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Michael Mason

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Transnational Compensation for Oil Pollution Damage: Examining Changing Spatialities of Environmental Liability

Michael Mason

Department of Geography and Environment, London School of Economics, Houghton Street, London, WC2A 2AE

Abstract

The civil liability regime for ship-source oil pollution stands at the forefront of rule development for transnational environmental compensation, advancing private law remedies to enable national victims of oil spill damage to make financial claims against domestic and non-domestic tanker owners and, in certain circumstances, the global oil cargo industry. This rule formulation and implementation attests to the significance of legal norms in constituting new spaces of financial accountability for transboundary environmental harm. I examine the evolving – and contested – parameters of environmental liability set by the international oil pollution liability conventions, focusing on the admissibility of reinstatement costs and the geographical scope of compensation norms. A preliminary assessment of the extent to which the liability regime meets the interests of affected (third) parties applauds its equitable consideration of environmental claims, although this is restricted by a narrow definition of damage and national boundaries of entitlement. Oil pollution harm to collective ecological interests represents a key challenge to the liability framework.

Keywords: Oil pollution; Environment; Liability; Transnational, Norm development; Accountability

1. Introduction

If it is now widely acknowledged that the globalization of environmental risk – represented by the interaction of enduring technological impacts with new socio-ecological vulnerabilities – poses a mounting challenge to governance institutions (Held et al., 1999, pp. 376-413; Kasperson and Kasperson, 2001), then the rules of responsibility for harm production remain underdeveloped. For while the last thirty years has seen the negotiation and implementation of numerous international environmental agreements, commentators have noted the absence in most of these treaties of detailed provisions stipulating the responsibility of state and non-state actors for environmental damage. In terms of existing international law, the central deficiency relates to the means of financial accountability – liability – for environmental harm across national boundaries and to the global commons (Iwama, 1992; Sandvik and Suikkari, 1997). Principle 13 of the 1992 Rio Declaration on Environment and Development registered this deficiency, calling on states to cooperate in developing liability and compensation rules for environmental damage caused by activities both within and beyond their areas of territorial jurisdiction or control (United Nations, 1993, p. 10).

The development of state liability provisions in public international law has progressed haltingly. Most multilateral environmental treaties stipulate that signatory parties should act in accordance with the principle of state responsibility for environmental damage, but the nature of liability and compensation provisions are not prescribed. The 1972 Convention on International Liability for Damage Caused by Space Objects remains one of the few treaties with explicit state liability obligations – rules which supported a successful claim by Canada against the USSR for the clean-up of radioactive debris following the break-up of a Soviet satellite over Canadian territory in 1979 (Sands, 1995, pp. 646-48). Outside treaty law, the most significant recent precedent featuring state liability for environmental damage was United Nations Security Council Resolution 687 (1991) stating Iraq's liability for environmental damage resulting from its invasion and occupation of Kuwait (Briscoe, 1999). There are also occasional instances of international awards of environmental compensation for transboundary pollution damage. Overall, state practice nevertheless reveals a widespread reluctance routinely to pursue environmental liability through inter-state claims: indeed, the International Law Commission – the United Nations body charged since 1978 with the codification of general legal principles of international liability - has reflected state preferences for increasing the importance of private liability attached to operators of risk-bearing activities as the main mechanism for progressing environmental liability (Boyle, 1997, p. 408; Rao, 1998, p. 35).

This move to shift liability provisions from a state responsibility framework to one where environmental damage compensation falls squarely onto private actors has made civil liability treaties the preferred vehicle for rule development in this area. Civil liability regimes focus on the financial accountability of responsible parties under national legal regimes in conformity with international liability conventions. They have emerged to facilitate risk management for economic activities considered hazardous, notably (potential) damage arising from the peaceful use of nuclear energy, oil pollution, the transportation of dangerous goods and the transboundary movement of hazardous wastes (Sands, 1995, pp. 652-78; Birnie and Boyle 2002).

The civil liability regime for marine oil pollution was the first of these regimes to broaden compensation obligations beyond personal injury and property damage provisions to environmental impairment, and has served as a model for liability rule development for the carriage of dangerous goods, the maritime carriage of hazardous and noxious substances, and revisions to civil liability provisions for nuclear damage (Sandvik and Suikkari, 1997, pp. 64-65). Moreover, the method of compensation entitlement under this regime – strict liability (without the need to prove negligence) - has become the norm for pollution damage liability rules elsewhere. And it has also been rationalized as an effective and equitable means of incorporating the polluter pays principle into the field of environmental liability (Gauci, 1997, pp. 18-20; 1999, p. 30).

This paper evaluates the adequacy of the marine oil pollution civil liability regime as a vehicle for transnational environmental accountability: that is, the extent to which its overarching framework of legal obligations serves the interests of those national and non-national publics suffering transboundary injury from ship-source oil spills. Democratic accountability for transnational harm production requires the effective and equitable treatment of the claims of affected publics (Mason, 2001; Renn and Klinke, 2001). For oil pollution liability, this relates above all to claims for recompense: my focus is specifically on the changing spatialities of environmental liability as evident in the implementation of legal rules of entitlement under the relevant international conventions – the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), as both amended by 1992 Protocols (International Maritime Organization, 1996). Following a summary of the key features of the marine oil pollution liability regime, I address its evolving – and contested – parameters of environmental compensation, as represented in treaty provisions on environmental damage liability and geographical scope of application. Are current environmental liability rules sufficient to meet claims for compensation from (representatives of) affected publics?

Moreover, the institutionalization of oil pollution liability norms as international rules raises the issue of the standing of state and non-state actors, not only as potential claimants, but also as participants collectively shaping norm application. As scholars of norm development in international politics have observed, there are distinctive patterns of socialization as new rules of responsibility accumulate global currency, involving changing opportunities for communication between actors (Finnemore and Sikkink, 1998; Risse, 2000). The oil pollution liability regime deserves study in this respect for the openness and inclusiveness in its harmonization of private law remedies for transboundary damage. At the same time, however, its reliance on private actors (shipowners, oil importers and insurance companies) to achieve its regulatory goals prompts concerns about the pivotal role of private authority in environmental governance: is it possible in such a regulatory system to ensure the full representation and protection of affected environmental interests (Sand 1999, pp. 43-54; Bennett, 2001)?

2. The marine oil pollution liability regime

Prevention of ship-source oil pollution has been an international regulatory goal since 1954, giving rise to various conventions, resolutions and codes developed under the auspices of the United Nations International Maritime Organization (IMO). The 1973/78 International Convention for the Prevention of Pollution from Ships (the MARPOL Convention) stands as the core treaty regulating harmful emissions from ships: Annex I, concerned with oil pollution, contains detailed technical provisions designed to eliminate intentional discharges. MARPOL is credited as instrumental in significantly reducing discharges from marine transportation (contributing in 1993 to about 24 per cent of the input of petroleum hydrocarbons into the marine environment, compared to 20 per cent from tanker accidents: GESAMP(1993)), achieved by focusing international regulatory control on mandatory equipment standards for oil tankers – notably segregated ballast tanks and crude oil washing. Such regulatory progress has taken decades, though, punctuated by intensive IMO rule development in reaction to occasional catastrophic oil spills (Mitchell, 1994: Mitchell et al., 1999).

