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Action and compensable damage : the Civil Liability and Fund conventions in perspective

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WORLD MARITIME UNIVERSITY
Malmö, Sweden

**ACTIONABLE AND COMPENSABLE DAMAGE:
THE CIVIL LIABILITY AND FUND
CONVENTIONS IN PERSPECTIVE**

By

JUDITH EFUNDEM AGBOR ENAW
REPUBLIC OF CAMEROON

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

MASTER OF SCIENCE

in

Maritime Administration and Environmental Protection

2000

DECLARATIONS

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

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

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ACKNOWLEDGEMENT

The preparation and completion of this dissertation would not have been possible without the help and encouragement of many.

Firstly, I would want to express my sincere gratitude to Mr. Joseph Tsanga Abanda, Minister of Transport in the Republic of Cameroon for nominating me into this study program.

I am indebted to my sponsors, the International Transport Workers' Federation for providing the finances that enabled me to come to the World Maritime University. Thank you for providing me with such a wonderful learning opportunity.

Deep appreciation and gratitude are addressed to my Course professor, Professor P.K Mukherjee who encouraged me to venture into this slippery path. The challenges faced have been indeed educative.

To Professor Patrick Donner, my supervisor, who patiently read through my work, kept an open mind for discussion and exchange, providing strength and encouragement when everything seemed to go wrong, I am deeply indebted.

I would like to take this opportunity to thank the entire academic and administrative staff of the World Maritime University, particularly the Library staff. Without their continuous help and selflessness, it would have been impossible to get the documentation necessary for the completion of this work.

I salute the friendship of the 2000 class, and welcome some of the adversity. They spurred me on. Sincere gratitude is extended to Ms. Claudette Patricia Rogers from Guyana, Mr. Ahmedou Ould Mohamed from Mauritania and Mr. Moses Bieck-Bafour from Ghana for staying true friends, as well as to all those whose names do not appear in this spine.

My stay in Malmö, and the completion of this study program would not have been possible without the sacrifice made and the care and support of my family; my husband Enaw Val-John, my children Iris, Enaw-Ako Jr. and Keshia. Their encouragement and devotion to my academic pursuits kept me sane throughout my 17 months away from home.

ABSTRACT

My fascination for marine pollution prevention, liability and compensation has been motivated by my love for the sea. Among other things, the seas are important to mankind for two main reasons; they provide a source of food and a means of transportation. As such, mankind has a duty to protect and preserve the seas and its living resources from wanton use and destruction. In my search for principles that may underlie this great conviction, I have found out that these principles are universal and hereditary as expounded by the following Bible verses:

“... And the Spirit of God moved upon the face of the waters.”
Genesis 1: 2

“And God said, “Let the waters bring forth abundantly the moving creature that hath life. And God created great whales, and every living creature that moveth, which the waters brought forth abundantly, after their kind..” Genesis 1: 20-22

“And the Lord God took the man and put him in the Garden of Eden to work it and take care of it.” Genesis 2: 15

The work strives to bring out the measures that the international community has taken to protect the marine environment. This is the higher command. One of the multiplicity of polluting substances, oil, is the focal point of this dissertation. In particular, the dissertation provides an insight into actions taken by the international community to mitigate such pollution damage through compensation where protective and preventive measures have failed. In order to do so, this work examines in detail the liability regime in international law relating to oil pollution damage. The law as it stands now is contained in international conventions, which embody complex and often controversial issues regarding compensating victims who have suffered such damage. The limitations and implications of these measures are also examined.

Key words: Marine Pollution Prevention, Oil Pollution Damage, Liability, Compensation.

TABLE OF CONTENTS

Declaration	ii
Acknowledgements	iii
Abstract	v
Table of Contents	vi
Table of Cases	ix
Abbreviations	xi
Chapters	Pages
1 Introduction	1
2 Liability and Compensation within the Spectrum of Marine Pollution	6
2.1 International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969	8
2.1.1 Strict Liability	9
2.1.2 Limitation of Liability	9
2.1.3 Compulsory Insurance	10
2.2 The International Oil Pollution Compensation Fund 1971	11
2.3 1984 Protocol to the CLC/FUND Conventions	12
2.4 1992 Protocols to the CLC/FUND Conventions	13
3 The Civil Liability and The Fund Conventions 1969/71 & 1992	16
3.1 Historical Development	17
3.1.1 Legal Importation	20
3.1.1.1 Doctrine of State Responsibility	20

3.1.1.2	State Responsibility for Vessels Arising out of Convention Law: (United Nations Law of the Sea Convention 1982)	22
3.1.1.3	Importation from the Common Law System	23
3.1.1.3.1	Doctrine of <i>Actual Fault or Privity</i>	23
3.1.1.3.2	The Rule of Strict Liability	24
3.2	Implementation of International Conventions: Consequences and Implications of Legal Importation	26
3.2.1	Consequences of Implementing International Conventions: (Legal Importation) The Case of the CLC/FUND	26
3.2.2	Implications of Implementing the CLC/FUND Conventions	27
3.2.2.1	Common Law System	28
3.2.2.2	Civil Law System	29
3.2.2.3	Implications of the Legal Importation within the CLC/FUND Regimes	30
3.2.2.2.4	Applicability of The CLC/FUND Conventions	31
4	Actionability in Marine Pollution	35
4.1	The Notion of Actionability	36
4.1.1	The Notion of <i>Locus Standi</i>	36
4.1.1.1	<i>Locus Standi</i> : The Position of a State	37
4.1.1.2	<i>Locus Standi</i> of A Corporate Body/ of A Private Person	42
4.2	The Doctrine of Public Trust and The Concept of <i>Parens Patriae</i>	43
4.2.1	The Doctrine of Public Trust	43
4.2.2	The Concept of <i>Parens Patriae</i>	44

5	Compensability: A Remedy in Marine Pollution	50
5.1	Principles of Judicial Remedy	51
5.1.1	<i>Causa Proxima</i>	52
5.1.2	The Notion of Quantifiability	54
5.1.2.1	Limitation of Liability	55
5.1.2.2	Difficulties of Quantifiability	56
5.1.2.3	The Innate Value of the Environment	56
5.1.2.4	The Nature of Environmental Damage	57
5.1.2.5	Non-Commercial Resources	57
5.1.2.6	Absence of Uniform Rules of Quantifiability	58
5.1.2.7	Long Term Effects of Oil Pollution Damage	60
5.2	Compensability: Adequacy	61
5.2.1	Consequential Loss	61
5.2.2	Pure Economic Loss	63
5.2.3	Restoration and Re-Instatement	66
6	Insurance and Limitation of Liability	68
6.1	Development of Limitation of Liability	68
6.1.1	Limitation of Liability under English Law	69
6.1.2	Limitation of Liability under Civil Law	71
6.1.3	Limitation of Liability in Oil Pollution: The CLC/FUND Conventions 196/71 1992	73
6.2	The Concept of Insurability in Oil Pollution Damage	75
6.3	Limits of the 1992 CLC/FUND Conventions	79
7	Conclusion	83
8	References	87

TABLE OF CASES

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- Antonio Gramsci I (USSR 1979)...58
- Antonio Gramsci II (Finland 1987)...54, 59
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- Corfu Channel Case (1949) I.C.J. Reports, p.4...21
- Donoghue v. Stevenson (1932) A.C. 562 p.580... 18
- Esso Petroleum Co. Ltd. v. Southport Corporation, (1955) 2 Lloyds Rep. 655. 18
- Exxon Valdez Incident 1989... 13
- Maine v. m/v. Tamano, 375 F.Supp. 1097, 1098.1973, A.M.C. 1131. 1131-1132 (D.Me.1973)...39
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- Overseas Tankship (UK) Ltd. v. Miller SS. Co. Pty Ltd. (Wagon Mound II) (1966) 1 Lloyd's Rep.675 (P.C), (1967) 1 A.C. 617...53
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The Tanio Incident 1980. 13

Toomer v. Witsell, 344 US 385, 1948 A.M.C 1098 (1948)...38

Torrey Canyon Incident March 1967. 2, 6, 8

Trail Smelter Arbitration, 3 U.N.R.I.A.A.,iii p.1905. Decision March 11, 1941...20, 45

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Zoe Colocotroni 628F. 2d 652 (1st Cir. 1980)...38, 42, 45, 56, 67

ABBREVIATIONS

CMI	Comité Maritime International
CLC	Civil Liability Convention
EEZ	Exclusive Economic Zone
IMCO	Intergovernmental Maritime Consulting Organisation
IMO	International Maritime Organisation
IOPC FUND	International Oil Pollution Compensation Fund
LLMC	Limitation of Liability for Maritime Claims
OPA	Oil Pollution Act
P&I CLUBS	Protection and Indemnity Clubs
SDR	Special Drawing Rights
UK	United Kingdom
UNCLOS	United Nations Law of the SEA Convention
USA	United States of America
WCED	World Commission on Environment and Development

CHAPTER 1

INTRODUCTION

By the dawn of the 21st century, it is clearly evident that world economic trends have motivated the need for more energy of which oil is the main source. This period also marks the era of growing public awareness with respect to the innate value of the bounties of nature and of the threats that oil poses to it. The conflict that arises from the growing demands of oil and the rejection of its adverse impact to nature was largely responsible for the development of international regimes that aim to resolve this issue. Given the potential damage that oil pollution can cause to the environment, considerable efforts have been directed to the development of pollution prevention legislation, as prevention remains the most effective way of fighting oil pollution.

However, prevention is just one way by which problems linked to oil pollution may be solved. Regardless of the existence of prevention regimes, of improvements in ship design, construction and equipment, of improved manning requirements, and the putting into place of safety management systems, pollution accidents are inevitable, and pollution liability ensues.

The need for developing internationally acceptable liability and compensation regimes is thus self-evident. With the coming into play of this aspect of the fight against pollution, shipowners engaged in the transportation of crude oil in bulk as cargo have to face the consequences of their venture. Humankind's desire and claim, both now and

for posterity to live in a decent environment, in which it can enjoy the amenities of nature, its quest for attaining an acceptable quality of life must be given primary consideration.

The *Torrey Canyon*¹ incident of March 1967 was to highlight the need for the development of an international regime that would address and resolve issues relating to liability and compensation for shipowners and claimants following upon a maritime casualty. Prior to this incident, oil pollution damage claims were made in accordance with the *lex fori*, and these cases were treated according to the rules of ordinary tort law. Given the international character of shipping and of oil pollution cases as was evident from the *Torrey Canyon*² incident, the concern for developing a convention framework to regulate liability and compensation could not be overlooked. It was against this background that the CLC/FUND regimes were developed.

From its inception, the history of oil international pollution legislation (CLC/FUND) has remained a history of developing a balance between the conflicting interests of the parties concerned. For this reason, the solution that must be sought, should be capable of guaranteeing acceptable levels of fairness and justice to all the parties who for one reason or another, must invariably be affected following upon a maritime casualty. Achieving this balance is a difficult task. Any international legislation that is developed to fulfil this purpose must be able to take into account the interests of the different claimants, while at the same time, assuring that all liable parties must be treated equally before the law.

