of crude oil from the seabed or its subsoil;
…..
and
(e) any facility which is normally used for storing crude oil from the seabed or its subsoil;

59 IMO Doc. LEG/CONF.6/c.2/4, 23 May 1984, *Official Records vol 2*, p. 150 at p. 151.
60 See IMO Doc. LEG/CONF.6/C.2/SR.26, 8 August 1986 (sic – the meeting took place on 24 May 1984)), *Official Records vol 2*, p. 584, at p. 587, paragraph 15.
61 UK Official Papers Cmnd 6791; 16 *International Legal Materials* 1450 (1977).

> which, or a substantial part of which, is located seaward of the low-water line along the coast as marked on large-scale charts officially recognized by the Controlling State;
> provided, however, that
> …..
> (ii) a ship as defined in the International Convention on Civil Liability for Oil Pollution Damage, done at Brussels on 29 November 1969, shall not be considered to be an installation."

97. The 1977 Convention applies to "pollution damage … resulting from an incident which occurred beyond the coastal low-water line at an installation under the jurisdiction of a Controlling State" (Article 2). It is apparent from the definition in Article 1 of the 1977 Convention that (i) the 1977 Convention was intended to apply to fixed or mobile facilities for the offshore storage of oil from the seabed, and (ii) that it did not apply to 'ships' within the meaning of the 1969 Civil Liability Convention. The intention to distinguish between 'installations' and 'ships', putting fixed or mobile storage facilities in the category of 'installations', is clear. Although the 1977 Convention applied only to facilities storing oil from the seabed, its drawing of this distinction provides some support for the view that FSOs have not been assimilated to ships in the context of provisions for pollution liability.

98. A similar point can be made about OPOL. Part of paragraph 8 of OPOL Clause 1 (Definitions), as amended in 1999, reads as follows:

> " 'Offshore Facility' means:
> A. any well and any installation or pipeline or portion thereof of any kind, fixed or mobile, being used for the purpose of exploring for, producing, treating, storing or transporting Oil from the seabed or its subsoil; and
>
> B. any well used for the purpose of exploring for or recovering gas or natural gas liquids from the seabed or its subsoil during the period that any such well is being drilled (including completion), re-completed or worked upon (except for normal work-over operations); or
>
> C. any installation of any kind, fixed or mobile, intended for the purpose of exploring for, producing, treating or storing Oil from the seabed or its subsoil where such installation has been temporarily removed from its operational site for whatever reason;
>
> which is described in the Appendix to the Rules and located within the jurisdiction of a Designated State but excluding any Offshore Facility located in the Baltic Sea or Mediterranean Sea to the extent that it and, in the case of any well, any installation from which it is drilled, are both to seaward of the low-water line along the coast as marked on large scale charts officially recognised by the Government of such Designated State:
>
> provided however that none of the following shall be considered an Offshore Facility:
> (i) any abandoned well, installation or pipeline; or
> (ii) any ship, barge or other craft not being used for the storage of Oil, commencing at the loading manifold thereof."[62]

[62] See < http://www.opol.org.uk/agreement.htm >.

99. That definition makes plain that a ship, barge or other craft that is in fact being used for the storage of 'oil' (defined in OPOL Clause 1.9 as "crude oil and condensate … whether or not such materials are mixed with or present in other substances") is an 'offshore facility'. The point is reinforced in the Appendix to the OPOL Rules, which lists the Offshore Facilities to which OPOL is applicable and includes 'Oil Storage/Loading Systems', which are defined as "an offshore fixed or floating Oil storage facility together with any associated offshore Oil loading facilities."[63] Like the definition in the 1977 Convention, OPOL provides some support for the view that FSOs are not to be regarded as ships.

100. These instruments accordingly provide further support for the view that FSOs are not 'ships' within the meaning of the 1992 Conventions, reinforcing the interpretation gained from a reading of the plain words of CLC Article I.1.

Conclusion regarding interpretation of the term 'ship'

101. **It is in my view clear from the available evidence that the definition of the term 'ship' was deliberately linked to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of the ship on a voyage. I can find no evidence of any intention to include FSOs within the definition, or of any understanding that FSOs do fall within the CLC definition of a 'ship'. I therefore conclude that FSO's are not 'ships' within the CLC definition of a 'ship'.**

WHAT DISTINGUISHES A SHIP FROM AN FSO?

102. Having concluded that the definition of the term 'ship' in the 1992 CLC was deliberately linked to the carriage of oil in bulk as cargo, that such carriage was understood to involve navigation on a voyage, and that FSOs do not fall within the definition, it is necessary to address the question of the criteria for distinguishing ships from FSOs.