It was the political fallout following the 1967 Torrey Canyon oil tanker disaster off the south-west coast of Britain that provoked the forerunner of IMO – the Inter-Governmental Maritime Consultative Organization – to review state systems of civil liability for oil pollution damage. National claims processes were overwhelmingly structured by the traditional law of tort, leaving potential claimants with the onerous task of proving shipowner negligence. And the restriction of damage claims to personal injury and property damage typically excluded environmental mitigation and reinstatement costs. For oil spills caused by non-national vessels, even personal and property damage claims could be frustrated by the unwillingness of domestic courts to assume enforceable jurisdiction or the shipowner registering only limited assets (Churchill and Lowe, 1999, pp. 358-59; Trew and Seward, 1999, p. 9). In a time prior to the codification of coastal state environmental jurisdiction in the United Nations Law of the Sea (LOS) Convention (United Nations, 1982), the international negotiations to draft an oil pollution liability convention had to defer strongly to the long-established navigation rights of flag state vessels. Even Western European states such as the United Kingdom (UK) and France, pushed by public pressure to support new international obligations on liability for oil pollution damage, had to balance this against their domestic shipping interests and their economic reliance on maritime trade.

Not surprisingly, then, the civil liability convention adopted at a diplomatic conference in Brussels in 1969 (entry into force June 1975), proved to be a political compromise. CLC 1969 places liability for oil pollution damage squarely on the registered owner of the ship from which the oil escapes or is discharged: this liability is strict in the sense that the claimant only has to demonstrate that (s)he has suffered damage as a result of the spill, removing the need to prove that the shipowner was at fault. The intent here was to facilitate prompt, equitable compensation payments to victims for damage suffered in the territory, including the territorial sea, of any contracting state. To aid this, ships carrying more than 2,000 tons of persistent oil as cargo are required to carry appropriate liability insurance. For owners of oil-carrying vessels the new burden of strict liability was mitigated by the limitation of their liability under CLC 1969 (up to 133 Special Drawing Rights for each ton of a ship's

gross tonnage, capped by a maximum of 14 million Special Drawing Rights for each incident): claimants are only able to breach that limit – and sue for more – if the incident is a result of the ‘actual fault or privity’ of the owner. Furthermore, the shipowner avoids any liability if the damage is (i) attributable to acts of war or exceptional natural phenomena, is wholly caused either (ii) by an act of omission of a third party done with the intent to cause damage or (iii) the negligence or other wrongful act of an authority in its function of maintaining navigational aids.

Despite the move to strict liability at the Brussels Conference, states animated by marine protection interests had expressed reservations that CLC 1969 might not be adequate to meeting the damage claims arising from large scale oil pollution incidents: there was also an assertion that oil cargo interests should bear some of the economic consequences of oil pollution damage (Sands, 1995, p. 660; Trew and Seward, 1999, pp. 9-10). As part of the Brussels compromise, IMO was entrusted therefore with the creation of a new international fund to supplement the liability coverage of CLC 1969: the 1971 Fund Convention (entry into force October 1978), sharing a strict liability and compensation ceiling framework (limited to 30 million Special Drawing Rights – including shipowner liability payments), established a statutory system compelling oil cargo interests in contracting states to pay a levy, calculated on the basis of their national share of international oil receipts, towards the International Oil Pollution Compensation (IOPC) Fund 1971. In operation until 2002, the IOPC Fund 1971 provided compensation for oil pollution damage not fully available under CLC 1969 because of the responsible shipowner being exempt from liability or being financially incapable of meeting compensation obligations or, alternatively, that the damage exceeded the limits of shipowner liability. Up to 31 December 2000, the 1971 Fund had approved the settlement of pollution damage claims arising out of 96 incidents, amounting to over £263 million in total compensation payments (International Oil Pollution Compensation Funds, 2001, pp. 37, 150-71).

That tanker owners and oil companies were in favour of uniform, limited liability rules for oil pollution damage is evident in their global co-operation in establishing two private schemes – the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (1969-1997) and the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (1971-1997) – which complemented the oil pollution liability treaties (Sands, 1995, pp. 665-67; Gauci, 1997, pp. 25-27). Tensions emerged in the 1980s, though, with the perception of oil cargo interests that shipowners’ limited liability was lagging behind rising damage mitigation costs and inflation, pushing the compensation burden for major spillages onto the oil importers. In contrast, CLC 1969 contracting states with sizeable tanker interests (e.g. Greece, Korea, Liberia) were expressing alarm at incidences of national courts breaking shipowner rights to limit liability under the convention, undermining in their view both the economic viability of their shipping industries and the much vaunted equity of application of CLC 1969. An IMO diplomatic conference in London in 1984 reviewed the liability and compensation provisions of both CLC 1969 and the Fund Convention 1971, adopting significant increases in both shipowner liability and the IOPC Fund 1971 compensation ceiling, although the former was linked to a narrowing of the conditions under which the shipowner could lose the right to limit liability – a significant concession to shipping interests. Concerns had also been raised by contracting states at the London Conference about a growing number of substantial

claims for environmental damage compensation allowed by national courts under the international liability regime (International Maritime Organization, 1993b, pp. 357-59, 475-83). Here delegates identified a convergence of flag state (shipping) and coastal state (environmental protection) interests in redefining the parameters of liability for oil pollution damage to standardize cover of transnational environmental harm. The agreed amendments featured the explicit inclusion of environmental impairment as constitutive of pollution damage under CLC and the extension of the geographical scope of both liability conventions beyond the territorial seas of contracting states to cover their exclusive economic zones (or equivalent) and the costs of measures wherever taken to prevent damage to their national maritime areas.

