

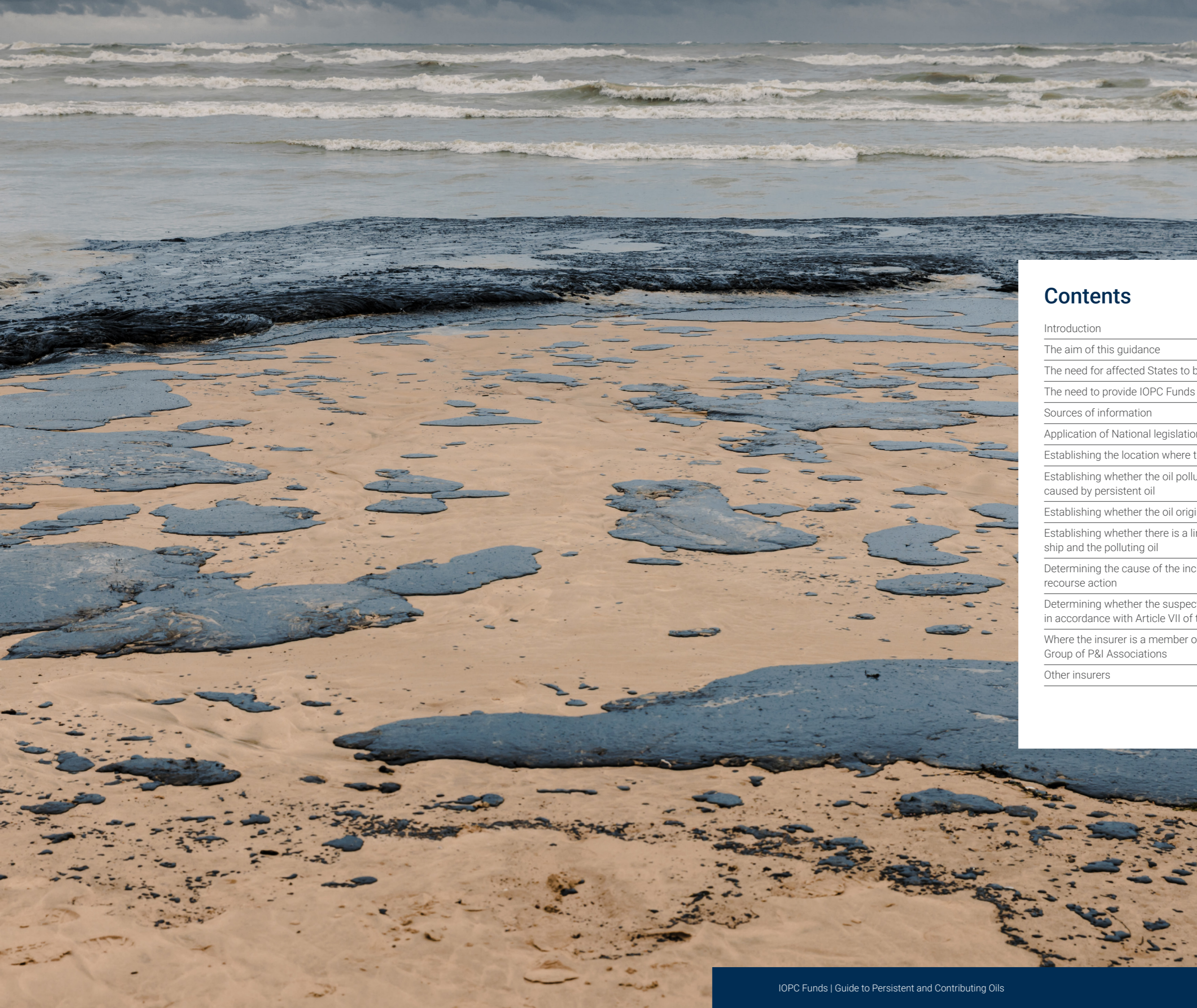


International Oil Pollution  
Compensation Funds



# Guidance for Member States

Investigating the Circumstances Surrounding an Oil  
Pollution Incident Involving Uninsured and Unsafe Ships



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## 1 Introduction

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Despite the plethora of international regulations governing the safety of international shipping, oil spill incidents continue to involve ships which are unsafe due to factors such as their advanced age, lack of repairs, substandard maintenance and disregard for safety standards. All too frequently, these factors go hand-in-hand with lack of adequate insurance. Added to this are the increasing number of such ships which, for one reason or another, are attempting to circumvent the authorities by turning off their Automated Identification System (AIS) transponders or Long Range Identification and Tracking (LRIT) transmissions with the aim of conducting illegal ship-to-ship (STS) oil transfers, often in dangerous circumstances which may result in oil spills putting coastlines at an increased risk of oil pollution damage.