103. This is not a matter of interpreting a legal text, because neither the Conventions nor any associated agreement or practice set out such criteria. Nor is it a matter of unlimited discretion. The criteria applied must not bring within the 1992 Conventions structures and craft that on any reasonable interpretation could not be regarded as falling within the CLC Article I.1 definition of a ship (such as fixed storage facilities and passenger ships); and equally the criteria must not exclude ships that on any reasonable interpretation would be regarded as engaged in the carriage of persistent oil in bulk as cargo (such as an oil tanker at anchor awaiting entry into port).

104. Within those limits, the IOPC Funds have discretion to decide on the criteria that it will apply. The task is to draw a line to distinguish between 'ships' and FSOs that is reasonable and useful for practical purposes. That is a matter of discretion and policy, not a question of law. It is a matter of determining practical criteria which reflect, as accurately and reasonably as possible, the distinction in the light of the reason for drawing it.

105. That reason may be briefly summarized as the intention to confine the application of the 1992 CLC to craft engaged in the carriage of oil in bulk as a cargo by navigating on voyages at sea. There is no internationally-agreed definition of 'navigation' or 'voyage' that could guide or constrain the IOPC Funds in formulating criteria. There is, however, a recent discussion in

[63] See < http://www.opol.org.uk/rules-appendix.htm >.

the English courts of the concept of a 'ship' (in the context of the question whether a jet ski is a ship) which casts some general light on the concept. The Court said that:

> "Navigation is the nautical art or science of conducting a ship from one place to another. The navigator must be able (1) to determine the ship's position and (2) to determine the future course or courses to be steered to reach the intended destination. The word "navigation" is also used to describe the action of navigating or ordered movement of ships on water. Hence "navigable waters" means waters on which ships can be navigated. To my mind the phrase "used in navigation" conveys the concept of transporting persons or property by water to an intended destination. A fishing vessel may go to sea and return to the harbour from which she sailed, but that vessel will nevertheless be navigated to her fishing grounds and back again.
>
> "Navigation" is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another. …..
>
> It may be possible to navigate a jet ski but in my judgment it is not "a vessel used in navigation"."[64]

The 'mother vessel' question

106. The Danish paper, IOPC/OCT10/4/3/1, dated 24 September 2010, illustrates the nature of the task of distinguishing between ships and storage units. In the paper, Denmark raised questions concerning the application of the term 'ship' to mother vessels anchored off the Danish coast in four scenarios set out in paragraphs 3.1 – 3.8 of the paper.

107. The scenarios all involve tankers sailing to Danish waters and anchoring there before continuing their voyages. It follows from the analysis set out in the preceding paragraphs that in every case the mother vessel *could* properly be regarded as a 'ship' within the meaning of the 1992 Conventions. There is no doubt that they are constructed or adapted for the carriage of oil in bulk as cargo and are doing so. The fact that they anchor for varying periods of time, and that they engage in ship-to-ship ('**STS**') transfer operations, would not preclude their being treated as 'ships'. All four scenarios fall within the area of discretion permitted to the IOPC Funds in formulating the criteria that are used to distinguish between 'ships' and 'FSOs' (see paragraph 104, above).

108. That said, there might be thought to be relevant differences between the scenarios. A tanker that anchors, without engaging in STS operations, pending the continuation of its voyage must surely be regarded as a ship (Danish scenario 1). There also seems to be no good reason for excluding from the category of 'ships' a tanker that anchors in order to load or offload oil onto smaller vessels before continuing its voyage, particularly in cases where the reason for the STS transfer is that the waters are too shallow for the tanker itself to proceed to port to load or offload its cargo (Danish scenarios 2 and 3). Whether the tanker arrives empty or half-laden or fully laden should make no difference in principle.

109. The fourth Danish scenario, where the mother vessel remains at anchor and both offloads oil and also uploads oil might be thought to be different. The mother vessel is, on one view, operating not as a vessel carrying oil as cargo but as a trading post. It remains in place not in order to deliver or receive the oil that it is contracted to carry as cargo, but rather to hold oil that is bought and sold from the vessel.

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64 *R* v *Goodwin*, [2005] EWCA Crim 3184, at paragraph 19 (quoting Steen J in *Steedman* v *Scofield* [1992] 2 Lloyd's Rep. 163)

110. A bright-line rule could, if it were wished, be adopted, which addressed concerns about distinguishing between ships that remain in place for extended periods, say one year conducting such operations, and ships that anchor for shorter periods as they await sailing instructions.

111. The Conventions do not prescribe precise criteria for distinguishing between ships and FSO's, and there is considerable discretion for the Member States to decide this issue. All the craft engaged in the four Danish 'mother vessel' scenarios can properly be regarded as within the scope of the CLC Article 1 definition of a 'ship', because all of them are in the course of a voyage carrying oil as cargo, which they will continue after the STS transfer. It is however, within the discretion of the IOPC Member States to decide, if they so wish, the appropriate time period beyond which it would not be reasonable to say that a vessel remains on a voyage, for the carriage of oil by sea as cargo, and thus to deprive a vessel of its character as a 'ship' for CLC purposes, and give the vessel the character of an FSO. In this regard, paragraphs 4.4.27 and 4.4.36 of the Record of the Decision of the October 2010 Assembly, record the diverging views amongst Member States regarding whether a vessel which remained at anchor for more than one year could be considered to be on a 'voyage'.