These and other amendments were formulated within legal protocols but their entry into force (based on minimum thresholds of national tanker tonnage and oil receipts) failed to take place. As the leading oil importer in the world, United States ratification was desirable for global acceptance of the 1984 CLC and Oil Pollution Fund Protocols, but the extensive damage caused by the grounding of the Exxon Valdez in Prince William Sound, Alaska in 1989 prompted the unilateral introduction of an American oil pollution liability regime. The strength of environmentalist sentiment in the aftermath of the Exxon Valdez incident is evident in the comprehensive liability provisions of the Oil Pollution Act (OPA) 1990 which imposes stronger duties of care on shipowners than CLC 1969 - and includes a right of action against operators. In contrast to moves to strengthen limited liability defences under the 1984 CLC Protocol, OPA 1990 shifts the burden of accountability towards the harm producer – for example, incident-related failures in reporting, co-operation and compliance can all leave a responsible party facing unlimited liability for damage. Furthermore, individual US states had opposed national ratification of the 1984 protocols because this would have pre-empted their rights to establish their own oil pollution liability rules; and many have indeed added additional liability for oil pollution damage beyond that established by OPA 1990 (Little and Hamilton, 1997, pp. 394-97; Gauci, 1997, p. 173). As will be discussed below, the critics of the international oil pollution regime have claimed that its ecological remediation provisions are weaker than OPA 1990, rendering it less effective in compensating affected environmental interests. The 1984 amendments were finally incorporated into the international liability system when another IMO diplomatic conference in 1992 reduced their entry into force conditions to facilitate early regime adoption without American ratification. As framed by these revised protocols, CLC 1992 and the Oil Fund Convention 1992 (both in force May 1996) set the current terms of application of claims for compensation within contracting states: it is to their provisions on environmental damage and geographical scope that I now turn.

3. Environmental liability for oil pollution I: contested definitions of damage

Article I(6) of CLC 1969 defines pollution damage as ‘loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever, such escape or discharge may occur, and includes the cost of preventive measures and further loss of damage caused by preventive measures.’ While it was clear from the beginning that this wording covered economic losses connected with personal injury or property damage, the absence of any reference to environmental damage left this aspect to the interpretation of national courts

according to the domestic implementation of the convention (Wetterstein, 1994, p. 234). Concerns expressed by states at the 1984 IMO conference on marine liability and compensation that some liberal court rulings on damage were destabilizing the regime's uniformity of application, led to the formulation of a new clause on environmental damage. As incorporated into Article I(6) of CLC 1992, pollution damage is defined as:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken (emphasis added).
- (b) the costs of preventive measures and further loss or damage caused by preventive measures (International Maritime Organization, 1996, pp. 47-48).

This statement of meaning on environmental impairment was shaped by experience with the IOPC Fund 1971 and was therefore designed to limit environmental claims against both shipowners under CLC 1992 and oil receivers under the Oil Fund Convention 1992. National courts in states which had ratified the 1992 protocols would not coherently be able to find for environmental damage claims beyond loss of profit and reasonable measures of reinstatement; this would rule out, it was planned, claims for environmental damage per se (Gauci, 1997, pp. 55-56; Trew and Seward, 1999, p. 16).

According to the Chair of the committee charged at the 1984 IMO conference with formulating the substantive changes to CLC 1969, it proved too difficult to reconcile divergent state positions on Article I(6), so the environmental impairment amendment was more a clarification than an innovation. Conference records demonstrate this lack of agreement, from states with prominent shipping interests (e.g. Greece, Liberia) preoccupied with ruling out the possibility of excessive environmental damage claims, to those states (e.g. Australia, Netherlands, Poland) pushing for a broader definition of pollution damage to encompass liability claims for ecological impairment and restoration (International Maritime Organization, 1993b, pp. 347-57, 479-83). Shipping and oil industry observers to the work of the committee aligned themselves with the former position, while the two observing environmental groups - Friends of the Earth International (FOEI) and the International Union for the Conservation of Nature and Natural Resources (IUCN) - supported the latter stance. Significantly, a transnational network of maritime law associations, the International Maritime Committee - which had played an active part in formulating the original text of CLC 1969, actively participated in refining the text of the amended definition of pollution damage. It is clear, though, that this gave a legal sheen to what was a political compromise mediating between divergent state interests.

Not surprisingly, states that domestically had to balance shipping, oil industry and environmental interests shaped the negotiated compromise on pollution damage incorporated into the 1984 CLC Protocol (International Maritime Organization, 1993c, p. 205). Heightened public concern about oil pollution informed UK moves to

strengthen transnational environmental liability for pollution damage, but strong maritime trade interests moderated its ecological protection agenda. Supported by the Federal Republic of Germany, the UK delegation argued successfully for a broad understanding of economic loss and an explicit acknowledgement of reasonable cost recovery for environmental reinstatement measures (International Maritime Organization, 1993b, pp. 347-49, 479-80). Thus, 'losses of profit' under Article I(6) was agreed to encompass not only consequential loss claims (loss of earnings by owners/users of property contaminated by oil) but also claims for pure economic loss (loss of earnings suffered by parties whose property has not been damaged, e.g. coastal hoteliers, fishery concerns): this formalized for the CLC and Fund Convention an extension of liability norms beyond their traditional restriction to property damage (White, 2002). However, while representing a legal recognition of environmental compensation, the clause 'reasonable measure of [environmental] reinstatement' failed to prevent subsequent inter-state disputes as to the application of the oil pollution liability regime to ecological damage. I shall briefly highlight disagreements in practice over (i) quantification of damage, (ii) the state as environmental trustee, and (iii) ecological restoration.

3.1 Quantification of damage

As a system of economic compensation for oil spill damage, the recovery of environmental reinstatement costs under the CLC/Oil Fund Convention regime has turned on whether they are deemed acceptable according to the international rules. Resolution No. 3 of the IOPC Fund Assembly, adopted in 1980, as clarified by the 1984 environmental amendment, has informed the efforts of the IOPC Fund Executive Committee to ensure consistent implementation of the environmental damage provisions of the oil pollution liability treaties. This Resolution had been prompted by Soviet claims for ecological compensation arising from the grounding of a tanker, the Antonio Gramsci off Ventspils (Baltic Sea) in 1979, whereby the USSR government attempted to recover estimated costs for environmental damage beyond demonstrated economic loss. Although the USSR was at that time not party to the 1971 Oil Fund Convention, its claims against the shipowner under CLC 1969 had consequences for the Fund by consuming a major part of the shipowner's limitation amount. In the light of this claim, the 1971 Fund Assembly adopted Resolution No. 3 stating that 'the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage in accordance with theoretical models' (International Oil Pollution Compensation Fund, 1980).

Claims for environmental compensation not related to quantifiable economic loss have consistently been opposed by the IOPC Funds on the basis of Resolution No. 3. Such claims are rare although by no means insignificant in amount; for example, environmental damage claims of 5,000 million lire (Patmos spillage – 1985) and 100,000 million lire (Haven spillage – 1991) from the Italian government, and \$3.2 million from Indonesia (Evoikos spillage – 1997). The 1971 IOPC Fund declared all these inadmissible because of the abstract manner of their calculations; however, the Italian government still pursued its environmental claims through its national courts. Although the Italian Court of Appeal accepted a claim which included inter alia non-use environmental values assessed by expert testimony, the Fund appealed against the judgment and the claim was settled out of court. In the Settlement Agreement, the

Fund made it clear that it neither accepted nor made payments for such environmental claims (International Oil Pollution Compensation Fund, 1994; Bianchi, 1997, pp. 113-28). It is noteworthy that Italy's adoption of CLC 1992 and the Fund Convention 1992 (in force in Italy by September 2000) had to await resolution of the Patmos and Haven claims: at the 1992 IMO conference Italy had expressed its reservation that only accepting environmental damage claims quantifiable in terms of concrete economic loss prevented the legitimate recognition of damage 'in terms of fair remuneration according to prior understandings between the parties' (International Maritime Organization, 1993d, p. 176). The position on environmental damage quantification within the CLC/Fund Convention regime is in contrast with OPA 1990 where abstract quantification of non-market environmental damage is allowed in accordance with prescribed assessment standards (Trew and Seward, 1999, pp. 106-11; Third Intersessional Working Group, 2001b, p.1). Whatever the merits of the American model – and few states under the international oil pollution liability framework have developed an active interest – the lack of clear damage assessment standards and compensable value characteristics within the international regime has presented a significant obstacle to the uniform application of environmental compensation rules (Little and Hamilton, 1997, p. 401; Sandvik and Suikkari, 1997, p. 68).