## 2 The aim of this guidance

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- 2.1 This guidance was developed following the decisions of the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, and the Supplementary Fund Assembly in April 2024, which instructed the Director to begin to develop, in consultation with the Audit Body, guidance for Member States for investigating the circumstances surrounding an oil pollution incident in order to identify ships and persons involved, including but not limited to, shipowners and their insurers.
- 2.2 This guidance is particularly relevant in situations where the information surrounding an oil spill incident is unclear, such as the cause of the spill, the registration or insurance of the ship.

## 3 The need for affected States to be proactive

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- 3.1 It is essential for States affected by an oil spill (hereinafter referred to as the 'affected State') to take proactive steps whenever an oil pollution incident poses a threat of pollution damage to their coastlines, fisheries and other coastal interests, rather than solely notifying the IOPC Funds about the incident and awaiting their assistance. Delay in prompt action on the part of affected States may lead to the loss of vital information concerning the ship responsible for the incident and its insurer, as well as the circumstances surrounding the incident. This, in turn, may create difficulties for the IOPC Funds not only in assessing any claims for pollution damage (thereby creating delays in paying compensation for the damage) but may also hinder the IOPC Funds in any subsequent attempts to take recourse action under the 1992 Fund Convention to recover the costs from potentially liable third parties. The ultimate bearers of these costs where they cannot be recovered will inevitably be all States Parties to the 1992 Civil Liability and Fund Conventions and potentially the Supplementary Fund Protocol.
- 3.2 Recognising the danger to life and limb and also to the marine environment presented by unsafe and uninsured ships and, in an attempt to prevent illegal operations in the maritime sector, IMO Assembly Resolution A.1192(33) requires States to be proactive at all times and to adopt measures aimed at preventing such situations from occurring in the first place<sup><1></sup>.
- 3.3 Among the benefits resulting from the suggested proactive measures advocated by IMO Assembly Resolution A.1192(33), particularly those measures required to be implemented by port and coastal States, is the assistance that these measures may provide States in identifying potentially suspect ships within their waters even before an oil spill occurs.
- 3.4 However, even where the measures advocated by IMO Assembly Resolution A. 1192(33) do not, in a given situation, directly assist the affected State in identifying the suspect ship and linking it to a particular spill of oil, the more rigorously flag, port and coastal States apply these measures, the fewer such oil spills will occur, and coastal States will be less at risk.

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<1> Flag States are urged to ensure that ships on their registers adhere to measures which prohibit or regulate ship to ship (STS) transfers of oil, and that such ships comply with pollution prevention requirements and to consider requiring ships on their registers to update their STS plans to include notifying them when and where they are engaged in such measures. Port States are urged to ensure enforcement of the safety and liability conventions and to notify flag States when they become aware of ships intentionally taking measures to avoid protection. Coastal States are urged to monitor STS operations within their territorial seas and EEZ and take appropriate action when ships fail to comply with maritime safety or maritime pollution prevention regulations.

## 4 The need for affected States to provide the IOPC Funds with information

- 4.1 The more information provided to the IOPC Funds about the circumstances surrounding the pollution incident, the easier it will be for the 1992 Fund Executive Committee and the Supplementary Fund Assembly to decide whether the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol apply to the incident and to decide whether to authorise the Director to make payments of compensation for claims arising out of the incident.
- 4.2 The information about the circumstances surrounding the pollution incident should state whether the vessel involved is a 'ship' as defined by the 1992 CLC. It should also include details about the ship or ships involved, their history, ownership, class and insurance cover, and the type of oil in question, all of which are important.