112. Further industry sources may need to be consulted in order to resolve this issue, and consideration may need to be given to the notion of 'continuing a voyage', a notion which might be stipulated to involve more than moving to a nearby anchorage. Alternatively, the Assembly could decide that the decision as to what constituted a 'voyage' should be decided in light of the particular circumstances of the case, in a similar manner to the discretion granted during the 11th session of the 1992 Fund Assembly in October 2006, regarding permanently and semi-permanently anchored vessels engaged in STS oil transfer operations.[66]

POSSIBLE APPROACHES TO DEFINING 'SHIP'

113. It is for the IOPC Funds to decide precisely how it will interpret the term 'ship' in the CLC, but some brief comments might be helpful in approaching that question.

114. The first point is that it is easier to apply a definition if there is a presumption coupled with an exemption: for example, "all sea-going vessels and seaborne craft capable of carrying oil in bulk as cargo will be presumed to be ships unless it is shown that (a), (b) or (c)...".

115. The presumption could itself be qualified, referring for example to "all sea-going vessels and seaborne craft capable of carrying oil in bulk as cargo at sea under their own power and steering…".

116. The presumption could be supplemented by further stipulations: for example, "The following will also be considered to be 'ships': - Barges designed to proceed to sea under tow [while they are actually under tow]".

117. The ways in which the presumption can be rebutted can be defined either precisely ("… unless it is shown that their power and steering equipment has been and remains removed or rendered inoperable…") or more generally ("… unless it is shown that their power and steering equipment has been and remains removed or rendered inoperable or that the vessel or craft is otherwise unable to navigate at sea under its own power …").

118. However the matter might be approached, it should be kept in mind that the main criterion implicit in the CLC definition of a ship is the capacity to navigate at sea, and the

[66] 92FUND/A.11/35, paragraph 32.12

interpretative criteria should reflect that fact. A craft that is incapable of navigating at sea cannot be regarded as a craft capable of carrying oil in bulk as a cargo.

119. With those points in mind, several different types of FSO might be distinguished. To give some examples for the purposes of illustration, the IOPC Funds might decide that (1) **FSOs that are connected to pipelines** (whether originating in the seabed or on land) should not be regarded as ships, except in the case of short-term connections for the purpose of taking oil on board in order to take it to another place. If such FSOs leave their station for maintenance or to avoid the stress of weather, that should be regarded as an operational matter and not as a voyage; and the FSO should remain excluded from the category of a ship. Only when it ceases to be employed as a 'connected' FSO might it become a ship.

120. Similarly, (2) **Purpose-built FSOs that have no independent motive power for sea-going navigation and / or no steering equipment** should not be regarded as ships, unless they are or are about to be under tow.

121. It might be the case that such craft could be towed as if they were cargo-carrying barges. Almost any craft or floating structure *could* be towed at sea, however; and if that were sufficient to qualify it as a 'ship' it would destroy the evident intention to distinguish between FSOs and ships. On the other hand, it would be unreasonable to exclude all barges from the category of 'ships', and so some distinguishing criterion must be found.

122. Clearly, any barge that is in fact being towed by a ship navigating on a sea voyage and that is carrying a cargo of oil should be regarded as a 'ship', if only because it is essentially a part of the ship that is towing it.[67] Equally, a barge that has been, or is about to be, towed for the purpose of carrying a cargo of oil at sea, and is temporarily at anchor for purposes incidental to its ordinary navigation or because of *force majeure* or distress[68] but is not linked to a vessel able to tow it, should continue to be regarded as a 'ship'.

123. It does, however, seem reasonable to take the view that a craft without power or steering that is explicitly constructed or adapted to function as an FSO and is actually employed as such (whether or not connected to a pipeline) should in all other circumstances be regarded as outside the category of 'ships', even if it can be towed to and from its normal anchorage.

124. (3) **Purpose-built FSOs that have their own independent motive power and steering equipment for sea-going navigation** are constructed so as to be able to be employed in either the storage or the carriage of oil in bulk as cargo. They are in the same position as tankers or combination carriers that are capable of long-term anchoring in a single location. These are considered below (category (6)).

125. (4) **Craft originally constructed and operated as vessels for the transportation of oil, but later converted into FSOs (i.e., non-purpose-built FSOs) that *do not* retain the capacity to navigate at sea under their own motive power** because they have had their motive power and / or steering equipment disabled, are more difficult. The *Slops* was one such, regarded as a ship by the Greek Supreme Court but not by the IOPC Funds.