3.2 The state as environmental trustee

The Patmos case highlighted the possibility of a state's right to environmental compensation as parens patriae (guardian) of collective interests; that is, as representative of its affected public as a national community. In that case the Italian courts stated that CLC 1969 made no distinction between private property damages and public property damages: they found, moreover, that direct public ownership was not necessary to justify environmental compensation claims because the state as a trustee for national or local publics has a right of action beyond economic loss (Bianchi, 1997, p. 126; Gauci, 1997, p. 254). While the IOPC Fund has recognized that public bodies can be legitimate claimants under the oil pollution liability regime, it has not accepted trusteeship claims divorced from quantifiable elements of economic damage. In the Haven case the Fund Executive Committee observed a punitive element in the environmental damage claims neither admissible under the civil liability rules nor of any consequence to the shipowner (protected by limitation of liability) (International Oil Pollution Compensation Fund, 1994, pp. 5-7).

More recently, the right of a state as public trustee to claim environmental compensation has been championed by the French government - within an IOPC Fund 1992 Working Group reviewing the international oil pollution liability conventions. Despite being one of the first states to ratify the 1992 protocols and incorporating their rules into domestic law, French ministers – facing a public outcry following the break-up in December 1999 of a Maltese-registered tanker, the Erika, which badly contaminated with heavy fuel oil an extensive section of the Brittany coast – severely criticized the 1992 Fund over its claims handling and fixed compensation ceilings (International Oil Pollution Compensation Funds, 2001, pp. 113-14). In its submission to the Working Group, the French delegation recommended incorporating into the IOPC Fund 1992 Claims Manual a concept of compensation for environmental damage as a violation of state rights over its collective marine assets. The submission cited in support a provision of OPA 1990 – Section 1006(b)(2)(A) – stipulating that

the federal or foreign governments, individual states and Indian tribes can pursue environmental liability claims for oil pollution damage as trustees (as well as owners and managers) on behalf of their respective, affected publics. However, the French public trustee proposal failed to receive significant support within the Working Group, as it was judged to fall outside the scope of pollution damage defined in CLC 1992 (Third Intersessional Working Group, 2001c; 2001d, pp. 32-33). The Fund continues to maintain that such theoretical formulations of public or collective environmental damage would open up liability determination to arbitrary decisions in national courts, perhaps even hindering private victims in their own claims for compensation.

3.3 Ecological restoration

French moves to liberalize the environmental reinstatement rules of the international oil pollution regime conjoined the state trusteeship principle with a broader notion of compensation. They argued, within the Working Group, that international and national developments in the field of environmental liability demonstrated increasing acceptance of ecological rehabilitation norms. If this was only implicit in Article 235(3) of the LOS Convention requiring states to assure 'prompt and adequate compensation in respect of all damage caused by pollution of the marine environment' (United Nations, 1982, p. 1315) then, the French government maintained, it was certainly clear in constitutional and legal obligations embraced by many countries (e.g. Brazil, France, Italy, Spain, United States). Once again, OPA 1990 served as the key comparator; in particular, its provisions for compensation restoration for the loss of natural resources and services which, in their allowance of the acquisition of equivalent habitats away from the damage site, go beyond CLC 1992 provisions on environmental reinstatement. Supported above all by the Italian delegation, the French called for the oil pollution liability conventions to be amended to allow member states to permit claims for introducing 'identical' or 'equivalent' ecological attributes in an adjacent marine area should reinstatement at the damage site be physically or economically infeasible (Third Intersessional Working Group, 2001c, pp. 12-14; 2001d, pp. 31-34). This is also a position endorsed by the IUCN observer (de la Fayette, 2002). Encouraged by the French presidency of the European Union in the second half of 2000, the European Commission added to the political pressure on the international oil pollution liability system. In the wake of the Erika incident, the Commission published its own proposals for European maritime safety: one of its key recommendations, echoing French and Italian concerns, called for CLC 1992 to be amended to enable restorative compensation for damage to the environment in a manner consistent with wider Commission proposals on civil liability for environmental damage (Ringbom, 2001; Wilde, 2001, pp. 32-34).

As Gauci (1997, p. 55; 1999, p. 32) notes, the oil pollution liability conventions were not designed to provide full compensation for environmental damage. While the review of the environmental impairment provisions by the 1992 Fund Working Group identified scope for more innovative recovery measures, the French proposals prompted serious concerns about their compatibility with the established rules on economic loss and environmental reinstatement. Furthermore, telling practical criticisms against compensatory restoration came from the observer delegation with the greatest experience of co-ordinating damage assessments and environmental recovery following oil-spills – the International Tanker Owners Pollution Federation

Limited (ITOPF). An ITOPF submission to the Working Group had noted the ecological risks of introducing new species into an area or engineering new habitat areas – both of which could upset those natural recovery processes relied on after most oil spills to degrade post-cleanup residual oil (Third Intersessional Working Group, 2001a; White 2002). In the absence of references to marine ecological research in the arguments of those pushing for compensatory restoration, the technical authority of the ITOPF proved influential in setting a scientific case against it.

Although the 1992 Fund Working Group did not accept the French and Italian proposals to allow environmental compensation beyond economic loss, the delegations of Australia, Canada, Sweden and the UK sponsored a more modest recommendation to liberalize the criteria for admissibility of reinstatement costs to include recovery efforts centred on the damaged area (short of substitute habitat enhancement or creation). It was anticipated that this broadening of environmental impairment norms would prove more receptive to new ecological rehabilitation techniques, while staying within the parameters of environmental damage set by the oil pollution liability conventions. However, when the proposal went to the 1992 Fund governing Assembly in October 2001, states with significant shipping and oil receiving interests were hostile, forecasting a plethora of speculative environmental claims if it were to be adopted. For Japan (contributing to 21 per cent of oil pollution liability claims through the payments of its oil receivers) and Korea (contributing 10 per cent of all claims through its oil receivers) in particular, the recommendation promised higher costs for spurious or negligible benefits. Such vociferous opposition revealed the delicate geopolitical balance in which the oil pollution liability regime rests. In spite of majority support for the revised environmental reinstatement criteria from contracting states, the Fund Assembly decided not to move to a vote, although the issue has by no means achieved closure (International Oil Pollution Compensation Fund 1992, 2001, pp. 7-9). Application of environmental liability norms to transnational oil pollution damage remains politically charged and contested.