In the light of the preceding remarks, it is clear that oil pollution is undesirable. To avoid its occurrence, the community of states has elaborated an impressive array of convention frameworks, which seeks to reduce if not eradicate oil pollution. These are however not presented in this dissertation.

¹ Torrey Canyon Incident (March 1967)

² *Ibid.*

In chapter 2, the writer provides a bird's eye view of the international liability and compensation regimes embodied in the Civil Liability Conventions and the International Oil Pollution Compensation Funds (CLC/FUND) 1969/71 and 1992, developed under the auspices of the International Maritime Organisation (IMO).

This dissertation traces the origins of certain rules of law that have immensely influenced the text of the CLC/FUND regimes. As will be realised, reliance was made on the rules of law existing in the two major legal systems: common law and civil, as well as some doctrines within the realm of public international law. This writer subscribes to the view of most scholars who acknowledge the differences in approach between these two systems. This notwithstanding, strength and inspiration were drawn from these systems, most especially from the common law system to establish a regime that is expected to be globally accepted and uniformly applied. It is of course interesting to know what the consequences of such legal importations are, when the rules of law of a given legal system are applied to matters before a court, which traditionally does not subscribe to them. Chapter 3 addresses these concerns.

One of the requirements that the law demands claimants to establish when they espouse an action for the recovery of damages, is their right to bring action with respect to that particular claim. A claimant must possess a substantive right to bring a suit for damages with respect to the alleged loss. This rule is upheld in the CLC/FUND conventions. Chapter 4 examines this issue, as well as the complex issues that claimants, most important of all, governments, have to contend with in relation to their substantive right of action for oil pollution damage to the environment.

The *raison d'être* of the CLC/FUND regimes is to provide immediate and adequate compensation to victims of oil pollution damage. That compensation can be immediately paid to a claimant is a fact that can be easily verified. As such, there is little

if at all any questions as to whether the regimes fulfil this objective. What is highly debatable is the allegation of the adequacy of compensation payable. What thresholds of compensation will meet the requirement of adequacy? It should be borne in mind that, though the regimes advocate compensability with respect to oil pollution damage, not all damage suffered following upon a maritime casualty are compensable, at least for the purposes of the convention. The basis for legal compensation must be established. It is in the interest of claimants to know what claims are compensable under the regime.

In addition, situations have been known where claimants have failed to sufficiently benefit from the liability and compensation regimes due to difficulties connected with the quantifiability of damage, especially as concerns damage to the environment. These issues have led this writer to questioning the adequacy of compensation as a remedy in marine (oil) pollution. An attempt has been made in chapter 5 to address these problems.

The aspirations of the regimes would not have been met without the necessary financial security. For this reason, the insurance industry has greatly contributed towards the success registered in the realm of compensation in oil pollution damage. On the other hand, the insurance industry would not have provided third party liability coverage had shipowners not accepted to run the risks of an activity as extra-hazardous as the transportation of oil.

By providing a regulatory framework for liability and compensation, the CLC/FUND regimes seek to apportion the liability arising from oil pollution damage among the shipping (covered by the insurance industry) and oil industries. In chapter 6, the methods of apportionment of this liability and the drawbacks of the compulsory insurance regime have been presented.

From the summaries of the various chapters of this work, its purpose is evident. Its main purpose is to demonstrate the level of awareness and the responsiveness that the international community exhibits in its continuous struggle towards oil pollution prevention, as well as the steps it will take to mitigate any damage via compensation. By the same token, this writer questions whether the measures embodied in the CLC/FUND conventions are sufficient to resolve the problems linked with oil pollution damage. A comparison between the CLC/FUND regimes and other liability and compensation regimes would have been a good idea. Unfortunately, such a comparison falls outside the scope of this work.

CHAPTER 2

LIABILITY AND COMPENSATION WITHIN THE SPECTRUM OF MARINE POLLUTION

Prior to convention law, liability and compensation for oil pollution damage was governed by the *lex causae*, that is the domestic law of the place where the damage was suffered. This was determined under domestic tort law of negligence, trespass or nuisance. Owing to the great diversity of municipal law regarding liability and compensation, there was a need to seek some degree of harmonisation of the regime governing these two related legal concepts.

The main rationale behind the harmonisation of the plethora of municipal law in this regard, was based on shipping (and oil pollution which is a negative fallout of the shipping activities), being international in character. As such, all states have a responsibility *vis-à-vis* the international community to regulate oil pollution from ships flying their flags. The need for providing prompt and adequate compensation to oil pollution victims also motivated the adoption of the Fund Convention of 1971 as an adjunct to the Civil Liability Convention of 1969.

The *Torrey Canyon*¹ incident of March 1967 highlighted the need for the development of new international regimes on two very important subjects in both public and private

¹ Torrey Canyon incident March 1967

international law. These two subjects were not contemplated before. They were related to;

- The right of a coastal state to intervene on the high seas in the face of an oil pollution threat; and
- Civil liability and compensation for oil pollution damage (a private law issue to be considered here).

Private law issues raised after the incident especially with regards to compensation were legion. The liability of the tanker owner did not raise any doubt, considering that at the time of an accident the navigation of the ship and the custody of the cargo are in the charge of the shipmaster. The main questions were those of ascertaining the jurisdictions and laws that would govern the claims, given that the vessel was;

- flying a Liberian flag
- owned by a company in Bermuda
- managed by principal officers residing in France
- time chartered to a USA domiciled oil company
- sub voyage chartered to a UK oil company
- the pollution damage was suffered principally in the UK.
- substantial pollution damage suffered in France.

Questions with respect to the owners' right of pleading limitation of liability arose, considering that different jurisdictions observed different rules of law. The fear that fishermen and hoteliers could assert their rights to recover damages as granted by some jurisdictions and rejected by others as pure economic loss owing to its remoteness was also present. Again, some jurisdictions aligned costs for clean up to that of pure economic loss and would dismiss such claims. Furthermore, doubts were expressed on the degree to which such rights as shown above, where granted by judicial process could be enforced against a company with limited assets. The demerit of the absence of compulsory insurance could be felt.

It was crystal clear that traditional principles or municipal law principles could not address the private law issues raised above. These diversified rules of law with limited applicability left a lacuna and hence were insufficient to answer affirmatively the problems caused by oil pollution damage from ships.

2.1 International Convention on Civil Liability on Oil Pollution Damage (CLC) 1969

The development of this instrument came about as a global response to the outcry and condemnation following the *Torrey Canyon*² incident, which at that time caused oil pollution damage on a scale that the world had not hitherto witnessed.

Convening in Brussels in 1969, the International Conference on Maritime Pollution Damage had the mandate to consider the draft convention on oil pollution damage alongside other documents. Pre-requisites had been established thanks to the devotion of IMCO as (IMO was then called) and the Comité Maritime International (CMI). The committee created at the conference was largely responsible for the examination of the private law issues raised above. At the end of the day, the CLC '69 emerged.

The CLC '69 was a revolutionary instrument and a major break through in maritime law, which was to change customs and practice forever. Together with its 1992 Protocol, the CLC remains the principal international instrument governing and regulating civil liability for oil pollution from ships caused by persistent oil. The ship should be carrying the persistent oil in bulk as cargo.

For oil pollution damage to qualify for compensation under the CLC, the damage must have occurred within the territory or the territorial sea of a member State. This gives the convention its territory specific quality and limits its geographical application. The damage, on whose behalf the claim is being made, must be outside the ship. It applies

² *Ibid.*

to damage caused or measures taken following the escape or discharge of oil. It is based on three cardinal doctrines;

- **Strict liability:** otherwise referred to as liability without fault. This notion deleted the age old custom of fault based liability, thereby introducing a novelty on the basis of liability. This liability is however subject to certain exceptions.
- **Limitation of liability:** given that the liability of the shipowner is strict, he can however limit the amount recoverable from him based on the tonnage of his ship.
- **Compulsory insurance:** the shipowner is obligated to have insurance coverage for potential liabilities arising under the convention.

2.1.1 Strict Liability

The rule of strict liability, that is liability without fault is clearly enunciated in the 1969 Convention. It provides;

...except as provided in paragraph 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident³.

His liability is incurred in so far as he is the owner of the ship responsible for the pollution damage. Here, the notion of *culpa* is far fetched.

2.1.2 Limitation of Liability

Under the existing convention (1957 Brussels Limitation Convention), the shipowner could limit his liability only where he could prove that the incident did not occur as a result of his *actual fault or privity*. (This limitation was to the value of 1.000 Poincare' francs per ton of the vessel's adjusted net tonnage.) Though there was a general

³ Civil Liability Convention 1969 Article III(1)

acknowledgement of the fact that larger amounts of money were necessary to adequately compensate oil pollution damage, it was also agreed that additional liability on the shipowner should only be to the tune against which he could reasonably be expected to pay.

The 1969 Convention raised the level of liability borne by the shipowner to 2.000 francs per limitation ton, in the case where the pollution did not arise from his *actual fault or privity*. Concern was also expressed on how far the shipowner's limitation of liability could be stretched to enable him shoulder this additional cost.

2.1.3 Compulsory Insurance

One of the major innovations of the CLC, was the unanimous adoption of a system of compulsory insurance by tankers trading to contracting states. They are required to adequately insure their liabilities arising under this convention. A positive fall out of this requirement is that it saw the involvement of the P& I Clubs in the settlement of claims arising from oil pollution.

Under this scheme, claimants could initiate direct action against the insurer without the need of either pursuing the ship in an *in rem* action, or its owner in an action in *personam*. In this way, a claimant faced with a bankrupt owner could resort to direct recourse against the insurer (P&I Club). The insurer could also limit his liability to the same amount as the shipowner, and could protect himself from liability by pleading any of the exceptions available to the shipowner.

In light of these three principles, the first tier compensation scheme was adopted, that is the CLC 1969 Convention. It was soon to be realised that greater amounts of money were needed to effectively compensate victims of oil pollution damage, and therefore the need to step up the level of compensation available to claimants. At the same time, concern was expressed on how far the shipowner could be reasonably expected to

meet these new dictates. It was argued that the owner was only one of the parties connected to the trading and transportation of the good whose hazardous nature was the potential cause of the damage. Furthermore, it was a way of imposing a legal responsibility on cargo owners *vis-à-vis* persons who did not have any interest in the oil transported, with regard to any liabilities that their cargo could create.

On the strength of these arguments, there was a need to develop a scheme that would enable the cargo owner to contribute to the compensation awarded to victims of oil pollution damage. Against this background, the cargo owners (oil importing countries) were envisaged to fund the second tier of compensation necessary to pay all supplementary amounts arising from major oil spills and pollution damage.

The second tier goes operational where the claims are over and above the limit of the first tier compensation recoverable from the shipowner. It further awards compensation where the liability of the shipowner cannot be engaged.

2.2 The International Oil Pollution Compensation Fund 1971

The 1971 Fund Convention emerged from the Diplomatic Conference convened in Brussels in 1971 as a follow up action, arising from a resolution taken during the discussions that led to the CLC Convention of 1969.

As an intergovernmental body, the IOPC Fund was set up under this convention to administer the contributions made to it by oil receiving states. Under the Fund regime, no liability is imposed on individual cargo owners. Compensation is payable from the Fund as indicated above. It therefore represents the statutory contributions of cargo interests to an oil pollution damage claim. From the foregoing, it can be seen that the Fund was designed to be closely linked with the CLC. As such, only members of the CLC can become members of the Fund.