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67 Cf., 71FUND/EXC.57/10, 29 January 1998. 'Incidents involving the 1971 Fund. *Pontoon No. 300*'. See also the cases of the *Nestucca* (Canada, 1988) and the *Vistabella* (Caribbean, 1991). The same approach has been taken in the United States, where the *Morris J Berman* incident (Puerto Rico, 1994) is a notable precedent for a serious pollution incident involving an oil barge.

68 The phrase mirrors that in Article 18 of the 1982 UN Convention on the Law of the Sea. The concept is long-established and well-understood.

126. Such 'disabled' craft could be converted back into navigable ships: but that seems a characteristic too contingent to be the basis of their classification. One might reasonably take the view that if the owners have done all they reasonably can to strip such craft of the character of a ship, and if the craft are in fact employed as FSOs and are not employed as barges, those craft should not in those circumstances be regarded as 'ships'. If the disabling of their equipment is subsequently reversed, that indicates an intention that they should be rendered capable of engaging in voyages; and if they then carry oil in bulk as cargo, they should of course be regarded as ships.

127. (5) **Craft originally constructed and operated (or capable of being operated) as vessels for the transportation of oil, but later converted into FSOs that *do* retain the capacity to navigate at sea under their own power and steering**, should be regarded as being in the same position as tankers or combination carriers that are capable of long-term anchoring in a single location (category (6)).

128. (6) **Craft originally designed and operated (or capable of being operated) as tankers or combination carriers transporting oil, and which have not undergone conversion into FSOs** are in principle 'ships'. The only question is whether long-term anchoring at a single location for the purposes of storing oil should alter that character. A pragmatic approach might be taken to that question, requiring the owner to take some step such as the disabling of the craft's motive power and steering equipment, if the craft is to cease to be regarded as a ship.

129. Some such categorization might be publicised for illustrative purposes in a guidance note.

130. There can be no guarantee that national courts would follow such interpretative decisions and guidance notes. If, however, they are publicised, it is very likely that in any dispute one or other party will refer to them, and that they would have very considerable persuasive authority, and that they would be disregarded only if national law specifically directed a different interpretation.

Conclusion on the definition of 'ship'

131. For the reasons set out above it is concluded that the current definition of the term 'ship' in the 1992 Conventions cannot plausibly be applied to FSOs. The 1992 Conventions give no clear and precise guidance on how to distinguish between a ship and an FSO so as to decide which category a particular craft belongs to. The IOPCF has considerable discretion to draw up and apply practical criteria for this purpose. Those criteria should focus on the question whether the craft is engaged in a voyage for the carriage of oil by sea as cargo, or whether it is storing the oil in one location.

MAKING AN AGREED INTERPRETATION EFFECTIVE

132. If the IOPC Funds adopt an agreed interpretation of the term 'ship', there would remain the task of ensuring that it is applied by courts and tribunals in Contracting Parties.

133. Each national legal system has its own rules on interpretation. In some States, if treaty provisions are enacted in the form of domestic statutes courts will interpret them as they do domestic statutes. Courts may, accordingly, refuse to examine the preparatory works of the treaty, and rely upon nothing but the wording of the implementing statute. In other states, the courts may read domestic law in the light of the treaty and be prepared to consider the treaty's preparatory work. There is no uniform practice; and different courts may therefore come to

different results. Differences may also result from the fact that it is common to oblige courts to give effect to national statutes even if they conflict with international treaty provisions.

134. The most effective way to address this risk of diversity in national implementation is to amend the relevant part of the 1992 Conventions: i.e., the definition of the term 'ship'. This could be done by the adoption of another Protocol, revising or supplementing the definition of 'ship' in Article I.1. Such a move could, if desired, also create a system for the designation of FSOs.

135. An easier alternative would be formally to adopt, by unanimity or consensus, an agreed interpretation of CLC Article I.1 as a **Resolution of the Assembly**, and to publish it along with texts of the 1992 Conventions and of the official forms and papers published by the IOPC Funds. The IOPC Funds might adopt an agreed interpretation in the form of a decision, or issue guidance notes. Unlike an amendment of Conventions such an interpretation would, strictly speaking, not bind the courts in Contracting States to give effect to the agreed interpretation. It would, however, count as a 'subsequent agreement' for VCLT purposes, and be likely in practice to be applied by national courts. While there can be no guarantee that national courts would follow interpretative decisions and guidance notes, if they are publicised it is very likely that in any dispute one or other party will refer to them, and that they would be treated by national courts as having very considerable persuasive authority.

CONTRIBUTIONS

136. The second main question addressed in this paper is the question of contributions, viewed in the light of the analysis of the term 'ship'. This question is distinct from that of the definition of the term 'ship', but the two questions have some common features.

137. Contributions to the Fund are made in respect of contributing oil that is "received … in the ports or terminal installations" of a State. Article 10 makes no reference whatever to 'ships'. The liability to make contributions is defined not by reference to what is or is not a 'ship', but according to whether oil has been 'received' in a Contracting State.