## 5 Sources of information

- 5.1 In seeking information about the incident, affected States should not feel constrained to speak only to the master of the suspect ship (although this source is important). Other possible sources of information include the current or previous flag States, States where the ship has previously operated, the affected Member State, Port State Control organisations, classification societies or organisations, insurance companies or organisations (P&I and Hull & Machinery insurers and P&I correspondents), and charterers.
- 5.2 Additionally, private companies specialising in tracking ships or oil movements may also provide useful information. They should also interview as many other sources of information as possible including, for example, private investigators, investigative journalists and reporters who often have their own contacts and sources of information, as well as the owners and operators of local businesses and residents who often have specialised knowledge of the area within which the spill occurred, tides and surrounding coastline.

## 6 Application of national legislation

- 6.1 When circumstances surrounding an incident are unclear, or questions arise regarding the registration or insurance of the ship, affected States are urged to use all available national, legal processes to recover the costs of the damage caused by the spill. This includes pursuing civil legislation, such as tort law, where it is alleged that the spill was the result of negligence<sup><2></sup>. The *Gulfstream* incident is an example of a case where pursuing such measures is relevant.
- 6.2 As indicated in Article 4.1(b) of the 1992 Fund Convention, claimants are required to take all reasonable steps to pursue the legal remedies available to them against those shipowners responsible for the oil pollution damage. These legal avenues should be pursued without waiting for the IOPC Funds to investigate the spill. The outcome of such legal actions will be helpful in assisting the IOPC Funds in identifying those individuals responsible for the pollution damage as well as in assessing the extent of the pollution damage caused by the oil spill.

<2> Such legal action should take into account IMO Resolutions A.987(24) and A.1056(27) on Fair Treatment of Seafarers in the Event of a Maritime Accident, as well as the IMO Legal Committee draft guidelines on 'Fair treatment of seafarers detained on suspicion of committing crimes', adopted at their 111th session and attached at Annex 1 of document LEG111/17/Add.1 (to be updated pending final adoption by ILO and IMO).

## 7 Establishing the location where the damage has occurred

One of the first steps for a Member State affected by an oil pollution incident is to ascertain whether the pollution damage was caused in its territory including its territorial sea or in its exclusive economic zone (EEZ) or equivalent area, as stated in Article II(a) of the 1992 CLC, and Article 3(a) of the 1992 Fund Convention and the Supplementary Fund Protocol.

## 8 Establishing whether the oil pollution damage was caused by persistent oil

- 8.1 Pursuant to Article I(5) of the 1992 CLC, oil<sup><3></sup> is defined 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.'
- 8.2 In order to claim compensation under the 1992 Fund Convention or the Supplementary Fund Protocol, a claimant must show that the polluting oil meets the above criteria, namely that it is persistent hydrocarbon mineral oil<sup><4></sup> which, because of its chemical composition, is usually slow to dissipate naturally when spilled into the environment and which is therefore likely to spread and require a clean-up response.
- 8.3 In order to prove whether the oil is persistent or non-persistent<sup><5></sup>, the relevant authorities of the affected State should take steps to ensure that samples are taken by an independent surveyor and analysed in a competent laboratory as soon as possible after the incident. The IOPC Funds will most likely also conduct their own independent tests in accordance with their internal guidelines.

## 9 Establishing whether the oil originated from a ship

It is a prerequisite for any claim for compensation for oil pollution damage from the IOPC Funds that the spill of oil causing the damage originated from a ship<sup><6></sup>. For this purpose, a ship is defined under (Article I(1) of the 1992 CLC, Article 1.2 of the 1992 Fund Convention and Article 1.6 of the Supplementary Fund Protocol) as meaning:

"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> This is different from the concept of 'contributing oil' as defined in Article 1.3 of the 1992 Fund Convention and Article 1.7 of the Supplementary Fund Protocol, which is relevant to the assessment of annual contributions, if any, to be levied on Contracting States (see Articles 10-15 of the 1992 Fund Convention) in the event of an oil spill.

<4> Such as crude oil, fuel oil, heavy diesel oil and lubricating oil.

<5> Neither persistent nor non-persistent oils are defined in the Conventions. However, under the guidelines 'Guide to persistent and contributing oils' developed by the IOPC Funds, an oil is considered non-persistent if at the time of the shipment at least 50% of the hydrocarbon fraction, by volume, distil at a temperature of 340°C (654°F); and at least 95% of the hydrocarbon fractions, by volume, distil at a temperature of 370°C (700°F), when tested in accordance with the American Society for Testing and Materials' Method D 86/78 or any subsequent revision thereof (document IOPC/APR24/7/1).