From its inception, the Fund had the following objectives:

- to provide supplementary compensation to victims of oil pollution damage in member states where the possibility of obtaining full or adequate compensation under the CLC is absent or inadequate ; or where the shipowner is financially incapable of embracing such a responsibility;
- to give some relief to the shipowner in respect of increased financial burden imposed by the CLC;
- to pay compensation to victims of oil pollution damage where the liability of the shipowner has not been established.

Some seven years later, the Fund Convention entered into force. With it, the second tier compensation following oil pollution damage came to be realised. Two Protocols have amended both the CLC and Fund Conventions. Today, though the two-tier system has seen wide application, they do not enjoy universal application. Some countries especially the United States of America opted to go their way by adopting their own municipal law with respect to oil pollution damage. Thus the CLC and Fund Conventions cannot be considered customary international law.

2.3 1984 Protocol to the CLC/FUND Conventions

World economic trends in the 1970s were a pointer to the fact that the real value of the compensation limits prescribed by the 1969 CLC and the 1971 Fund Conventions would become drastically insufficient to meet oil pollution claims in the face of a major oil spill. The inflation experienced worldwide had eroded compensation limits to an unacceptable level.

The implication of this was that, funds originally intended for use in major disasters supplied by the oil industry, could be used in Fund member states to discharge smaller claims. As such available compensation would be found wanting to meet the consequences of a major claim. It threatened the international compensation system to

its very foundation. The *Tanio*⁴ disaster of 1980 was to confirm these pre-occupations. It further confirmed the trend of thought that a revision of the 69/71 instruments was not only inevitable but also urgent.

On this premise, an IMO diplomatic conference took place in London in 1984 to discuss the Protocol that was to amend the 69/71 CLC/Fund Conventions. The need to revise the limits of compensation was unanimously agreed upon. Difficulties were encountered while discussing issues such as the figures of the new regime, the apportionment of financial burden between the shipping and oil industries in cases concerning small tankers and the upper limits of the compensation under the regime. On the mistaken belief that the USA would ratify the protocol, the delegates to the conference made major compromises.

Thanks to the *Exxon Valdez*⁵ incident of 1989, this was never to be the case. The USA opted for its own law, the Oil Pollution Act of 1990 (OPA 90). With this, the 1984 Protocol failed to obtain the requisite number of ratifications. It never entered into force, and eventually became defunct.

2.4 1992 Protocols to the CLC/FUND Conventions

A month following the entry into force of OPA 1990, CLC/Fund member States were stunned by the casualty involving the *Haven*⁶, a tanker laden with 144.000 tons of crude oil, while at anchor in Genoa. Some of its cargo escaped into the sea causing extensive damage to the French and Italian Rivas. The claims that ensued represented the largest claims ever presented to the CLC/Fund Conventions. They far exceeded the total compensation available under this scheme.

⁴ The *Tanio* incident 1980

⁵ *Exxon Valdez* incident 1989

⁶ The *Haven* Italy 1991

Following this incident, the importance and urgency of giving effect to the protocols revising the 69/71 instruments became too obvious. There was a perceived need to augment limits of compensation to match contemporary realities. There was a need to maintain the viability of the international system. The IMO again convened a diplomatic conference in London in 1992. It was mandated to develop protocols that would suit the purposes of existing and potential members of the CLC/Fund Conventions. This was achieved by reaching a compromise involving contributions to the Fund, which, it was agreed should not be prejudicial to the oil industry of major contributors such as Japan.

The compromise led to the 1992 Protocols⁷. Entry into force requirements is less cumbersome as compared to those of 1984. In 1996, the 1992 regime entered into force. The CLC/FUND of 1992 maintained the three pillars of the 1969/71 liability and compensation regimes; strict liability, limitation of liability and compulsory insurance.

Changes brought in by the 1992 Protocols could be summarised as follows;

- scope of application extended to cover oil pollution damage caused in the EEZ or equivalent area of a state party,
- covers claims with respect to measures actually undertaken or to be undertaken to reinstate the contaminated environment;
- expenses incurred for successful preventive measures in the face of imminent threat of pollution damage;
- covers spills from bunker from unladen tankers in certain circumstances ;
- increased limit of shipowner liability, ranging from three (3) million SDR to 59.7 million SDR according to ship tonnage;
- shipowner's right to limit liability more stringent, that is if he can prove that the pollution damage resulted not from his personal fault or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

⁷ The Protocols are referred to as the CLC 92 and the Fund 92 Convention

Though not all members of the 1969/1971 Conventions have ratified the 1992 Protocols, there is reason to believe that it would sooner be realised that the merits of the latter instruments outnumber those of the former. Upon this realisation, the 1969/71 instruments will eventually phase out. Until this eventually happens, the two regimes exist side by side and are managed separately though by the same board.

CHAPTER 3

THE CIVIL LIABILITY AND THE FUND CONVENTIONS 1969/71 AND 1992

The reason for the development of an international liability and compensation scheme known as the CLC/Fund regime has been provided in Chapter 2. It was also demonstrated in that chapter that compensation for oil pollution damage arising from a maritime casualty is a relatively new concern, introduced into maritime law by a regime which has gained the reputation of being very ambitious and revolutionary. Most of the laws in this field were developed after the upsurge in the use of large tankers in the 1960s and the spate of tanker casualties that followed at that same period.

With these facts in mind, it would be of interest to know how the principles of law that make up the CLC/FUND package were developed. What principles of law, what legal systems influenced the development of these regimes are examined in 3.1 "Historical Development". Reference will be made to some decided cases to demonstrate how oil pollution damage cases were treated before convention law, and how the CLC/FUND regimes were developed. The writer will make reference to certain rules of both public international law and private law to show how they helped in shaping this branch of maritime law in what has been captioned "Legal Importation".

The consequences and implications of these "legal importations" on states whose domestic laws are not guided by such rules as in those legal systems from which

principles have been imported will be examined in 3.2 “Consequences and Implications of Legal Importations”. An analysis will be made with respect to a few of the provisions of the convention that may merit attention when possible amendments are contemplated in 3.3.

Such is the purport of chapter 3.

3.1 Historical Development

As mentioned in chapter 2 above, prior to convention law, the law that governed claims for oil pollution damage from ships was that relating to all other claims in tort against the ship or its owner. In other words, liability for oil pollution damage, just like that arising from other marine accidents, was grounded mainly on common law torts of trespass, negligence or nuisance theories. Although it had been recognised as far back as 1926 and 1936 that damage of this nature required an international solution, the only state that provided an exception to this rule was the United States of America, which in 1924 developed the Oil Pollution Act. This piece of legislation imposed specific liability on ships for the discharge of oil in the navigable waters of the United States.

It should be borne in mind that at this time, world trade in terms of tonnage of oil transported by sea was not very large, given that tanker sizes were kept within modest limits. The average ships had a dead-weight (dwt) of 11.600 tons gross¹. Furthermore, shipowners were under no statutory obligation of removing oil that escaped from their ships resulting from either normal ship operation or from a maritime casualty. Public authorities that incurred expenses from clean up operations could recover compensation only upon their ability to prove tort liability on the part of the shipowner who again, had the possibility of limiting his liability under maritime law.

¹ Colin De La Rue, (1998), Shipping and the Environment. p.10

An examination of the land mark *Esso Petroleum* case² tried in the United Kingdom (UK) relating to attempts at recovering costs incurred in removing oil from the shoreline will be helpful in demonstrating the pre- convention situation.

The facts of this case are as follows. In December 1950, the motor tanker *The Inverpool* set sail for Preston on the West Coast of England from Liverpool. Due to bad weather and a steering defect, she ran aground somewhere in the Ribble Estuary. She could not refloat on her own and the threat of breaking up became very real. To forestall this, her master jettisoned 400 tons of the oil she was carrying. The local authorities then brought an action against the owners of *The Inverpool*, the *Esso Petroleum Co. Ltd* in a bid to recover the cost of the removing oil from the adjacent shoreline. These claims were brought in negligence, trespass and nuisance.

The action based on negligence failed because the three factors necessary to establish a claim in negligence were not satisfied; a legal duty to take care, a breach of that duty, and a consequential loss arising from that breach. The plaintiff failed to prove the existence of the legal duty to take care as established in Lord Aikin's celebrated obiter dictum in *Donoghue v. Stevenson*³.

Trespass would entail an illegal interference with a person's right to enjoy their property. This was ruled out in the *Esso Petroleum*⁴ case, as the high court found that the plaintiffs had failed to prove any tortious liability on the part of the shipowners, given that the claimants had no property in the sea or the polluted coastline. The House of Lords upheld the decision of the appellate jurisdiction on the same grounds.

Relating to nuisance, it could be either public or private. It is defined as public nuisance "any nuisance which materially affected the reasonable comfort and convenience of

² *Esso Petroleum Co. Ltd v. Southport Corporation*, [1955] 2 Lloyds Rep.655

³ *Donoghue v. Stevenson* [1932] A.C.562 p.580

⁴ *Op.cit.*

life..."⁵ Nuisance could not be successfully proved in the case under consideration. Added to this, the owners of *The Inverpool* were under no statutory obligation to clean up oil that escape from their ships. Grounds for action thus provided by the law of tort, themselves subject to a number of defences, proved inadequate to right the wrongs suffered by oil pollution victims. Though the ruling in this case went by almost unnoticed outside legal circles, it was later on to play an immense role in the development of the law regarding oil pollution damage.

Events in world history such as the Suez Canal Crisis of 1956 and developments in ship design and building techniques were to oblige shipyards to build tankers of unprecedented sizes. Tankers' carrying capacities increased. The attending risks of damage from oil pollution in the event of a tanker casualty were not only higher, but such a damage if and when it did occur, was to be of a phenomenal scale.

It was only a matter of time before one such super tanker would unleash its contents to cause pollution on a scale unknown before. This school of thought recognised that an incident of this magnitude would provide the platform for an international demand for uniform liability and compensation schemes. The *Torrey Canyon* incident of 1967 was to provide that platform.

The *Torrey Canyon* was a Liberian tanker (one of the largest at that time)⁶ which, while transporting a cargo of 120.000 tons of crude oil from Kuwait destined for Wales, struck the Pollard Rock on the Seven Stones Reef, between Land's End and the Isles of Scilly. Thousands of tons of oil escaped from her ruptured tanks. The apparent fear of wide scale oil pollution became real, and the damage occasioned by this casualty spread beyond the boundaries of one country. It highlighted the need for the development of new international regimes in both private and public law, as discussed in above.

⁵ Attorney-General v. P.Y.A Quarries Ltd [1957] 2 W.L.R. 770, C.A

⁶ Colin De La Rue (1998) Shipping and The Environment p. 11

The community of states realised the international character of oil spill and the seriousness of the damage that ensued. There was unanimity with regard to the need for formulating universal rules to govern liability and compensation. Nonetheless, the timing between the fast growth of technology and the spate of tanker casualties had the negative effect that international law had little time to receive and develop applicable general principles. The main hurdle was that of determining what legal system and what principles of law would influence these regimes. Reliance had to be made on “ legal importations ” in order to develop the regimes that were to satisfy this growing demand.