138. The terms 'received' and 'receipt' are not defined in the Fund Convention, and have no established technical meaning. The drafting history of Article 10 of the Fund Convention is very thin. The only relevant episode was an Egyptian intervention questioning whether oil discharged in Suez and piped to Alexandria in order to be reloaded onto tankers for carriage to its destination in a European port would be counted as having been 'received' by Egypt for contribution purposes.[69] That point was the subject of an Egyptian proposal for an amendment to the text considered by the Conference.[70] The amendment, which would have exonerated oil in transit completely from the duty to contribute or set the contribution at a very low rate, was rejected by the Conference.[71] The main argument against it was that "the risks of pollution

[69] IMCO Doc. LEG/CONF.2/C.1/SR.14, 8 December 1971, *Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971*, page 409.

[70] IMCO Doc. LEG/CONF.2/WP.2, 14 December 1971, *Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971*, page 619.

[71] IMCO Doc. LEG/CONF.2/SR.4, 17 December 1971, *Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971*, page 670 at pages 679–681.

damage were more directly related to entry and exit from harbour areas and that it was not always easy to ascertain the exact terminal destination of the oil."[72]

139. That episode cannot be said to dictate any particular interpretation of the terms 'received' and 'receipt' in Article 10 of the Fund Convention. The evidence is simply too thin. It does, however, suggest an inclination on the part of the drafters of Article 10 towards regarding any discharge of contributing oil in the "ports or terminal installations" of a Contracting State as a 'receipt' for Article 10 purposes.

140. A "terminal installation" is defined in Article 1.8 of the Fund Convention as meaning "any site for the storage of oil in bulk which is capable of receiving oil from waterborne transportation, including any facility situated off-shore and linked to such site." The "site" described in this definition would appear to refer primarily to an onshore storage facility, but also to include an offshore facility linked to it (presumably by pipeline connection). However, the Fund Assembly decided in 1980 that the discharge of oil into an offshore floating tank involved similar risks to those inherent in discharge at a terminal, and that such oil should be considered contributing oil irrespective of the existence of any pipeline connection between the floating tank and onshore installations. The Assembly also decided that ships would be considered as floating tanks only if they are 'dead ships', i.e., "if they are not ready to sail".[73] In 2006 the Assembly decided to regard not only discharges into 'dead ships' but also discharges into ships that "are permanently or semi-permanently at anchor" as 'receipts' for contribution purposes.[74]

141. On the basis of this interpretation there is no reason why the discharge of oil into a craft that would qualify as a 'ship' for CLC purposes[75] should not also be regarded as a 'receipt' of oil in a port or terminal installation for the purposes of Fund Convention Article 10. The IOPC Funds could thus decide to treat a particular craft as a 'ship' in one context and as a craft assimilated to an 'installation' in the other. As with many other issues arising under the conventions, this interpretation would be open to challenge in national courts.

142. The question of the circumstances in which contributing oil should be said to have been 'received' within the meaning of Fund Convention Article 10 was also raised in the paper submitted by Denmark.[76] The paper refers to several categories of 'mother vessels': (a) anchoring while loaded for one to three months in national waters; (b) anchoring for one to three months in national waters in order to be loaded with oil; and (c) anchoring for one to three months in national waters in order both to be loaded with oil and to unload oil onto feeder tankers.

143. Denmark considers all these categories of mother vessel to fall within the definition of a 'ship' in the CLC and the Fund Convention. The point was made in paragraph 111 above that all of these categories of craft do indeed fall within the CLC definition of a 'ship', because they are all constructed or adapted for the carriage of oil in bulk as cargo. But as the Danish

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72 IMCO Doc. LEG/CONF.2/SR.4, 17 December 1971, *Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971*, page 670 at page 680.

73 FUND/A/ES.1/13, paragraph 10, < http://www.iopcfund-docs.org/ds/pdf/71aes1-13_e.pdf >.

74 Notes on the October 2006 Revision of the 'Report on Receipts of Contributing Oil' form.

75 And, indeed, for the purposes of those provisions of the Fund Convention that do refer to a 'ship': Article 1(2) of the Fund Convention stipulates that the term 'ship' has the same meaning as it has in Article 1 of the CLC. This is necessary in order to ensure that the compensation provisions of the Fund are aligned with the liability provisions in the CLC. No such necessity exists in the case of the calculations of contributions to the Fund.