4. Environmental liability for oil pollution II: broadening geographical scope

The spatial delimitation of oil pollution liability under the international conventions has always deferred to the sovereign rights of contracting states: CLC 1969 (Article II) and the Fund Convention 1971 (Article 3) both apply only to pollution damage caused or impacting on the territory, including the territorial sea, of member states. At the time of the original conventions, there was no international consensus on the breadth of the territorial sea, which militated against the uniformity of geographical application of the liability regime. Article 3 of the LOS Convention 1982 set the limit of the territorial sea of a state at twelve nautical miles, which is now widely accepted as the international norm (Churchill and Lowe, 1999, pp. 79-80), although both CLC 1992 and the Fund Convention 1992 do not refer to the twelve-mile limit in deference to the autonomy of state maritime claims (e.g. Liberia, which is a member of the oil pollution liability conventions but not the LOS Convention, claims a 200 mile territorial sea). Nevertheless, at the 1984 IMO London conference on maritime liability and compensation, various states successfully lobbied for an amendment to the oil pollution liability conventions to recognize the exclusive economic zone (EEZ) rights accorded to coastal states by the LOS Convention (Part V): these entitlements extend up to 200 nautical miles from the baseline from which the breadth of the

territorial sea is measured (Article 57). The broadening of the geographical scope of the liability conventions was reinforced at the 1984 conference by international agreement clarifying that the liability conventions cover measures, wherever taken, to prevent oil pollution damage within a territorial sea or EEZ.

As eventually incorporated into CLC 1992 as Article II, and the Fund Convention 1992 as Article 3, the oil pollution liability conventions are geographically defined as applying exclusively:

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

- (b) to preventive measures, wherever taken, to prevent or minimize such damage (International Maritime Organization, 1996, pp. 48, 69).

In respect of geographical coverage, OPA 1990 is broadly in conformity with the international regime, applying to internal navigable rivers and lakes, bays and lakes, coastal waters and the 200-mile EEZ of the United States (Trew and Seward, 1999, p. 51). This consolidates at least a global recognition that (environmental) liability rules for oil pollution extend coastal state jurisdiction beyond territorial waters.

The political pressure on the oil pollution liability regime to acknowledge the distinctive legal import of the EEZ must be placed in the context of its wider geopolitical significance as ‘a reflection of the aspiration of the developing countries for economic development and their desire to gain greater control over the economic resources off their coasts, particularly fish stocks, which in many areas were largely exploited by the distant-water fleets of developed States’ (Churchill and Lowe, 1999, pp. 160-61). With several Latin American and African countries pushing for 200-mile territorial seas in the 1970s, the EEZ represented the political compromise extracted from states in the global North who viewed the extension of coastal state sovereign powers as a threat to their maritime freedoms. EEZ entitlements, as codified in the LOS Convention, stop short of territorial rights, granting coastal states ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone’ (Article 56(1)(a)). Moreover, Article 56(1)(b)(iii) of the LOS Convention recognized for the first time coastal state jurisdiction in the EEZ over protection and preservation of the marine environment, raising the prospect of the environmental liability provisions within CLC 1969 and the Fund Convention 1971 falling behind the evolution of international maritime law on extra-territorial rights.

Although the LOS Convention had at that time not entered into force, several delegations at the 1984 London conference cited its EEZ provisions in support of an extension of the geographical coverage of the oil pollution liability treaties. A South-North division of interests is discernible in conference minutes: African (Gabon, Nigeria, Morocco), Asian (China, India, Indonesia, Korea) and Latin American (Argentina, Brazil, Chile, Mexico, Peru) delegations lined up to assert their EEZ natural resource rights and environmental protection jurisdiction, as recognized in the LOS Convention. Key industrial states dependent on unimpeded maritime traffic, such as Belgium, Denmark, Federal Republic of Germany, Japan, Sweden and the UK (joined by significant eastern bloc powers – German Democratic Republic and the USSR), opposed extension of oil pollution liability rules to EEZs, arguing on legal grounds that CLC 1969 and the Oil Fund Convention 1971 were autonomous from the LOS Convention and, in a replay of objections to liberalizing environmental reinstatement rules, maintaining also that any such change would in practice invite speculative claims (International Maritime Organization, 1993a, pp. 147-48, 338-39, 365; 1993b, pp. 361-72). Shipping, maritime insurance and oil cargo interests, all attending as observers, lobbied in support of this position. For a time the EEZ proposal lacked the two-thirds majority of states necessary to adopt it. However, cross-cutting the South-North cleavage, and proving pivotal to acceptance of the EEZ adjustment, a North American/Australasian alignment of states with rich offshore marine resource endowments (Canada, United States, Australia, New Zealand) pressed successfully home the majority state support for the amendments to CLC and the Oil Fund Convention, ensuring also that their final drafting was informed by the LOS Convention (International Maritime Organization, 1993b, pp. 520-22, 599-602).

Unlike the environmental damage provision clause of the oil pollution liability conventions, the EEZ amendment has not provoked disputes in practice over its application to transnational harm: the growing international consensus over both its legitimacy and delimitation has prevented unilateral national variance from the norm. And maritime oil trading companies have, in spite of their initial opposition, adapted themselves to the extended geographical scope of the 1992 oil pollution civil liability regime. The only issues to arise over implementation of the designation relate to areas where coastal states have not chosen to exercise their right under the LOS Convention to claim an EEZ, falling instead under the coverage of an area equivalent to such a designation under Article II(a)(ii) of CLC 1992 and Article 3(a)(ii) of the Oil Fund Convention 1992. Most recently, this has applied to the Mediterranean area where, in a region of interlocking maritime interests, coastal states have yet to agree on mutually exclusive EEZs. In September 2000, France, Italy and Spain issued a tripartite declaration signalling the applicability of the oil pollution liability treaties to an area beyond and adjacent to their respective territorial seas in the Mediterranean, up to the 200-mile limit. This has provoked concerns from member states that the designation is not ‘in accordance with international law’ as stipulated by the conventions; firstly, because it might jeopardise the legitimate EEZ claims of other Mediterranean states and, secondly, because it establishes overlapping areas of jurisdiction incompatible with the conventional delimitation of maritime boundaries. However, France, Italy and Spain have stressed that the zone is only germane to the oil pollution liability conventions, without prejudice to EEZ claims. The issue remains on the agenda of the work of the IOPC 1992 Assembly (International Oil Pollution Compensation Fund 1992, 2001, pp. 17-19).