<6> Article 4.2(b) of the 1992 Fund Convention provides that the Fund shall incur no obligation to pay compensation if 'the claimant cannot prove that the damage resulted from an incident involving one or more ships'.

## 10 Establishing whether there is a link between the ship and the polluting oil

- 10.1 To determine whether the oil originated from a particular ship, it will be necessary to confirm that the suspect ship is a ship according to the relevant definition and to establish the link between the suspect ship and the polluting oil.
- 10.2 Upon the occurrence of an oil spill, Member States are urged, as part of their investigation into the incident, to take samples to establish, among other things, the requisite link between the suspect ship and the polluting oil.
- 10.3 Where the suspect ship is still in the vicinity of the spill (for example, where it has capsized and has sunk, or where it has struck a submerged reef and is unable to move without assistance) the requisite link between the suspect ship and the polluting oil might be more readily ascertained, at least on a preliminary basis, by photographic or other visual evidence. In other cases, however, it may be necessary to employ more sophisticated methods, including but not limited to, satellite imagery<sup><7></sup>. Without wanting to specify the details of any investigation, it should be borne in mind that techniques of forensic oil 'fingerprinting' may be undertaken with samples from the spill site.
- 10.4 In cases where the suspect ship has left the vicinity, IMO's AIS transponders carried on ships, which were mandated under SOLAS Regulation V/19 adopted in 2000, as well as IMO's LRIT System mandated under SOLAS Regulation V/19-1, may assist in providing evidence concerning which ships were in the area of the spill at the estimated time of the spill. If the suspect ship has left the area, States are urged to cooperate with each other in identifying the suspect ship and its movements, and authorities at the next port of call are urged to collect oil samples.

## 11 Determining the cause of the incident and potential recourse action

- 11.1 Depending on the results of the investigation into the cause of the incident, a recourse action against the responsible parties may need to be pursued by the IOPC Funds. A thorough investigation should be conducted by the affected State to identify the cause of the incident. This will be important for the IOPC Funds when preparing a potential recourse action against the responsible parties. For example, in a collision case, the IOPC Funds may be able to recover costs from the ship responsible for the collision<sup><8></sup>.
- 11.2 In investigating the cause of the incident, affected States are advised to bear in mind the 2008 Casualty Investigation Code<sup><9></sup> adopted by the IMO Assembly which reminds<sup><10></sup> States that 'the safety of seafarers and passengers and the protection of the marine environment can be enhanced by timely and accurate reports identifying the circumstances and causes of maritime casualties<sup><11></sup> and incidents'. The primary objective of the 2008 Casualty Investigation Code is to provide a common approach for States to adopt when investigating marine casualties and incidents, with the aim of preventing similar occurrences in the future rather than to apportion blame or assign liability. However, the international standards and recommended practices in the Code can also assist in the investigation into the cause of an incident.

<7> Such techniques were used in the Incident in Israel (2021) to confirm that the 'oil' came from a 'ship' as defined in Articles I(5) and I(1) respectively of the 1992 CLC.

<8> Such as in the *Hebei Spirit* incident (Republic of Korea, 2007), where a crane barge struck the stationary, moored tanker *Hebei Spirit*.

<9> Adoption of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident: Resolution MSC. 255(84) adopted on 16 May 2008, hereinafter the Casualty Investigation Code.

<10> Casualty Investigation Code, paragraph 3 of the preamble.

<11> Paragraph 2.9.7 of the Casualty Investigation Code provides that a 'Marine Casualty' includes 'severe damage to the environment, or the potential for severe damage to the environment brought about by the damage to a ship or ships'.