76 IOPC/OCT10/4/3/1. See also above, paragraphs 106 – 111.

paper makes clear, the question whether oil on board such a mother vessel should be counted as oil 'received' is a question that is quite separate from the question whether the mother vessel is or is not a 'ship' . The Danish Government does not consider that mother vessels (as described in paragraphs 3.3 – 3.5 of the Danish paper) should be considered to be 'semi-permanently anchored', or that the oil on board them should be considered as 'received' for contribution purposes.[77]

144. This issue raises the question whether there is any period of time after which the mother vessel would be considered to be "permanently or semi-permanently" at anchor. When the Assembly considered this subject in October 2006 it used the phrase "permanently or semi-permanently at anchor" in reference to vessels which receive oil and subsequently offload it onto other craft at the same location.[78] Vessels may be said to fall into this category by virtue of the fact that, in the normal course of their operations, they are engaged only in two-way STS transfers of oil and do not depart from their anchorage on a cargo-carrying voyage. If it is uncertain whether an anchored vessel will depart on such a voyage, a long period at anchor may create a presumption that no transport of oil by that vessel is intended in the absence of evidence to the contrary. In practice, however, it may be expected that in many situations the nature of the operations, and the intentions of those involved, will be reasonably clear.

145. If the IOPC Funds wished to review its policy, this option is available. The point is not that any such change to policy is necessarily desirable, but rather that such an option is available if it should be thought desirable. In any event, the definition of a 'ship' under the CLC has no necessary relationship with the definition of a 'contribution' under the Fund Convention.

146. For the reasons given above, it is concluded that the question of what constitutes a 'receipt' of oil for the purposes of contributions under Article 10 of the Fund Convention is independent of the question of what constitutes a 'ship'. The IOCPF may exercise a broad discretion in laying down a precise definition of the circumstances in which oil is received for the purposes of Article 10.

147. Finally, in relation to the question of the Danish 'mother vessel' contributions, it is concluded that the oil on board those vessels which fall into the four scenarios described in paragraphs 3.3-3.5 of document IOPC/OCT10/4/3/1 should not be regarded as 'received' contributing oil, given the evident intention that oil loaded onto the mother vessels is to be carried by those vessels on voyages (albeit after a period of storage).

SPECIFIC QUESTIONS

148. I am asked also to consider the implications of the conclusion that FSOs are not 'ships' for the purposes of the 1992 Conventions for questions of (i) strict liability, (ii) compulsory insurance, and (iii) certification of FSOs.

Strict liability

149. If an offshore craft is involved in an incident which causes oil pollution, and it is not considered to be a 'ship' within the meaning of the Civil Liability and Fund Conventions, compensation under the international regime will not be available for the damage.

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77 IOPC/OCT10/4/3/1. See paragraphs 5.1 – 5.3.

78 See Director's Note, 92FUND/A.11/30, paragraph 4.5; Record of Decisions, 92FUND/A.11/35, para. 32.16.

150. If the incident involves an escape of bunker oil from the craft, and it occurs in a state where the Bunkers Convention is in force, that Convention may be applicable as it defines a 'ship' as 'any seagoing vessel and seaborne craft, of any type whatsoever.' Compensation will then be available on a strict liability basis. (This may not necessarily be adequate, as a limitation fund established in accordance with the 1976 Limitation Convention, as amended, is not dedicated to pollution claims. There is also no international second-tier fund available for pollution claims if the liability limit is exceeded.)

151. If neither the CLC nor the Bunkers Convention is applicable, compensation will not be available under any other international regime: there is currently no such regime in force in relation to offshore craft. Liability for oil pollution will therefore depend in such a case on national law – most likely the law of the place in which the pollution is suffered.

152. In some jurisdictions legislation is in force which would impose liability for oil pollution from a wide range of seagoing craft, to the extent that such incidents do not fall within any international regime. Liability imposed by such legislation is commonly strict.

153. In other jurisdictions, where no such legislation is in force, liability may depend on the law of tort or similar jurisprudence. In general this does not impose strict liability but requires proof of fault.

154. Any liability for oil pollution incurred by the owner of an offshore craft independently of the CLC cannot be limited in accordance with that Convention, but may be subject to limitation in accordance with any applicable national or international limitation regime, such as the 1976 Limitation Convention as amended. If liability is limited, and admissible claims exceed the limit, no supplemental compensation will be available from the IOPC Funds.

Compulsory insurance

155. CLC Article VII.1 requires ships carrying more than 2,000 tons of oil in bulk as cargo to maintain insurance with an approved insurer to cover the shipowner's liability for pollution damage under the Convention.

156. Article VII.8 provides that claims for pollution damage may be brought directly against the insurer of the owner's liability for pollution damage, and that the insurer may not invoke any policy defences other than wilful misconduct.

157. The owners of craft that do not count as 'ships' under CLC are not bound to maintain such insurance.

158. In practice the owners of ships and offshore craft commonly insure against liabilities for oil pollution even if the compulsory insurance requirements of CLC do not apply. However, if a craft is not considered to be a 'ship' within the meaning of CLC, the Convention will not apply to an oil pollution incident involving that craft, and rights of direct action under the Convention will not be available.

159. Regardless of whether it is a 'ship' for the purposes of CLC, an offshore craft may be considered a 'ship' as defined by the Bunkers Convention and therefore be subject to its compulsory insurance requirements. These would include a right of direct action against the insurer in the event of a bunker oil pollution incident in a contracting state.