3.1.1 Legal Importation

Inspiration was to be drawn from other aspects of the relation between states that is, public international law, as well as from other well developed principles of private law. This marked the legal importation from public international law and private law into this branch of the law.

3.1.1.1 Doctrine of State Responsibility

The doctrine of state responsibility, an established doctrine recognised in public international law, played a leading role in the formulation of most marine pollution prevention regimes as well as the CLC/FUND Conventions. By this doctrine, international law imposes a responsibility on every state to ensure that its territory is not used in such a way as to cause damage to other states or citizens thereof.

Where the state fails to assume this responsibility, such a state will be bound by international law to pay compensation to affected persons. It is the duty of states to regulate activities under their control so that they do not cause harm to other states. This doctrine was used in the *Trail Smelter Arbitration*⁷ between the United States of America and Canada, whose facts are as follows.

⁷ Trail of Smelter Arbitration, 3 U.N.R.i.A.A.,iii,p. 1905. Decision March 11 1941

Fumes from a smelter in Trail British Columbia close to the border with the United States had drifted across the border, causing harm to persons in US territory. In an action brought by the US government on behalf of its citizens, the tribunal declared that-

*...under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or property or persons therein....*⁸

This declaration and duty has been stretched to cover not only injury by fumes, but also includes the states' duty to prevent persons under their jurisdictions, as well as ships and other floating devices attributable to them from polluting other states' jurisdictional waters. This rule was reiterated in the *Corfu Channel* case⁹. The facts are as follows.

Albania had always disputed the status of the North Corfu Channel as an international strait, and would rather consider it as forming part of its territorial sea. Owing to skirmishes which British warships had been subjected, a test passage was again organised by the UK government in October 1946 to see Albania's reaction. The ships struck recently laid mines, resulting in the death of some crew members. In finding for the UK government, the court held among other justifications that, though the mines may have been laid without the direct orders of the Albanian government, they could not have been laid without it being unaware of it. Albania, under international law, is not to allow her territory to be used in a way that is contrary to the interests of other states. A breach of this duty incurs liability.

The nexus between this rule of international law and the CLC/FUND is indeed quite conspicuous. While the former has been clearly stated, the latter imposes a liability on the state, acting either in its capacity as a shipowner (maritime state) or as cargo owner (oil industry) under the Fund convention for oil pollution damage. In this way, a public

⁸ Brian D. Smith (1988). *State Responsibility And The Marine Environment* p. 73

⁹ *Corfu Channel Case* [1949] I.C.J. Reports, p.4

law doctrine is employed in private law, in resolving issues with purely private law undertones. Conversely, *Trail Smelter* and other cases tried after it, exemplify the hybrid notion of states litigating as private entities within the domain of public international law. States use doctrines elaborated under public international law to enforce the legal rights of their citizens, acting as a private entity. This marks a fusion between public international law and private law.

3.1.1.2 State Responsibility for Vessels Arising out of Convention law: (United Nations Law of the Sea convention 1982)

Though developed subsequent to the CLC/FUND (1969/1971) regimes, this umbrella convention lays down, among other things, the blue print for marine environmental protection. It prescribes the duties of states, as well as the consequences of violating what could be rightly termed principles of customary international law. It empowers a state by prescription and enforcement, to totally control the physical condition, movement and operations of vessels that fly its flag. Hence, such a state has the utmost jurisdiction for prescribing design, construction, equipment and manning standards that must be met by all vessels under its registration¹⁰. States are further required to adopt laws and regulations for the prevention, reduction and control of marine pollution from ships flying their flags.

Exercising the same authority, the state must take measures to ensure that the master, the officers and the crew are conversant with and required to observe applicable international regulations relating to safety of life at sea and the prevention and control of marine pollution.

¹⁰ United Nations Law of the Sea Convention 1982 Article 94 (3)

UNCLOS is very categorical on this as it provides that "states have the obligation to protect and preserve the marine environment"¹¹. From these, it can be deduced that each state has the obligation to prevent harm to the its own marine environment, its EEZ and its territorial sea as well as those of other states and of the high seas beyond such zones.

It is only logical that when a state assumes legal authority over a vessel through registration, it should complement such authority by assuming certain obligations. It should take measures to ensure that the vessel acts in a manner compatible with the dictates of international law. A state's obligation can therefore be translated into a duty to exercise the full measure of its territorial and extraterritorial legal authority to prevent marine pollution. Its international responsibility will arise out of a failure to adequately exercise this "fictional" authority to prevent this violation. Its responsibility under international law will be triggered when this obligation imposed by a norm-creating convention law is breached.

3.1.1.3 Importation from the Common Law System

As one of the major legal systems, the English Common Law was instrumental in shaping the liability and compensation schemes established under the CLC/FUND regimes. This was true not only with respect to the spirit of the law as it existed in the UK at that time, but also with certain rules of law that were brought and applied to a system that was to achieve international recognition and application.

3.1.1.3.1 Doctrine of *Actual Fault or Privity*

In their original version, the CLC/FUND conventions relied heavily on the spirit of the wordings of existing English legislation. This can be seen in the provisions relating to the shipowner's right to limit his liability when faced with maritime claims. Under the

¹¹ *Ibid.* Article 192

English regime¹², the shipowner lost his right to limit his liability where the damage occurred due to his *actual fault or privity*. CLC 1969¹³ also upholds a nexus between the loss of the right to limit liability and the owner's responsibility where it is proved that the damage occurred due to the *actual fault or privity* of the shipowner. The *actual fault or privity* doctrine could also be traced to the 1957 Limitation Convention as well.

The dictates of this principle provide that, the shipowner will be unable to plead his right to limit such liability, if it is shown that he was actually at fault or was privy to the cause of the damage. It is not necessary to prove that the owner was actually at fault but causal link between the fault and the damage must be established and proved.

3.1.1.3.2 The Rule of Strict Liability

The rule of strict liability was developed under the common law system. In essence, it is a rule that imposes liability on any person who for his own purposes, indulges in an activity hazardous by its very nature, that it will "do mischief" by causing damage if it escapes. This rule was established in the classic case of *Rylands v. Fletcher*¹⁴.

In this case, independent contractors who were mill owners constructed a reservoir on the land of the defendants. Eventually, water flooded into a shaft of an unused coalmine causing damage to it. In deciding in favour of the plaintiff in an action to recover damages against the defendant, the Exchequer Chamber highlighted the following points which today form the basis of the rule of strict liability;

- bringing to land, collecting and keeping for one's own purpose something out of its natural habitat, or something which is naturally not there;
- likelihood of causing "mischief" damage if that something escapes;
- escape of that something;

¹² Merchant Shipping Act 1894, Section 503

¹³ Civil Liability Convention 1969, Article V para.2

¹⁴ *Rylands v. Fletcher* [1868], L.R.3 H.L 330, [18868], L.R Ex.265 pp.270-280

- causes damage as a natural consequence of its escape.

As mentioned above, this rule contributed greatly to the elaboration of the liability and compensation regimes under examination. Generally, an oil spill will answer affirmatively to the criteria established above.

Viewed from another perspective, a difficulty will be encountered if a strict application of the rule in *Rylands v. Fletcher*¹⁵ were to be made to an oil spill. The rule relates to the use of land. Justice Blackburn states-

*...we think that the true rule of law is that the person who for his own purposes brings on **land** and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so is prima facie answerable for all the damage of its escape*¹⁶.

Oil spills on the other hand occur at sea and not on land. Could this then eliminate the applicability of this rule, given that all of the criteria have not been met? This does not fit in with the rationale of the *Rylands v. Fletcher* rule. It is worth mentioning that, the rule established in this case, stands for the proposition that there is strict liability where the activity that caused the damage is of an extra hazardous character. It is the quality of the activity that seems to be of essence and not the place in which the said activity is being carried out. The extra hazardous nature of an activity will exist whether that activity is carried on land or at sea. Strict liability will flow where damage is caused. The damage could arise from collecting huge quantities of water on land as in the case, or from transporting huge quantities of oil by sea. Be it as it may, the defendant will be strictly liable once it is established that his activity was of an extra hazardous nature.

¹⁵ *Ibid.*

¹⁶ *Rylands v. Fletcher* [1868], L.R 1 Ex. 265 pp.270-280

Furthermore, it could be argued that, under principles of public international law a ship is considered as part of the territory of the state whose flag it flies. It is considered as a floating island of the flag state¹⁷. Hence, rules of law that are applicable to the landmass are in the same way, applicable to the floating island. The jurisdiction of the flag state can be described as "quasi territorial". Consequently, an oil spill from a ship, is an "escape" which if it causes damage to another state could be considered as using the ship, i.e., "territory" in such a way as to cause damage to another state or person.

3.2 Implementation of International Conventions: Consequences and Implications of Legal Importation

From the preceding discussion, it can be inferred with a high degree of certainty that the English common law was very instrumental in the moulding and shaping of the CLC/FUND regimes. The consequences and implications of implementing these importations into the domain of state practice within the framework of government implementation, compliance and enforcement of international conventions cannot be ignored.

3.2.1 Consequences of Implementing International Conventions (Legal Importation): The case of the CLC/FUND

As a matter of principle, international conventions are applicable to states, as opposed to national legislation, which is applicable to the citizenry. It follows from this that only states can become parties thereto by either ratifying or acceding to them. By whatever means a state chooses to become a party to an international convention (ratification, accession), the legal consequences are legion. These include, *inter alia*-

¹⁷ S.S Lotus case (France v. Turkey), [1927] PCIJ ser. A.,no. 10

- The state party is bound by the provisions of that convention. It undertakes a duty under public international law, and dons a mantle of responsibilities and obligations arising out of that convention.
- It is obliged to implement that convention by incorporating it within its corpus of municipal law, thus giving it legal effect.
- It is subject to the convention with respect to other contracting states, even if it fails to implement the convention.
- It cannot enforce the provisions of the convention against any contravening state where it fails to give it legal effect, since the convention has not become part of the law of the land.
- On the other hand, by giving legal effect to the convention, the state party empowers itself and its citizenry to benefit insofar as concerns the application of the said convention within its jurisdiction.

Against this background therefore, the implementation of a convention to which a state has become a party is very essential if the provisions of the convention are to make any meaningful contributions to the economic life of the state concerned. To give it a norm-creating character, it is important that the implementation and effect of the international convention within a national legal order be governed by either its domestic constitutional law, or by any other law which is both superior and of general application in the land.

3.2.2 Implications of Implementing (Legal Importation) the CLC/FUND Conventions.

The impact of the legal importation dealt with above, will be examined alongside the two major legal systems in contemporary times, these being the common and civil law systems. Far apart from the differences that arise from their respective historical beginnings, these systems demonstrate marked differences from the standpoints of legal reasoning and rules of procedure.

3.2.2.1 Common Law System

The common law system has been defined as, "the group of legal systems founded mainly on the common law of England"¹⁸. It has been defined as judge made law or as case law. Unlike its civil law counterpart, the existent of legislative law is intended to provide guidance to the tribunals. There is the noticeable absence of the strict application of legislative law, as it is intended to give guidance to judges who can interpret the law to suit the matter before the court. The starting point of legal reasoning in this system is always around the interpretation and applicability of earlier judicial decisions, most important of all being decisions rendered by courts of superior jurisdiction such as the House of Lords. The applicable law is derived from the decisions of courts.