While the extension of the geographical coverage of the oil pollution liability regime is generally acknowledged by member states to enhance the rights of victims by admitting extra-territorial claims (impacting on the EEZ), its spatial resonance to transnational harm may still be questioned in relation to (i) marine protected areas and (ii) marine common spaces.

4.1 Marine protected areas

In recent years the notion of marine protected areas has gained growing currency in international law. Article 211(6) of the LOS Convention allows coastal states to designate special areas allowing them to prescribe particular standards and navigational practices to prevent ship-source pollution. Within the United Nations Environment Programme, the Regional Seas Programme has advanced specially protected marine areas through protocols to its East African, Mediterranean, South-East Pacific and Caribbean Conventions. In addition, Annex I of the MARPOL Convention has facilitated the designation of extensive Special Areas where oil discharges are strictly controlled or prohibited – for example, the North West European Waters Special Area created in 1999. Lastly, there has been the parallel, albeit more halting, development by IMO of the Particularly Sensitive Sea Areas (PSSAs) designation – marine protected areas established to protect recognized ecological or socio-economic or scientific values. An important catalyst for the current flurry of activity on marine protected areas came from the 1992 United Nations Conference on Environment and Development (UNCED), notably the Convention on Biological Diversity and Chapter 17 (‘Protection of the Oceans’) of the sustainable development programme, Agenda 21. The overarching UNCED Rio Declaration provided an endorsement of precautionary norms and the concept of common but differentiated responsibility, which explicitly informed subsequent IMO work, including that on marine protected areas (Birnie, 1997; Wonham, 1998).

As noted by de La Fayette (2001, pp. 185-94), the range of marine protected areas – all with different geographical scope, criteria for designation and protective measures – has undoubtedly caused confusion, but consolidation work within IMO has now clarified at least the respective roles of MARPOL Special Areas and PSSAs. If, as is likely, the global network of marine protected areas expands further, their impact on oil pollution liability claims has still to be systematically examined, both for the CLC/Oil Fund Convention executive bodies and member states. The IOPC Funds have in practice long acknowledged the need to meet more demanding clean-up standards in areas identified with high tourism and/or wildlife values. While oil spill damage in ecologically sensitive PSSAs has so far not been an issue for the 1992 Fund Executive Committee (the only two PSSAs currently designated are the Australian Great Barrier Reef and the Cuban Sabana-Camaguey Archipelago), the committee may take a more generous view of reasonableness in order to meet stringent environmental reinstatement costs. Were that to be the case, the preventive environmental rationale of marine protected areas would at least prompt a sympathetic realignment in the economic compensation system for oil pollution damage, although the high biodiversity value of such areas is likely to expose more acutely the absence of recompense for ecosystem damage per se.

4.2 Marine common spaces

Outside territorial seas and exclusive economic zones, use of the high seas is above all governed by open access and the near-exclusivity of flag state jurisdiction over maritime vessels. This laissez-faire regime has not only generated widespread over-fishing and marine pollution, but also prompted concerns over piracy, drug trafficking and the movement of asylum seekers (Churchill and Lowe, 1999, pp. 203-22). For the oil pollution liability system, the collective action problem resides in the absence of incentives for actors to mitigate damage not affecting any state rights or interests. According to the IOPC Fund 1992 Claims Manual, responses on the high seas to an oil spill would in principle qualify for compensation only if they succeed in preventing or reducing pollution damage within the territorial sea or exclusive economic zone of a contracting state (International Oil Pollution Compensation Fund 1992, 2000, p. 7). The Fund position is that, given world shipping lanes, such spills are rare. Furthermore, the difficulty of mounting a practical response to an oil discharge on the high seas means that natural dispersal is normally relied on for such incidents: any adverse consequences would manifest themselves in national claims systems - e.g. the pure economic loss of a reduced fish catch in the EEZ of a member state. Nevertheless, as Boyle (1997, p. 93) observes, citing the environmental damage caused in Antarctic coastal waters in 1989 by a diesel oil spill from an Argentine vessel (Bahia Paraiso), there is a need for oil pollution liability mechanisms to cover significant harm in marine common spaces (although the fuel oil in this case falls outside the CLC/Fund Convention regime).

Regardless of the practical rationale for restricting liability for high seas oil pollution damage to its impact on national interests, the LOS Convention affords states the right of intervention on the high seas in the case of maritime casualties threatening harmful pollution (Article 221(1)) and, more radically, the right of port states to take legal proceedings against visiting vessels alleged to have illegally discharged oil outside the state's own maritime zones, including the high seas (Article 218(1)). An increasing reliance on port state enforcement in maritime governance is evident in the evolving network of regional Memoranda of Understanding which co-ordinate port state regulation of safety and environmental rules – including MARPOL provisions on oil pollution discharges (Keselj, 1999; de La Fayette, 2001, pp. 222-23). Port state control has established a significant precedent for the development of transnational accountability for marine pollution, acknowledging situations where states can take action against polluters for non-national harm. This renders the oil pollution liability regime open to interrogation for its confinement of environmental liability to damage in coastal state maritime zones.

5. A new accountability? Oil pollution compensation and affected publics

Is it possible to identify, in the evolution of the oil pollution liability regime, movement towards a more effective and equitable institutionalization of accountability for transboundary harm? The changing environmental and spatial parameters of the international liability conventions suggest increased resonance to the consequences of oil pollution damage; and although the relevant legal norms remain firmly within a system of economic compensation, they operate according to rules of uniform coverage and the equal treatment of claimants. In other words, the financial accountability promoted by CLC 1992 and the Fund Convention 1992 is

structured to protect the interests of all third parties materially affected by significant oil discharges as they impact on the maritime zones of contracting states. This impartial orientation to affected publics highlights an actor group neglected by the dominant liberal institutionalist approach to international environmental policy-making, which has focused on agents with fixed preferences and identities (Risse, 2000, pp. 3-4; Renn and Klinke, 2001, p. 271). In contrast, the communicative notion of affected publics opens conceptual room for the relational identification of third parties (potentially) harmed by specific transboundary material practices. For transnational environmental accountability, the key question concerns the extent to which the interests of affected parties are represented and incorporated in the relevant governance institutions, which can be assessed in general terms according to standards of (i) harm prevention, (ii) inclusiveness and (iii) impartiality (Mason, 2001). In this section these criteria inform a preliminary review of the environmental accountability of the oil pollution liability regime.