160. Otherwise, in respect of any oil pollution from the cargo of an offshore craft, there are no international compulsory insurance requirements. Claims falling outside both CLC and the

Bunkers Convention would be subject to national laws, and they could not give rise to any rights of direct action under the international regimes.

Certification

161. Under CLC Article VII.2, Contracting States issue certificates attesting to the existence of insurance cover as required by CLC Article VII.1. If a craft is considered not to be a 'ship' as defined by CLC, the compulsory insurance and certification provisions do not apply.

162. In some cases there may be doubts as to whether a craft is or is not a 'ship' for these purposes, and as to whether the compulsory insurance and certification provisions apply to it. It is understood that this has sometimes been the case, for example, with clean oil tankers which are capable of carrying persistent oil, or which have in the past done so. Similar considerations may apply to an offshore craft if it engages, or may engage, in the transport of oil by sea. It is unlikely to be practicable for owners to wait until such movements occur before arranging certification, nor for them to risk differences of opinion with port entry or port state control authorities as to the applicability of the Convention. For these reasons it is understood that owners and insurers sometimes arrange certification as a precautionary measure, despite doubts whether the craft is in fact a 'ship'.

163. There is, however, no basis for regarding the issue or possession of a certificate, or the existence of insurance, as conclusive evidence that the craft is or is not a 'ship' for the purposes of the 1992 Conventions.

SUMMARY OF CONCLUSIONS

164. In this paper I have reached the following main conclusions:

a. The available evidence indicates that the definition of the term 'ship' was deliberately linked to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of the ship on a voyage. I can find no evidence of any intention to include FSOs within the definition, or of any understanding that FSOs do fall within the CLC definition of a 'ship'. [Paragraph 101, above]

b. The current definition of the term 'ship' in the 1992 Conventions cannot plausibly be applied to FSOs. The 1992 Conventions give no clear and precise guidance on how to distinguish between a ship and an FSO so as to decide which category a particular craft belongs to. The IOPC Funds have considerable discretion to draw up and apply practical criteria for this purpose. Those criteria should focus on the question whether the craft is engaged in a voyage for the carriage of oil by sea as cargo, or whether it is storing the oil in one location. [Paragraph 130, above]

c. The question of what constitutes a 'receipt' of oil for the purposes of contributions under Article 10 of the Fund Convention is independent of the question of what constitutes a 'ship'. The IOPC Funds may exercise a broad discretion in laying down a precise definition of the circumstances in which oil is received for the purposes of Article 10. [Paragraph 146, above]

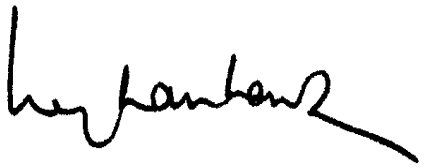
d. There is no established legal criterion that distinguishes precisely between a 'ship' and an FSO, so as to determine which category a tanker anchored in the long term at a single place would fall in. The IOPC Funds are free to adopt and apply reasonable criteria. National courts would be expected to follow the IOPC Funds'

criteria, but would not be bound to do so if the IOPC Funds adopted the criteria in the form of an Assembly Resolution, rather than a binding Protocol that addressed this particular aspect of the 1992 Conventions and supplemented the existing text. In addition, the IOPC Funds may wish to issue additional guidance notes.

e. (i) If an incident occurs which causes oil pollution damage for which there is no remedy under the international regime – because the craft concerned is not a "ship" and/or because the incident does not involve a spill of "oil" as defined – compensation may be available from the owners of the craft under other national or international laws. In some cases (but not necessarily all cases) other laws may provide for strict liability and rights of direct action against insurers. If for any reason such compensation is inadequate, there is at present no international fund, comparable to the IOPC Funds, from which top-up compensation could be obtained. [Paragraphs 149 – 154, above]

(ii) Craft that do not count as 'ships' are not bound to maintain compulsory insurance under the CLC but may choose to do so or be obliged by other laws to do so. [Paragraphs 155 – 160, above]

(iii) There is no basis for regarding a certificate as conclusive evidence as to whether or not a craft is a 'ship'. [Paragraphs 161 – 163, above]



Professor Vaughan Lowe Q.C.

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ANNEX II

Profile of Professor Vaughan Lowe QC

Professor Vaughan Lowe is Chichele Professor of Public International Law and a Fellow of All Souls College in the University of Oxford and a practising Barrister at Essex Court Chambers, mainly in the field of international law, with cases in the International Court of Justice, the International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights, Inter-American Commission on Human Rights, Iran-US Claims Tribunal, the UN Compensation Commission, Court of Arbitration for Sport, *ad hoc* Arbitral Tribunals, and courts in England, China (Hong Kong), the USA and elsewhere. His work has included matters such as maritime boundaries, State immunity, investment disputes, antitrust laws, claims to statehood, and other questions of international and English law. He has acted for around twenty Governments, and also sits as an arbitrator in World Bank investment cases and sat as an *ad hoc* judge on the European Court of Human Rights. His cases in the International Court of Justice include *Passage through the Great Belt (Finland v Denmark), Wall in Occupied Palestinian Territory, Avena (Mexico v USA), Romania v Ukraine Maritime Boundary, Kosovo,* and *Peru v Chile Maritime Boundary*; and other cases include the *Mox (Ireland v UK), Land Reclamation (Malaysia v Singapore),* and *Tomimaru (Japan v Russia)* cases in the International Tribunal for the Law of the Sea.