Faced with such a situation, the tribunal is compelled to formulate and apply a legal norm, of character enough to resolve the dispute between conflicting parties. Decisions thus arrived at by the courts of highest jurisdiction are binding upon subordinate courts which adhere to such case law. This is referred to as the doctrine of *stare decisis*. However, a court is under no obligation to follow its own precedents. It may elect to follow a case law rule, which it had laid down earlier. In the same way, a case law rule established by a court is not binding on a court of parallel or higher jurisdiction.

A positive fall out of this system is that, a greater level of flexibility is awarded judges with respect to the various views of the judicial role in dealing with case law. Under this system, courts have greater liberties in dealing with issues than their counterparts in the civil law system. Some states that have adopted the common law system besides the UK are Canada (without Quebec), New Zealand, Australia, India and the USA.

¹⁸ D. Walker., the Oxford companion to Law.

3.2.2.2 Civil Law System

The civil law system is,

...the general term for the group of legal systems which developed mainly in Western Europe from the ruins of the Western Roman Empire and in which concepts and principles drawn from Roman law have powerful influence.¹⁹

Within these circles as opposed to those of common law, the starting point of legal reasoning is more often than not a provision in the statute or code. Very little regard is placed on judicial precedence.

A code will represent a systematic compilation of related enactments normally specifying most crimes and the procedure for prosecuting them. Under this system, a rule of legislative act is cast in an authoritative textual form, from which the judge cannot depart except where such a rule is unconstitutional. A judge cannot exercise the flexibility to ignore or supplant a rule even if to his belief, such a rule is unreasonable.

Rules of procedure are remarkably different within this system from those under the common law system. Judges play an active role in the examination of witnesses as well as in the conduct of the proceedings. Hence the role of counsel is immensely reduced. The reverse is true with the common law system. Due to these factors, the civil law system is referred to as inquisitorial as against the adversarial nature of common law proceedings.

Given the marked differences between these two major systems, it would be of interest to know how rules of law of the one system work when imported into the other via international conventions. All conventions are to be internationally applied. How the picking and choosing impacts the legal environment within these respective systems and how the judicial machinery in each system has adapted to these variances, is presented below.

¹⁹ *Ibid.*

3.2.2.3 Implications of the Legal Importation within the CLC/FUND Regimes

When a state elects to ratify or accede to an international convention, it finds itself under the obligation to incorporate it into the corpus of its domestic law for the reasons stated above. A convention is always cast in a textual form. As such, (the case of the CLC/FUND) it is considered as a legislative act in its broader sense, since the intended effect of that convention is that of adding to or altering the law.²⁰

A state which has adopted the common law system (conspicuous absence of legislative act), and which ratifies or accedes to the CLC/FUND Conventions, finds itself under the obligation of introducing into its body of municipal law, a law cast in a textual form, identifiable with the civil law system. The direct implication of this is that the judicial landscape of a predominantly case law system is altered. It is now infringed by methods, which hitherto were unknown.

It had been demonstrated earlier on how the rule of strict liability developed and established in the *Ryland v. Fletcher*²¹ case was introduced into the CLC/FUND regimes. This rule owed its survival not to a legislative act, but to the doctrine of binding precedence. By ratifying and incorporating the CLC/FUND Conventions into their municipal law, and applying the provisions of these conventions within their jurisdictions, states that have adopted the civil law system introduce into their system an uncodified rule established and upheld by judicial precedence. Judging by the standards of the proponents of the civil law system, the authority generated by judicial precedence is not greater than that of legal scholars and therefore falls short of constituting a law.

It is evident that the requirement of implementing international conventions irrespective of the process involved has tremendously altered states' customs and practices insofar

²⁰ B.O. Okeke 2 (1981) *The Techniques of International Maritime Legislation* I.C.L.Q., vol 30 p.513,515
²¹ *Rylands v. Fletcher* [1868], 1.R.3 H.L 330, [1868] L.R 1 Ex.265pp.270-280

as their adoption and adaptation are concerned. The marked difference between the two legal systems in terms of the starting point of legal reasoning has somehow been downplayed.

It is not surprising that today legislative acts can be seen playing an increasingly dominant role in the development of principles of law in the common law jurisdictions. Conversely, courts of civil law jurisdictions are seen to be increasingly following and applying prior judicial decisions. This has played favourably with respect to international conventions, (especially as concerns the CLC/FUND Conventions) as it has instilled in them a high degree of respectability as well as uniformity in application.

3.2.2.4 Applicability of the CLC/FUND Conventions

The CLC/FUND Conventions like all other international conventions are not applicable to non-contracting states. An oil pollution damage that occurs within the territorial sea or EEZ (location of damage) of a non-contracting state will not be compensated by the instruments. In the same way, the instruments will not be applicable to an oil spill that occurs within the territorial sea or EEZ of a non-contracting state (location of incident) even if the same incident led to pollution damage in a state, which is a contracting party to the conventions.

It should be recalled that the *raison d'être* for the creation of the CLC/FUND regimes is of providing immediate and adequate compensation to victims of oil pollution damage following a maritime casualty insofar as such victims are private or public persons within contracting states. The driving force has been getting both the shipping and oil industries to contribute to IMO's efforts towards protecting and preserving the marine environment. Certain provisions within the text of the conventions have prompted this writer to make the following analysis.

The wordings of the 1969/71 and 1992 conventions specifically spell out the geographical scope of application of the conventions, as within the territorial sea of contracting states.²² The revised version extends the ambit of application to embrace the EEZ of contracting states²³ a concept created by UNCLOS 1982.²⁴

The catching words within this context are, *within the territory not beyond the territorial sea, the exclusive economic zone and contracting states*. These denote the areas in favour of which the benefits of the regimes can be construed. It would not be wrong to contend from these that the regimes are "territory specific" in nature, in terms of location of damage. In this connection therefore, no one would expect the CLC/FUND regimes, be it in their original or revised versions, to be applicable to oil pollution damage within a non-contracting state.

Applied in the reverse, it would be expected that immediate and adequate compensation would be available to any contracting state that suffers oil pollution damage upon a maritime casualty irrespective of the location of the incident, where it is clear that the requirements of the articles cited in the footnote have been met with. The advantage of this is that a close knit relationship between such potential victims and the instruments will be created. On the other hand, some shortcomings that merit attention can be identified upon a close examination of the text of the conventions.

Firstly, the general rule is to the effect that for oil pollution damage to be covered under the conventions, the damage should be within the territorial sea for '69/ '71 states, and as far as the EEZ for the '92 states. On the other hand, a contracting state which suffers oil pollution damage within the areas prescribed above from an incident occurring within a non-contracting state, but from which same incident oil drifts and causes the said damage will not be covered. The fact that the ship involved in the casualty from which the oil escaped and caused the damage is registered under a contracting state does not

²² Civil Liability Convention 1969, Article II, Fund Convention 1971 Article 3

²³ Civil Liability Convention 1992, Article 3, Fund Convention 1992 Article 4

²⁴ United Nations Law of the Sea Convention 1982, Article 55

alter the position.²⁵ This leaves this writer with the impression that focus has been shifted from the “territory specificity” in terms of location of damage, to “territory specificity” in terms of location of incident.

For all intents and purposes, what the conventions seek to address by providing remedial action via the mechanisms of liability and compensation, are the protection and preservation of marine fauna and flora and of property. Therefore, it is logical thinking to expect that such remedy should be made available to a contracting party suffering from that which the convention seeks to prevent once convention law has been satisfied. The *provenance* of the oil should not be a determining factor.

Furthermore, provision is made within the convention for re-imbusement of expenses incurred with respect to reasonable preventive measures²⁶, which have the primary objective of preventing or minimising pollution damage that may occur within the territorial sea or EEZ of contracting states. Again reasonable preventive measures could be taken by anybody whose interests are threatened by the spill. Infact, the convention does not limit action to be taken to a specified group or groups of persons.

Construed in this manner, a contracting state would be entitled to compensation under the notions of reasonable preventive measures, even if the damage is not yet real. The damage is yet to be suffered. Relating to reasonable preventive measures, the origin of the oil does not appear to be of importance. The rule relating to “territory specificity” (location of incident and location of damage) appears to apply differently when it comes to reasonable preventive measures. It obviously applies in favour of the location of the incident, as opposed to the dictates of the conventions.

Convention provisions are drawn to favour more the prevention of damage than to reversing the negative impact of the oil pollution damage. Better coverage is awarded the threat than the actual damage. Maybe the fact that lower amounts are payable

²⁵ Colin De La Rue (1998). Shipping and the Environment p. 77

²⁶ CLC 1969 Article 1, Fund 71 Article 1, CLC 1992 Article II, Fund 92 Article 1

under the regime for reasonable preventive measures than for actual oil pollution damage is accountable for this tendency.

CHAPTER 4

ACTIONABILITY IN MARINE POLLUTION

It has been demonstrated in the preceding chapters that under the CLC/FUND '69/71 and '92 regimes, a shipowner would be strictly liable for oil pollution damage to property and the environment caused by oil that escapes from or is discharged by his ship. Thus, the protection of the environment is not solely governed by the realm of public and administrative law arising out of the doctrine of state responsibility, which are mostly preventative in nature. Rules of private law (especially that of strict liability) which are compensatory in nature have tremendously contributed to the development of environmental protection regimes.

While the liability of the shipowner and the cargo owner under the regimes has been limited to insignificant if at all any debate, in many cases, there has been a lot of debate as to whether a particular claimant or group of claimants possesses a substantive right to bring suit for damages arising from an oil spill. Furthermore, not all losses suffered in connection with an oil spill are compensable under the regimes.

The possibility of recovering compensation under the regimes does not operate in isolation. It is subject to recognised principles of law. What legal quality should a claimant possess to enable him recover damages under the regimes? Is the possession of the required *locus standi* a pre-requisite and a guarantee to a successful claim? An attempt is made in chapter 4 to address these issues.

4.1 The Notion of Actionability

Actionability within this context refers to the quality of the claimant in bringing an action for compensation for oil pollution damage. The fact that a damage or a loss has been caused following an oil spill does not necessarily entitle everyone who may have been adversely affected by the spill to bring an action for compensation. To have quality to sue for compensation, the claimant must prove a substantive right to bring suit in relation to the damage suffered generally referred to as *locus standi*.

4.1.1 The Notion of *Locus Standi*

In many legal systems, the law demands that the person claiming compensation on behalf of a loss must have a particular type of interest such as ownership, possession or control of the subject matter of the claim in order to claim the loss. This is known as *locus standi* or standing, and is inherent to the claimant, arising from his proprietary interest in the property damaged. Thus *locus standi* is different from jurisdiction; the latter being the power of the court to entertain the matter. Within common law jurisdictions, the right of action is vested only on those who are directly harmed by the damage. This will mean that the right of action would lie on the individual possessing the property, which suffers the damage. In this connection, the litigant should be able to prove two things;

- possession of the damaged property;
- proprietary interest in the property.