5.1 Harm prevention

The obligation of conduct on actors to prevent damage to the marine environment is evident in the growing repertoire of international maritime regulation. While in practice a reactive regulatory tool, environmental liability treaties can contribute to preventive goals by providing additional economic incentives for actors to take into account the potential social and ecological consequences of their activities. The conjunction of strict liability and compulsory insurance in the oil pollution liability regime is widely acknowledged by most contracting states to have proved effective in meeting quantifiable claims for environmental (and other) damage from oil spills, although the discussion above (section 3) has noted the ecological selectivity of this coverage: there are continuing concerns, expressed by several states, that the environmental reinstatement provisions of CLC have been interpreted too narrowly by the IOPC Funds. Nevertheless, as at 31 December 2001, 79 states had ratified CLC 1992 and 74 states had ratified the Fund Convention 1992 – figures indicating the global reach of the liability regime. In effect, all international tankers now require certification and insurance consistent with the coverage of the conventions. Moreover, a recent study of the main vehicle by which shipowners mutually insure their third-party liabilities – the Protection and Indemnity Clubs – demonstrates the significant incentives afforded by compulsory oil pollution liability insurance to penalizing shipowners with poor environmental performance (Bennett, 2001, p. 20). If the precise influence on shipowner economic calculations of oil pollution liability insurance has yet to be ascertained, the higher duty of care it imposes has at least been internalized by these key harm producers.

For critics of the international compensation framework advanced in the oil pollution field, its economic incentives to avoid discharges are weakened by the channelling of (limited) liability to the registered shipowner – a charge levelled by the European Commission in its post-Erika review of CLC and the Fund Convention. Marine insurance and oil company representatives have rejected the European Commission proposal to make charterers and operators also directly liable, arguing that the resultant fragmentation of accountability would dilute shipowners' responsibilities, serving also as a disincentive for insurers to take a pro-active interest in the condition and operation of insured vessels (e.g. Oil Companies International Marine Forum, 2001, pp. 5-6). A more fundamental criticism, perhaps, is that in spite of strict liability

standards, the preventive force of the oil pollution liability regime is reduced by the heavy burden of proof imposed on victims to demonstrate a causal link between specific oil contamination and the alleged damage. Monitoring of ship movements, combined with long-distance sourcing of oil types, could collectively facilitate more compensation claims against shipowners and the 1992 Fund (e.g. International Oil Pollution Compensation Funds, 2001, pp. 96-98). An additional argument deserving consideration is that, in order to set a burden of proof in line with precautionary environmental norms, a statutory presumption of causality in favour of the claimant could be invoked where, in addition to inconclusive but strong evidence of a vessel in the proximity of a spill being responsible for the alleged damage, there is a proof of breach of anti-pollution regulations by that vessel (Gauci, 1997, p. 85). One benefit of such a move would be to integrate more closely the oil pollution liability conventions with the MARPOL rules on oil tanker equipment standards, combining their incentive effects on shipowners.

5.2 Inclusiveness

The issue of establishing proof of damage exposes the individualistic structure of accountability informing the international oil pollution liability framework, for its inclusion of affected environmental interests is registered through particular economic claims. It is important here to credit the system for its non-discriminatory application, such that national court judgments on compensation claims must, if fairly reached, be recognized in any contracting state (CLC 1992, Article X(1); Fund Convention 1992, Articles 7(6) and 8). This equality of treatment promotes inclusive representation of liability claims across national maritime zones. As already stated, though (section 4), the jurisdictional selectivity of the liability conventions points to problems in invoking financial responsibility for oil pollution in marine common spaces. The International Law Commission, in its work formalizing new state responsibility rules, has recommended that states be given legal standing to seek remedies for breach of obligations erga omnes (collective obligations owed to the international community as a whole). However, short of international crimes (which could conceivably include intentional massive marine pollution), the Commission has cautioned against ‘third party’ states being able to seek compensation as a form of reparation for such breaches (Peel, 2001, pp. 93-94). In the area of marine law, where Article 192 of the LOS Convention – ‘States have the obligation to protect and preserve the marine environment’ – has already been identified by some commentators as an obligation erga omnes (see Ragazzi, 1997, p. 159), this might seem to oppose the geographical extension of environmental liability norms to cover major oil pollution damage to marine common spaces. Against this exclusion of compensation as a remedy for non-criminal injury to global interests, Peel (2001) argues that such reparations, sought by pro-active states on behalf of the world community, could be awarded to an international organization to utilize in accordance with the collective environmental interests harmed. Compensation to affected non-national publics in this way would in principle be more inclusive of environmental interests, but faces severe political and practical hurdles to its incorporation in the oil pollution regime.

Non-state advocacy for collective ecological interests is evident from the involvement of environmental organizations in the oil pollution liability regime. Revision and amendment of CLC is undertaken through committee work and diplomatic conferences convened by IMO, which has approved observer status for environmental

interest group involvement in both policy arenas. FOEI and IUCN were active at the key 1984 IMO international conference on CLC 1969 and the Oil Fund Convention 1971, lobbying for the inclusion of ecosystem values in the environmental liability amendments (e.g. International Maritime Organization, 1993b, pp. 44, 122-23), while de La Fayette (2001) has documented in detail the limited influence of these and other environmental interest groups in the development within IMO of marine environmental protection instruments. The legal autonomy of the IOPC Funds has resulted in narrower scope for environmental non-governmental organizations to be accredited as observers (International Oil Pollution Compensation Fund 1992, 1996). To be sure, their administrative focus admits less scope for political lobbying: FOEI has become less active in recent years, leaving IUCN as the only active environmental interest group amongst a significant number of industry-related observers.

Consultative status for environmental groups allows at best an indirect representation of their own ecological agendas, relying for influence at the international rule-making level on the support of sympathetic member states. The IOPC Funds have in practice admitted environmental clean-up claims from voluntary organizations, suggesting to some commentators that the effective inclusion of collective ecological interests in the liability process is best sought through granting a direct right to individuals or groups to seek public damages for environmental harm, separate from compensation for individual economic loss or reinstatement payments (Wetterstein, 1994, p. 240; Gauci, 1997, pp. 256-60). Legal initiatives in line with this include the standing afforded to environmental organizations by the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Article 18) and also recommended by the European Commission in its proposed Directive on environmental liability (Commission of the European Communities, 2002, pp. 44-45). Not surprisingly, shipping interests have rejected any move to detach environmental compensation entitlements from site-specific reinstatement costs, forecasting a tide of speculative claims (Howlett, 2002). This position holds sway within the oil pollution liability regime: at the present time, there is no significant constituency of support amongst member states to enact such a public interest right.

5.3 Impartiality

As a component of transnational environmental accountability, impartiality denotes the extent to which affected publics could reasonably accept that their interests have been taken into account in the relevant area of governance. Risse (2000) identifies international public spheres as the arenas of public scrutiny and justification in which affected parties can participate, positing that regimes prescribing non-hierarchical relations among actors are more likely to enable open, reasoned deliberation (p. 19). The oil pollution liability framework, constituted through majoritarian norms of international rule-making and, in the practice of the IOPC Funds, striving for consensual rule application, deepens its democratic legitimacy with its deliberative transparency and openness to the representations of non-state actors. IMO conferences and committees, along with IOPC Fund decision-making, reveal lively argumentation on the incorporation of environmental costs into maritime liability regimes. Of course, there is nevertheless an asymmetry of power between the lobbying force of shipping/oil cargo interests and the dispersed, ever-changing constituency of extra-territorial publics affected by environmental harm, who must rely on the sponsorship of environmental organizations. Ecological concerns are

registered in rule-making and implementation only through the advocacy of ‘coastal’ states, representing their own national maritime priorities. To suppose that these national spaces of interest aggregation will always (indirectly) cover non-national ecological interests in oil pollution liability decisions requires a leap of faith.