## 12 Determining whether the suspect ship is insured in accordance with Article VII of the 1992 CLC

- 12.1 With respect to a ship registered in a State Party to the 1992 CLC, the State Party is obliged to issue a certificate attesting that the insurance or other financial guarantee has been issued or attested by the appropriate authority. In respect of a ship not registered in a State Party, the certificate may be issued by the appropriate authority of any State Party<sup><12></sup>.
- 12.2 The certificate<sup><13></sup>, which is required to be carried on board the ship<sup><14></sup>, must be in the form of the model certificate of insurance or other financial security in respect of civil liability for oil pollution damage that is annexed to the 1992 CLC.
- 12.3 This information should assist an affected State to proactively obtain particulars of the pollution insurance carried by the suspect ship and to provide these details to the IOPC Funds as soon as possible after the incident occurs. In this connection, it should be borne in mind that the IOPC Funds will only incur liability for the payment of compensation to persons suffering pollution damage 'if such person has been unable to obtain full and adequate compensation for the damage under the terms of the 1992 CLC'<sup><15></sup>. One of the prerequisites of this, and fundamental to the continued successful operation of the international liability and compensation regime, is that the shipowner is obliged to maintain insurance or other financial security such as a bank guarantee, in the limited sum fixed pursuant to Article V(1) of the 1992 CLC<sup><16></sup>.
- 12.4 This certificate should be requested by the affected State as a matter of urgency following an oil spill in its waters. If necessary, the State may rely on its national laws to obtain the certificate.

## 13 Where the insurer is a member of the International Group of P&I Associations

- 13.1 Where, as in most cases, the insurer is a member of the International Group, IMO Circular LEG.1/Circ.16 of 20 June 2024<sup><17></sup> confirms that the 'Blue Card' issued by the member of the International Group of P&I Associations (International Group) and published on the P&I Club's website should be sufficient evidence of the validity of the certificate.
- 13.2 The Memorandum of Understanding (MoU) between the International Group and the IOPC Funds establishes a framework for their collaboration and outlines the terms and conditions under which they have closely cooperated over the years in handling incidents.
- 13.3 In addition, the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended 2017) and the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006 (as amended 2017) apply to tankers entered in P&I Clubs that are members of the International Group and reinsured through the pooling arrangements of the International Group. These agreements also fall within the framework of cooperation established by the International Group and the IOPC Funds. They were set up to indemnify the 1992 Fund and Supplementary Fund, respectively, for compensation paid above the shipowner's limit of liability under the 1992 CLC, up to certain amounts.

<12> Article VII(2) of the 1992 CLC.

<13> In accordance with Article VII(2) of the 1992 CLC, the certificate should contain the following particulars: (a) name of ship and port of registration; (b) name and principal place of business of owner; (c) type of security; (d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and (e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

<14> In accordance with Article VII(4) of the 1992 CLC, copies of the certificate should be kept by the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities of the State issuing or certifying the certificate.

<15> Article 4.1 of the 1992 Fund Convention.

<16> Article VII(1) of the 1992 CLC.

<17> The Guidelines contained at the Annex to IMO Circular LEG.1/Circ.16 set out the guidelines for States Parties to the 1992 CLC for accepting insurance certificates and insurance companies, financial security providers and the protection and indemnity clubs (P&I Clubs). These Guidelines revoke the guidelines contained at the Annex to Circular Letter No.3464 of 2 July 2014.

# 14 Other insurers

- 14.1 Where 'Blue Cards' or other similar documentation are received from insurance companies, financial security providers and P&I Clubs outside the International Group, in accordance with IMO Circular LEG.1/Circ.16, affected States should take active steps to verify the financial standing and solvency of the insurance companies and financial security providers to ensure the availability of prompt and adequate compensation for the victims of a pollution incident. This should be done as a matter of urgency following an oil pollution incident.
- 14.2 Some smaller tankers involved in an incident may be insured for pollution liability by commercial insurers, who may have very limited or no knowledge of the international liability and compensation regime established by the 1992 Civil Liability and Fund Conventions. In such cases, affected States should, as early as possible, provide the IOPC Funds' Secretariat with as much information as they can obtain concerning the identity of the insurer and details of the insurance policy, in particular, information as to what extent it covers pollution damage. This information will, in turn, enable the IOPC Funds' Secretariat to contact the insurer to explain how the international liability and compensation regime operates.
- 14.3 A Memorandum of Understanding (MoU) or an agreement between the IOPC Funds and the insurer can also be signed when incidents involve insurers who are not part of the International Group to establish the terms and conditions under which they will cooperate when handling the incident. Member States may wish to refer to the MoU template wording between the Member State, the shipowner's insurer and the 1992 Fund contained in Annex IV of the publication 'Guidance for Member States – Measures to facilitate the claims handling process', which is available on the IOPC Funds' website. In addition, the IOPC Funds and the Association of Commercial P&I Insurers (ACPII) have signed an MoU confirming that the two parties are committed to cooperating in the event of an incident involving an ACPII-insured tanker.

## Acknowledgements

### Photographs

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