It is only when these factors are established that the claimant can be heard to contend that he has the standing to bring an action with respect to the damaged property or environment. In fact, the idea that there exists a possibility of bringing an action on behalf of marine fauna and flora without establishing the above factors would seem strange.

The question of *locus standi* has often been raised with respect to actions brought by either a State, a community and even an individual in connection to environmental damage, as well as to the living resources that abound within the territorial sea and internal waters of an affected area.

4.1.1.1 *Locus Standi*: The Position of a State

As mentioned above, *locus standi* denotes the possession of a substantive right to bring an action with respect to the wrong done or a loss or damage suffered. Such standing can be demonstrated where the claimant can prove ownership, possession and control of the *res* in respect of which the compensation is sought. The claimant must be able to prove not only the existence of a proprietary interest in the damaged property, but also that such an interest has been detrimentally affected by the oil spill.

Following established principles of public international law, a state has exclusive sovereignty over its landed territory, its internal waters and its territorial sea.¹ The exercise of this sovereignty is recognised as an absolute manifestation of state power over its citizens, its resources and even other citizens found within such areas. The state is granted the power to conserve the living resources of the sea (territorial sea) and to preserve the coastal environment.² A state will have an interest in protecting such properties, which belong to no one in particular, by relying on the notion of common ownership of certain resources. This connotes that the state has a proprietary interest over such areas and resources.

An undue interference which may come by way of an oil spill, with the wetlands, beaches, tidal marshes and the development of such areas or aquatic life, will constitute an injury to the state property even though such property may belong to the public at large.

¹ United Nations Law of the Sea Convention : Article 2

² United Nation Law of the Sea Convention: Article 21 (d), (f)

Traditional legal theory would describe a state's interest in such areas and resources as direct ownership. In the *McCready* case³, the court's opinion was clearly stated in the following declaration;

...each State owns the beds of all tide-waters within its jurisdiction unless they have been granted away...in the like manner, the State owns the tide waters themselves, and the fish in them so far as they are capable of ownership while running. For this purpose the State represents its people and the ownership is that of the people in their united sovereign.

This notion of the proprietary interest of the state over the marine environment was buttressed in another court decision where the learned judges with Frankfurter. J concurring remarked as follows;

...a State may care for its own in utilising the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for common good, exercise all the authority that technical ownership confers.⁴

In the celebrated case of the *Commonwealth of Puerto Rico v. m/v Zoe Colocotroni*⁵, the question of locus *standi* of a state was again presented. In March 1973, the *m/v. Zoe Colocotroni* ran aground on a reef off the coast of Puerto Rico. During refloating operations, more than 5.000 tons of crude oil was released which finally came to rest on the South- Western tip of the Bahia Sucia Bay. The Commonwealth of Puerto Rico and the Commonwealth Environmental Quality Board filed claims for damages to the marine environment. Two legal issues were raised in this claim;

- the plaintiff's standing (*locus standi*) to sue for economic loss of its own property, and
- the plaintiff's capacity as *parens patriae* to initiate an action for damages as trustee of the public trust in the resources. This will be examined below.

³ *McCready v. Virginia*, 94 U.S 391,394 (1876)

⁴ *Toomer v. Witsell*, 334 US385, 1948 A.M.C 1098 (1948)

⁵ 628F. 2d 652 (1st Cir.1980)

Referring to the first issue, the Court of Appeal upheld the plaintiff's standing to sue for economic loss to its own property. The defendant shipowner and P&I Clubs did not contest this position. Judicial decisions⁶ and enacted legislation⁷ in certain common law jurisdictions notably the USA are legion in support of the fact that a state can directly or technically lay claim of ownership of marine wildlife as well as the organisms that abound within that ecosystem.

Against this background, it can be answered in the affirmative that a state has a substantive right of action and may sue in its proprietary capacity to recover compensation for oil pollution damage to state property beneath inland waters, beaches, wetlands and living resources. State interest is evidenced by its ownership of the environment and therefore of its living and non- living resources. This position has been recognised and upheld by the IOPC Fund in *The Haven*⁸ albeit not expressly. The facts of this case are as follows.

The *Haven* was a Cypriot tanker laden with a cargo of 144.000 tons of crude oil that caught fire whilst at anchor off Genoa. The fire led to a series of explosions resulting in the release of some of the oil into the sea. This caused extensive pollution damage to the Italian and French Rivas. In addition to the many claims that were presented to the IOPC Fund for property damage and or financial loss, the Italian government pursued a claim with respect to damage to the environment.

It is interesting to point out that what the defendants (IOPC Fund and the P&I Club) challenged in this matter, was the methods of assessment and quantification of damages and not the *locus standi* of the Italian government to pursue an action for compensation for damage to the marine environment. The defendant argued that such claims were inadmissible under the CLC/FUND '69/71 because;

⁶ *Maine v. m/v. Tamano*, 375 F.Supp. 1097, 1098.1973
A.M.C.1131.1131-1132 (D.Me.1973)

⁷ Submerged Lands Act of 1953, 43 U.S.c.§ 1301et seq., 1301(e)

⁸ The Haven Incident (Italy 1991)

...they were based on an abstract quantification of damage calculated in accordance with theoretical models, contrary to Resolution No.3 adopted by the Fund Assembly in 1980⁹.

By failing to rebut the alleged standing of the Italian government to pursue actions as owners of the damaged environment, the Fund impliedly consented to the fact that a state has ownership and therefore standing to initiate an action to recover compensation for oil pollution damage to the entire environment.

Notwithstanding the decisions of tribunals and the enactment of legislative acts proposing that a state or one of its branches should have standing to bring suit for oil pollution damage to the environment, some shortcomings can be registered against the application of this concept.

The first problem that can be identified is the ambiguity involved in defining what the environment really is. Defining the concept of the environment presents major hurdles, because none of the major international treaties, declarations, codes of conduct or even guidelines have afforded a direct and unequivocal definition of the term. Difficulties can be encountered in the identification and restriction of the scope of such a term. It could encompass anything from the whole biosphere to the habitat of the smallest creature or organism.

Dictionary definitions are also very varied, ranging from something that environs to the whole complex of climate, edaphic and biotic factors that act upon an organism or an ecological community and ultimately determines its form or survival. The Concise Oxford Dictionary¹⁰ defines the environment as; "... that surrounding objects, regions or circumstances".

⁹ Colin De La Rue (1998) Shipping and The Environment p.510

¹⁰ Concise Oxford Dictionary (5th Edn., Oxford, 1972), 406

The World Commission on Environment and Development (which is expected to be the leading authority on this subject) puts it in a more succinct way by holding that; "... the environment is where we live"¹¹.

By reason of these varied definitions, the environment can be considered to be an abstract phenomenon. It could be very elusive to grasp and owing to this, even more difficult to identify. For these reasons, it may be more fictional than real. Its use could also be over expanded or restrictive.

Another pitfall that could be encountered in attributing ownership of the environment in general and in particular the marine environment to a state, would be that relating to the possession of some animal life that abounds within such an area. The idea of laying claim of ownership over freely swimming fish in an international waterway, of stocks that migrate from one region of the world to another as property identifiable to one country or another is absurd and difficult to rationalise.

Fish of this nature (this includes shrimps, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal life), are generally considered wild. In the *McCready* case cited above, though the court was willing to recognise the fact that a state owns wildlife within its territorial sea, it cast some doubts on the state's capacity of asserting ownership/property while the fishes are on the run. No absolute property can be asserted in wild animals while they are alive. Ownership of this property can be asserted only when such animal life has been reduced to possession. Then they become the property of the possessor. The problems of attributing ownership of certain animal wildlife to a state cannot be overlooked.

¹¹ WCED, *Our Common Future* (Oxford, 1987), p.xi

4.1.1.2 *Locus Standi* of A Corporate Body/ of A Private Person

The question of whether a corporate body, a private person or a particular group of people can possess a substantive right of action with respect to claims for damage to the environment cannot be ignored. While a lot of debate has been carried out to support this notion *vis-à-vis* a state, one would be hesitant to accord the same level of flexibility and acceptance when examining the position of the above-mentioned groups of persons. In dealing with the corporate body, the departure point for the court and the IOPC Fund will be that of determining what authority is vested upon the said body and the mandate it is expected to exercise in connection to that environment.

Where it is established that the state has made an express grant to such a corporate body to control and protect the environment by taking cleanup or restoration measures after a disaster, the court and the Fund would be ready to accept the substantive right of action of the body. Again the authority to control and protect the environment could be evidenced by statute.¹²

Another situation of importance that merits attention is that of determining whether a private person or an environmental group should have a substantive right to bring suit against a shipowner, the P&I Club or the Fund for environmental damage. Though this possibility is not clearly stated by the law, it is worthy of consideration. By claiming such rights, the individual makes a manifestation of his contribution to the protection of the environment. It will not be surprising to find an individual with more motivation to defend and protect the environment than any governmental organisation. Such rights of suit would of course be over and above the individual's claim for compensation for damage to private property. It should not be aimed at personal aggrandisement, but rather directed towards the good of the wider public.

¹² Zoe Colocotroni Case: 628F.2d 652 (1st Cir.1980). , A.G.V. Emerson (1891) AC 649 (H.L.), at p. 653.Lord Herschell

4.2 The Doctrine of Public Trust and The Concept of *Parens Patriae*

These two concepts are among those that states have from time to time invoked as giving them a right to claim compensation for environmental damage in the wake of an oil pollution damage. Divergent views and opinions have been expressed to argue whether a state can initiate an action for damages on behalf of its citizens relying either on its position as trustee of the public trust in the environment, in other words as *parens patriae* of the national collectivity.

4.2.1 The Doctrine of Public Trust

As a widely accepted legal theory, the doctrine of public trust is to the effect that a state may seek damages for pollution damage to its natural resources. Justification for this is founded on the fact that these resources are held in trust by the government, on behalf of the people and for the benefit of the public. This doctrine is particularly important in the domain of marine pollution, as for its purposes, it traditionally applies to navigable waters, submerged lands, commerce, fishing and recreational uses like boating and swimming. It has been expanded to embrace the prevention of pollution with respect to water, air and wetlands.

It further recognises the rights of a state within the context of compensation. The doctrine is lauded for having created common law standards for judicial protection of the public's interest in the areas mentioned above, especially in situations where legislation is absent.

Trusteeship depicts a situation where one person, not the legal owner of a property, legally keeps and manages the said property on behalf of the legal owner for a definite or indefinite period of time. Under this relationship, generally referred to as the trustee relationship, (the state in this case) is expected to show proof of ultimate good faith

insofar as the management of the property is concerned. Protecting these resources held in trust against unfair dealing and dissipation is a display of good faith. An action to recover compensation for oil pollution damage to the environment would be another way of displaying the required good faith.

When faced with environmental damage, the state steps into the shoes of the public whose environment it holds in trust. It then operates as a property owner whose proprietary interest has been infringed. A right arising from this would be that of seeking redress to the situation. The state can pursue an action to recover compensation all the time, on behalf of the public whose property it holds in trust.

4.2.2 The Concept of *Parens Patriae*.

The origins of the concept of *parens patriae* can be traced to the English constitutional system. The idea behind its creation was that of enabling the state as sovereign and guardian of its peoples, to provide protection for persons under legal disability. Literally translated, *parens patriae* means parent of the country. The concept has commonly been invoked as a procedural device for asserting claims for damages or injunctive relief.