Furthermore, even within its own parameters of liability, the core capacity of the international regime fairly to make provision for entitled environmental claimants has been questioned. In recent years there has been a considerable increase in oil damage compensation claimed from the IOPC Funds, including cases exceeding the maximum compensation limits of the 1971 Fund (60 million Special Drawing Rights) and the 1992 Fund (135 million Special Drawing Rights) – notably, claims arising from the Braer (UK, 1993), Nakhodka (Japan, 1997) and the Erika incidents (International Oil Pollution Compensation Funds, 2000, pp. 37-40). In these cases the Executive Committees of the IOPC Funds have made interim pro rata payments to ensure no admissible claims – including environmental ones – are excluded, but this laudable impartiality in claims processing means that losses may not always be fully compensated. Amendments to CLC 1992 and the Fund Convention 1992 agreed in 2000 by the Legal Committee of IMO will see compensation limits raised by 50 per cent from November 2003; while the Assembly of the 1992 IOPC Fund has also recommended to IMO a new supplementary or third-tier fund for compensation (also funded by oil receivers), in order to meet all admissible claims for damage in full. Both initiatives are seen by member states as vital to maintaining the viability and credibility of the international oil pollution liability system. By increasing the pool of compensation funds, they may well allow scope for IOPC Fund discretion in favour of more innovative environmental reinstatement claims, should the balance of member state interests facilitate that.

These increases in compensation limits have been given urgency by moves within the European Commission to establish a separate European Community compensation fund (up to one billion euros), in response to the perceived shortfall of the international oil pollution liability funds. The Commission has criticised the central role played by private organizations in the area of maritime safety, developing rules more directly to regulate classification societies (responsible for verifying the seaworthiness of vessels) and recommending amendments to CLC 1992 to weaken the right of liability limitation of the shipowner. Behind the latter proposal lies the view that the tight interdependence between the Protection and Indemnity Clubs and shipowners, characterized by a tradition of self-regulation in maritime insurance coverage, may compromise the impartial consideration of public (environmental) interests in liability rule-development and implementation (Bennett, 2001; Ringbom, 2001). Indeed, in an attempt to stave off the prospect of additional liability burdens on tanker owners, the International Group of Protection and Indemnity Clubs has recently proposed voluntary increases in the limits of liability for smaller vessels under CLC 1992, to be applicable to damage in states opting for the new third-tier compensation fund (International Oil Pollution Compensation Fund 1992, 2001, pp. 4-5). Post-Erika, the close co-operation of private shipping actors in the oil pollution liability regime is being scrutinized over its public accountability.

6. Conclusion

The marine oil pollution civil liability regime stands at the forefront of rule development for transnational environmental compensation, advancing private law remedies to enable national victims of oil spillage damage to make financial claims against domestic/non-domestic tanker owners and companies receiving oil after sea transport. Its widely acknowledged effectiveness can be attributed to a vehicle of liability that facilitates prompt and equitable compensation recovery for affected third parties, although this rests on a financial capacity that has struggled fully to meet the costs of occasional catastrophic spills. In the arena of marine oil pollution, this strict liability model has been extended to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (Little, 1998; Wren, 1999) and the International Convention on Liability for Bunker Oil Pollution Damage, 2001. Both conventions (still to enter force) broadly share the environmental reinstatement provisions and jurisdictional scope of CLC 1992. Significantly, though, the bunker oil liability convention – covering fuel oil spills from vessels other than tankers – breaks with the liability channelling provisions of CLC 1992, exposing to compensation claims operators and charterers, as well as registered owners (all with rights of limitation). This notable shift to multiple liabilities is judged by some authorities to indicate pressure from the United States and the European Commission on IMO to accord more with American liability norms in this area of oil pollution, although it also reflects the need to make up for the absence of a second tier of supplementary compensation – as under the Fund Convention (Wu, 2001, p. 4).

A comprehensive account of the evolution of the international oil pollution liability conventions would need to map out the changing balance of geopolitical power between coastal and flag-state interests. The threat of unilateral action by key coastal states (notably the UK and the United States) created the incentive for flag states to sign up to CLC 1969 and then the Fund Convention 1971, reinforced by the preference of tanker owners and oil importers for uniform, predictable oil pollution liability rules across the world. While American disengagement from the international process delayed the adoption of the 1984 liability amendments, their eventual incorporation into CLC 1992 and the Fund Convention 1992 allowed a seminal acknowledgement of environmental compensation and a significant expansion of the geographical scope of the oil pollution liability norms. For developing countries, the revised international regime recognized their enlarged maritime zones of interest (EEZs), offering them also the economic incentive of low-cost or no cost insurance coverage for oil pollution damage – the costs of major spills being covered above all by oil companies in industrialized countries. Ironically, the European Commission efforts to set up a regional oil pollution compensation fund would, if successful, ultimately reduce the transfer of liability funds from European oil importers to injured and affected parties in member states from the global South. This would increase the burden on oil receivers in these countries, prompting their state authorities to disengage from the Fund Convention (building on the precedent set by those Southern states joining CLC but not the Oil Fund Convention, e.g. Brazil, Chile, Senegal, South Africa). The international oil pollution liability regime constitutes a finely balanced geopolitical equilibrium of mutual state interests: further fragmentation could quickly unravel its intricate network of responsibilities and entitlements.

Reference only to the interplay of geopolitical interests would fail to explain the currency and character of the oil pollution liability regime: its environmental compensation provisions draw legitimacy as obligations from private law concepts of responsibility and fair treatment. Overlapping civil liability traditions between states have facilitated the extension of these familiar legal norms to transnational damage claims and environmental harm from oil spills. The relatively rapid acceptance of international oil pollution liability norms by the majority of tanker owners and oil importing states attests to their 'fit' with existing normative frameworks (Finnemore and Sikkink, 1998, pp. 914-15). Of course, this also sets constraints on the further growth of environmental compensation for oil pollution damage, because private liability norms tend to register only certain types of claim (economic loss) from individualized victims. Both the ecological and jurisdictional selectivity of the current oil pollution liability regime has been highlighted, which limit its competence to address collective environmental interests. For marine common spaces in particular, there is currently no direct liability coverage for oil pollution damage. The development of marine protected spaces and port state control instruments indicates that environmental protection for such areas is emerging; yet there remains room for innovation in civil liability norms to encompass environmental compensation for damage to common spaces and resources. Spatialities of environmental liability for oil pollution damage would then have truly gone global.

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