Professor Lowe has written and edited many books and articles since since 1975. The books include:-

- British Year Book of International Law, Joint Editor (with J.R Crawford), 1999 – 2011;
- Halsbury's Laws of England: vol. 61, International Relations Law (with M Wood et al), (2010)
- The United Nations Security Council and War, (with A Roberts, J Welsh, D Zaum), (2008)
- International Law, (2007);
- The Law of the Sea, 1st / 2nd / 3rd Edition (with R R Churchill) 1983, 1988 1999;
- The Settlement of International Disputes (with J G Collier) 1999;
- Extraterritorial Jurisdiction: an annotated collection of legal materials, 1982

A full curriculum vitae providing details of external lectures and other activities and publications is available at http://www.essexcourt.net/members/barrister.asp?b=47.

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ANNEX III

Comparison between the conclusions of the legal opinion and the IOPC Funds' policies

Scenario Number	Scenario	Professor Lowe's Legal Opinion	Legal Opinion paragraph reference	IOPC Funds' Policy	1992 Fund Reference and Comments
1	FSO connected to pipelines	Not a 'ship'	119	Not a 'ship'	See document 92FUND/A.4/32, paragraph 24.3.
2	Purpose-built FSO with no independent power and/or no steering equipment	Not a 'ship' (unless being towed)	120	Not a 'ship' (unless being towed)	***Pontoon 300*** **incident** – The 1971 Fund decided that since the barge was carrying oil in bulk as cargo from one place to another it fell within definition of 'ship' (cf document 71FUND/EXC.57/10, paragraphs 2.1-2.4)**.**
3	Barge being towed by a ship navigating on a sea voyage and carrying cargo of oil	It is a 'ship'	122	It is a 'ship'	***Pontoon 300*** **incident** – The 1971 Fund decided that since the barge was carrying oil in bulk as cargo from one place to another it fell within definition of 'ship' (cf document 71FUND/EXC.57/10, paragraphs 2.1-2.4).
4	Purpose-built FSO with own independent motive power and/or steering equipment	It is a 'ship'	124	It is a 'ship'	
5	Craft converted into FSO that do not retain capacity to navigate at sea under own motive power	Not a 'ship'	125	Not a 'ship'	***Slops*** **incident** – The 1992 Fund Assembly decided that such vessels should not be considered as a 'ship' within the 1992 Conventions (cf document 92FUND/EXC.8/8, paragraphs 4.3.1-4.3.8).

6	Craft converted into FSO with capacity to undertake voyages at sea under own motive power retained	It is a 'ship'	127	It is a 'ship'	Capacity to undertake voyages and capable of and actually carrying oil, required under Article I.1 of 1992 CLC.
7	Tankers/combination carriers	It is a 'ship'	128	It is a 'ship'	***Aegean Sea, Prestige, Erika*** incidents etc.

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ANNEX IV

Comparison between the conclusions of the legal opinion and 1992 Fund policy regarding 'mother' vessels

Scenario Number	Scenario	Professor Lowe's Legal Opinion	Legal Opinion paragraph reference	IOPC Funds' Policy	1992 Fund Reference and Comments
8	Tanker anchored (for one-three months or perhaps up to one year) without engaging in STS operations pending continuation of voyage	The oil does not count as 'received'	147	The oil does not count as 'received'	The legal opinion questions whether long-term anchoring at a single location for oil storage purposes should alter character from a 'ship' to FSO.
9	Tanker anchored (for one-three months or perhaps up to one year)and engaged in STS operations before continuing voyage	The oil does not count as 'received'	147	The oil does not count as 'received'	The legal opinion questions whether long-term anchoring at a single location for oil storage purposes should alter character from a 'ship' to FSO.
10	Tanker anchored (for one-three months or perhaps up to one year) and engaged in extended (1-3 days) STS operations before continuing voyage	The oil does not count as 'received'	147	The oil does not count as 'received'	The legal opinion questions whether long-term anchoring at a single location for oil storage purposes should alter character from a 'ship' to FSO.
11	Tanker anchored in same position engaged in two-way STS transfers both offloading and uploading oil before continuing voyage	The oil does not count as 'received'	147	The oil does not count as 'received'	The legal opinion questions whether long-term anchoring at a single location for oil storage purposes should alter character from a 'ship' to FSO.