Like the doctrine of public trust, the concept of *parens patriae* seeks to recognise the rights of a state or one of its branches to seek recovery of compensation for damage to natural resources and various marine species in the area of a spill. According to this concept, the state as parent of the country brings suit against the shipowner, the P&I Club and the Fund for injury to the environment on behalf of the people. It is important to point out here that as opposed to the notion of *locus standi*, a state that seeks to bring a *parens patriae* action may do so even if the state as an entity has no proprietary interest in the resources that have been injured by the spill.

Advocates of this concept, however, hold that two requirements must be met before a state can successfully plead *parens patriae* as enabling it to bring an action for damages to the environment following an oil spill. These are;

- the action must be predicated on state interest which by itself is separate from injuries suffered by individual citizens,
- the spill and consequently the environmental damage must adversely impact a substantial portion of the citizens of the state.

By seeking to construe this concept in favour of states, its proponents hold that state interest will exist either when it suffers injury as a result of oil pollution damage to state owned land, or where pollution injures the general welfare of its citizens. In the *Trail of Smelter Arbitration* case¹³ discussed earlier between the USA and Canada, it would have been possible for the government of the USA to bring suit against the government of Canada in its capacity as *parens patriae* to recover damages for pollution damage arising from the activities of the citizens of Canada.

Though there is limited case law to suggest that the doctrine of *parens patriae* has been successfully invoked by states as granting them a right to bring an action with respect to damage to the environment, there is a possibility that this doctrine will be heavily relied upon in future, as environmental issues are attracting more and more public attention. In the *Zoe Colocotroni*¹⁴ case, the Environmental Quality Board of the Commonwealth of Puerto Rico sought to recover damages for injury to natural resources and marine species in the area of the spill as both trustee of the public trust in these resources and in its capacity as *parens patriae*. The example above will be emulated by many other states.

The defendant shipowner and the P&I Club challenged the plaintiff's right to recover damages "on behalf of its people for the loss of living natural resources on the land

¹³ 3 U.N.R.I.A.A., iii, p.1905. Decision March 11 1941

¹⁴ 628F. 2d 652 (1st Cir.1980)

such as trees and animals”¹⁵. Their argument was focused on the fact that by claiming *parens patriae* the state or its agency lacked sufficient proprietary interest in the damaged resources. *Parens patriae*, which in essence is a mere variation of the public trust doctrine, bestows upon a state an unexercised regulatory authority over wildlife. This unexercised authority fails to support a proper cause of action for compensation on behalf of the state. The Court of Appeal did not dwell on this issue, recognising however the fact that the Commonwealth Environmental Board had been granted the authority by the government to manage the damaged area.

Questions regarding a state's right to pursue an action for damages to marine resources again arose in the *Patmos case*¹⁶. In 1985, the *Patmos* collided with another tanker in the Messina Straits and some 700 tons of oil was spilled. Though most of the oil dispersed naturally, some of it hit the Sicilian coast, whereupon the Italian government put forward a claim for damages to the marine environment in its capacity as *parens patriae*. The court of First Instance, which considered that such a right did not confer upon the Italian government a right of ownership over the affected area, rejected this claim.

The Court of Appeal of Messina ruled otherwise, preferring to support the theory of *parens patriae* as giving a state sufficient authority to bring suit with respect to damage to the marine environment. The court's decision after the *Haven Incident*¹⁷ was considered in the same light, with the Italian government being granted the entitlement to recover for preventive measures where it could be proved that such claims had not been assigned to other entities.

¹⁵ Abecasis W.D, and Jarashow R.L. (1985) *Oil Pollution From Ships* (Stevens & Sons Ltd) London.p.552,§1

¹⁶ *Patmos Incident* (Italy, 1985).

¹⁷ *The Haven Incident* (Italy, 1991).

The ability of the state to exercise its authority and rely on its capacity as *parens patriae* to recover compensation for damage to the marine environment appears to be a growing concern within legal circles. It should come as no surprise that many schools of thought have sprung up with divergent views.

This writer (with respect to the renowned legal scholars and publicists who have written on this subject) is of the following opinion. Following recognised principles of law, every state has and enjoys supreme sovereignty over its landed territory, internal waters and the territorial sea. Inherent in this sovereignty and among other things, is the right of controlling activities that are carried out within its territory to ensure that such activities do not infringe the interests of other states or its citizens.

Conversely, the state has the legal authority of protecting its own citizens, living and non-living resources against any infringement. The marine environment is a component of these resources. Where some damage is done to the marine environment, such a state, by its government, or acting through a recognised agency, can take measures to ensure that the damage caused is redressed. By so doing, it seeks to protect the interest of its citizens. Where a state is recognised as possessing the inherent right of protecting the interests of its citizens and resources, and the authority to protect and preserve its marine environment,¹⁸ it would be contradictory to contend that such a state lacks interest enough in that environment to enable it to recover damages when the same resources and environment it protects and conserves are damaged.

Protecting the natural resources and the marine environment is not composed only of taking preventive measures against unfair dealing and dissipation of the natural resources. It does not only involve the exercise of an enforcement jurisdiction over such areas. It comprises seeking compensatory measures where damage has been done to these resources.

¹⁸ United Nations Law of the Sea Convention Article 21(d), (f).

For this reason, it is not necessary for the state to prove its proprietary interest in the damaged environment. The proprietary rights in the damaged environment are inferred as arising from the legal obligation it has in protecting both citizens and resources.

Wetlands, for example, would not belong to anyone and may be devoid of any direct economic potentials. However, their importance in maintaining an ecological balance within the marine environment can never be underestimated. Pollution damage to such an area could spark off a reaction, which could result in the destruction of some plankton and benthos which though not needed for human consumption, constitutes an important component in the food chain of certain valuable marine animal life.

Damage such as this, though not caused to a named person, should not be dismissed as unfit for compensation on the basis that *parens patriae* does not create entitlement in favour of the state to a right of action against the polluter. The status of parent of the country exercised through sovereignty automatically confers on the state or its recognised agencies a *prima facie* interest over the damaged environment. As such, this capacity should provide for the state an enablement to bring a private claim on behalf of its nationals for such damage.

It should be recalled that very little debate has been raised against the public trust doctrine which awards to a state ownership of the environment. *Parens patriae* is in essence a variation of the public trust doctrine. In the first situation, the state acts as the owner of the environment on behalf of its peoples. It can initiate an action against the shipowner, the P&I Club or the Fund where necessary for an infringement on that right. In the second situation, a state's action can be grounded on the basis of parent of the country, as a representative of the national collectivity. In fact, the dividing line between the two concepts is very thin.

The marine environment (a beach for example) is of immense importance. To some states, it is more than an amenity. It represents a treasure, a source of life, which a state would jealously guard and preserve for the benefit of its peoples and for posterity.

It is commendable that the community of states recognises this and has taken measures to enhance its protection and preservation. What it should do through compensatory schemes like the CLC/FUND to promote marine environmental protection, is not to raise objections relating to states' capacity as *parens patriae* to bring suit for oil pollution damage. Rather, it should work out ways and means whereby double recovery by states and private persons for injury to the same resources can be avoided. In this way, two things would be achieved;

- prevent polluters from suffering double jeopardy,
- create an awareness in the shipping, oil and insurance industries of the possibility of facing claims from governments for oil pollution damage done to the marine environment. This will call for greater awareness and higher standards and levels of care in the exercise of their duties.

CHAPTER 5

COMPENSABILITY: A REMEDY IN MARINE POLLUTION

Despite the best intentions of municipal and convention law, and the efforts of the shipping and oil industries, marine pollution following upon a maritime casualty will continue to occur. The rule of strict liability discussed in chapter three has been imported into the CLC/FUND regimes. Its applicability, whenever the liability of the shipowner and the cargo owner have been evoked with respect to oil pollution damage claims, has ensured that compensation has almost always been available to victims.

Notwithstanding this fact, it has not been uncommon to find situations where defendants (shipowners and the IOPC FUND) have raised strenuous arguments as to whether a particular type of claim qualifies for compensation. The second part of chapter 5 of this work will deal with this issue. Prior to this, in the first half of the chapter, a brief overview of the general principles of law regarding the admissibility of a claim grounded in tort, and its contributions to the domain of marine environmental protection regimes will be made. As it will unfold, even where a particular claim has transcended the rigours of admissibility, it is doubtful whether the compensation that ensues is adequate in terms of amount payable considering the difficulties associated with the quantification of compensation. As was with the other chapters, reference will be made to decided cases.

5.1 Principles of Judicial Remedy

In a society without norms, a society devoid of regulations that direct the conduct of behaviour and govern societal acts and omissions, a loss or damage will lie wherever it falls. In other words, the loss will be borne by whoever suffers it. This falls out with the expectations of norm regulating societies, which are guided by the underlining principle that the author of an act or omission that causes loss or damage to an innocent victim should bear responsibility for such a loss or damage.

Thus, it is a recognized principle of law that a remedy should be made available to that innocent victim by the perpetrator. The innocent victim should be compensated fully in cash or in kind by what is referred to as *restitutio in integrum*. The purport of this judicial remedy is to put the victim to the same position to which he was prior to the occurrence of the wrongful act or omission.

Given that full restitution is rare to attain, mechanisms such as compensation, otherwise known as damages are designed to provide the innocent victim with at least a monetary recompense made equal to the loss or damage suffered. Within the spectrum of marine pollution in general, and in particular oil pollution damage, *restitutio in integrum* could be attained without too much of a problem, insofar as damage to property (physical *res* such as vessels and fishing gears) is concerned. With respect to the environment, it would be difficult to attain similar results due to the varied definitions of the environment. Thus claimants who have suffered damage to the environment have to be compensated in some innovative ways, albeit within the established principles of judicial remedies. We shall see how far this has been achieved.

A claimant having satisfied the requirements mentioned in the preceding chapters, can only receive compensation when he can establish a direct relationship or connection between the act or omission and the loss or damage suffered. Establishing that the act or omission was the proximate cause of the loss or damage is of primary importance.

5.1.1 *Causa Proxima*

One of the elements that the law requires a claimant to establish is the relationship between the alleged wrongful act or omission and the loss or damage suffered by the claimant. In the first instance, the loss or damage suffered must have occurred as a direct consequence of the wrong. It must be so near to it that, without its occurrence, the victim would not have suffered the loss or damage. The victim must be in a position to prove the nexus, the causal link between the wrongful act and the loss or damage suffered. A failure to so prove will lead to the conclusion that the loss or damage is too remote to be attributable to the defendant.

Developed and thoroughly established within the precincts of traditional tort law, the notion of *causa proxima*, like the other principles of law discussed above, have played a predominant albeit subtle role within the realm of liability and compensation in oil pollution damage claims. Its influence will be discussed below. The problem of proving *causa proxima* is more acute where the loss or damage occurs as a result of burning oil, which within the text of the CLC/FUND Conventions does not constitute a basis of action. The position of the law has been well illustrated in the *Wagon Mound I* and *II* cases. It is worthwhile mentioning that though these cases are pre-convention cases, the rule of law that they established are well in use in oil pollution cases.

*Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (Wagon Mound I)*¹

While anchored at Sydney harbour taking on board furnace oil, servants of the *Wagon Mound* (charterers and respondents) negligently permitted the escape of some of the oil into the sea. Eventually winds carried the oil into the wharf where ship building and repair work was being carried out.

¹ *Wagon Mound I* (1960) 1 Lloyd's Rep.1 (P.C), (1961) A.C. 388

After consultation with the wharf managers as to the safety of continuous welding operations with floating oil around, the respondents managers were reassured of the absence of any risk of fire from the floating oil and the welding operations continued. A piece of molten metal eventually fell on a piece of cotton waste floating on the oil at that time. This ignited the oil and the respondents' wharf was damaged.

After an examination of the facts of the case and the existing law on the remoteness of damage, the Supreme Court of New South Wales held the appellants liable for damage to the wharf. However, on appeal the Privy Council, overturned that ruling.

The rationale behind the Privy Council's decision in this case was guided by the fact that the damage caused by the ignited oil floating on the surface of the harbour was too remote to be considered a consequence of the oil spill. Such a damage was not reasonably foreseeable and as such, the plaintiff failed to establish the causal link between the defendant's action and the damage suffered. The rule of foreseeability thus replaced the old rule of directness.

*Overseas Tankship (UK) Ltd. v. Miller SS. Co. Pty Ltd. (Wagon Mound II)*²

Faced with a slightly different set of facts, the court, that is the Privy Council that ruled in the *Wagon Mound I*³ arrived at a different conclusion. It held that the plaintiff's loss was reasonably foreseeable, as it was reasonably foreseeable that, wind movements could carry floating oil to adjoining property thereby causing damage. The resulting damage was not too remote.

Claims such as those arising under the *Wagon Mound I & II* cases (damage caused by oil spilling into the sea and then catching fire) fall out of the realm of the CLC/FUND Conventions. The text of the conventions will provide compensation for oil pollution damage arising from contamination outside the ship, for the cost of reasonable preventive measures, or for damage caused by such reasonable measures. Nonetheless the IOPC Fund has constantly relied upon the elements that fall within the

² *Wagon Mound II* (1966) 1 Lloyd's Rep. 657 (P.C.), (1967) 1A.C.617

³ *Ibid*

ambit of *causa proxima* (absence of reasonable foreseeability and remoteness of damage) to oppose claims.

An example of this arose in the *Antonio Gramsci II*⁴ incident. In this case, claims initiated by the Finnish government to recover compensation for expenses incurred in carrying out surveys of damage to the environment resulting from oil spill upon the grounding of the *Antonio Gramsci* were outrightly dismissed by the Fund as being too remote. The administrators of the Fund argued that the Finnish government in its regular pollution prevention exercises would have incurred such expenses whether or not the *Antonio Gramsci* had spilled its cargo.

Wagon Mound I & II provide an illuminating example supporting the principle that the extent to which *causa proxima* (reasonable foreseeability and remoteness of damage) which to this writer's mind are covered by the conventions under consideration as pure economic loss, can be relied upon by a defendant remains not a question of fact, but one that ought to be examined according to the merits of each case. The two major legal systems (common and civil law) are consistent with the doctrine of causation in tort cases. Common law rules of law would provide compensation to a claimant having a proprietary interest over something damaged by asking the question "was it reasonably foreseeable by the defendant that his act or omission would cause this loss or damage to the plaintiff?" Rules of civil law dictate that the damage, on whose behalf the claim is being made, must be direct and certain. The damage must be a close consequence of the pollution incident. The bottom line of both systems is that there must be a sufficiently close causal link between the pollution incident and the damage.

5.1.2 The Notion of Quantifiability

As mentioned earlier, the *raison d'être* of compensation is that of putting the victim as far as is possible to the same position as he would have been in, had he not suffered the

⁴ Antonio Gramsci II (Finland, 1987) Colin De La Rue ; Shipping and the Environment, p. 509

wrong for which he is getting compensation. It denotes the payment of damages in monetary terms, especially common in environmental damage claims. This calls for the quantification of damages payable for the damage suffered.

Quantification for the most part, refers to the process by which claimants are able to quantify the degree and extent of injuries suffered and damage to property or the environment. It involves attaching a price tag, a monetary value to it. It is expected that the monetary value will reflect the degree to which the victim is affected and can be restituted to the position in which he was prior to the damage. As opposed to damage to property, which can be easily ascertained by taking into consideration market value minus depreciation cost, it is questionable whether damage to a given marine environment can be properly quantified. There are some serious shortcomings discussed below.

5.1.2.1 Limitation of Liability

The age-old rule by which shipowners can limit liability is one of the restrictions that a plaintiff will have to contend with and which impacts on any quantification made. Pursuant to this rule, the shipowner could originally limit his liability up to the value of his ship. Thus the amount of damages that exceeded the value of his ship will not be met.

Although the shipowner's liability under the CLC/FUND package is far more generous than any global limitation regime, due largely to supplementary amounts payable by the Fund, its effects in this branch of the law are still felt. It is worth mentioning that the plaintiff will not receive any amounts that go over and above limits set by the conventions. The levels claimed after quantification will not change this position.

5.1.2.2 Difficulties of Quantification

One of the primary hurdles of quantification with respect to environmental damage is that relating to damage to natural resources. Firstly, claims arising under this heading are rarely concerned with the compensation of loss or damage suffered by a particular claimant. They are more concerned with the interest of the wider public. While the purport of compensation is to provide redress for environmental damage, which for the most part remains unremedied after clean-up operations, it is difficult to quantify such damage following conventional pecuniary assessment methods. Some of these difficulties are explained below.

5.1.2.3 The Innate Value of the Environment

Quite apart from the value of property, natural resources and the environment have value of their own. However, this value is one with no price attached to it. To be able to attach a monetary value to the environment, the starting point will be that of ascertaining the value of the environment that has been damaged. This by itself is difficult to achieve, considering that “any substantial part of the environment can be said to be as priceless as ...one of Chaucer’s plays.”⁵ The water, bed, fauna, flora are not for sale. This innate value of the environment is the most priceless of them all. It provides a source of life and is thus a cradle for mankind. In the *Zoe Colocotroni*⁶ case damage caused to natural resources after an oil spill was calculated and awarded by the court of first instance on the basis that such compensation was to represent the lowest replacement cost. This decision was overruled at the Appeal Court as the court among other things, failed to recognize the market value assigned to the environment.

⁵ Gotthard Gauci; Oil Pollution at Sea: Civil Liability and Compensation for Damage pg. 128 § 2

⁶ 628F.2d 652 (1st Cir.1980)

International law⁷ recognizes this value (not the monetary value though) and has endorsed it by guaranteeing not only the protection of the global marine environment, but also created protection for certain “special areas”⁸ deemed highly vulnerable to oil pollution and other sources of pollution.

5.1.2.4 The nature of Environmental Damage

One of the cardinal problems of making an objective assessment and therefore of quantifying damage to the environment stems from the very nature of the environment itself. Unlike property such as vessels or fishing gears, the environment is not static but in a permanent state of dynamism. Fluctuations in both plant and animals in terms of species and numbers are common, due to natural phenomena, notably climatic changes. Furthermore, most marine animal and plant life possess the ability of natural recovery favoured by their ability to produce huge reserves of eggs and larvae which will replace adult populations affected by short term adverse conditions. The reverse can also be true of other species.

Against this background, one cannot infer with any degree of certainty that the reduction in fish stocks or other marine resource must have been brought about by a particular spill. Failure to compute the various elements raised above will without doubt affect the precision of any quantification that can possibly be made. As such, any assessments made after an incident will be speculative in character and capable of raising controversies in the application of the regime.

5.1.2.5 Non-commercial Resources

Another factor that affects the remedial nature of compensation connected with quantifiability, is that linked to damage to certain species of natural resources. Where

⁷ United Nations Law of the Sea Convention Article 192

⁸ MARPOL Annex I Chap.II.Reg.10

marine fauna and flora are damaged by oil pollution, particularly damage to species that are not economically exploitable, there is a problem of determining what the actual value of the loss should be. Such values are difficult to translate into a price.

In addition, damage could be caused to certain plant and animal life, which though not necessary for human consumption, constitutes a vital link in the food chain of aquatic life. A disruption in the food chain would invariably have repercussions on the marine ecosystem. Ecological damage neither has a market value, nor can it be calculated in monetary terms.

5.1.2.6 Absence of Uniform Rules for Quantification

Due to the absence of uniform rules for quantification, diverse methods have been employed by oil pollution damage victims to assess the extent of damage suffered and the level of compensation expected. Often, such methods are done in accordance with a plethora of existing municipal law, and usually, to the detriment of the IOPC Fund. It is not uncommon to come across arbitrary and abstract measures of assessments, which needless to say, have provided insurmountable obstacles to claimants. The IOPC Fund has vehemently objected to such methods.

Arbitrary assessment methods have, if anything, highlighted the difficulties inherent in the quantification of environmental damage in the absence of precise rules. The IOPC Fund faced this problem in the *Antonio Gramsci I & II* cases.

*Antonio Gramsci*⁹

In 1979, the Soviet tanker *Antonio Gramsci* grounded near Ventspils in the Baltic Sea, spilling some 5,500 tons of her cargo. As a result Swedish, Finnish and USSR coastlines damaged. The Russian government put forward a claim for environmental damage calculated in line with municipal policy.

⁹ *Antonio Gramsci I* (USSR 1979), Colin De La Rue ; Shipping and the Environment p.507

The Russian claims were settled, but this led the IOPC Fund's Assembly in 1980 to pass Resolution 3 stating its intention regarding the assessment of environmental damage. By this Resolution, the assessment of environmental damage "is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models." This resolution has to a very wide extent guided compensations paid by the Fund with respect to environmental damage. The rationale behind this declaration is that the Fund will resist all claims made against it similar to that made by the Russian government.

*Antonio Gramsci II*¹⁰

The *Antonio Gramsci II* ran aground South of Finland in 1987, spilling close to 700 tons of crude oil. A Soviet oil combating operation deployed off the Estonian coast recovered some 40 tons of the oil before been forced to abandon operations due to heavy weather. The unrecovered oil caused pollution damage to the Finnish coast.

A claim for compensation for environmental damage submitted under the CLC was made by the Estonian State committee for Environmental Protection and Forestry. The assessment of the claim was again done following Soviet municipal legislation imposed by the *Methodika*, the same formula employed by the USSR in the *Antonio Gramsci I*¹¹ case.

The IOPC Fund's reaction to this claim was different from that of the first case. It relied on the provision of Resolution 3 cited above and resisted the Estonian claim, choosing to refer the court to the wordings of that Resolution. Estonia eventually revised the amount of the compensation sought and the matter was settled out of court. This rebuff by the IOPC FUND is visibly indicative of the difficulties of making objective assessment and quantification of environmental damage in the absence of agreed rules. The difficulty speaks for itself.

¹⁰ Antonio Gramsci II (Finland, 1987) Ibid, p.509

¹¹ Ibid

Situations have been known where the courts have had to rely on expert opinion when controversy arises as to the extent of the damage and the level of assessment made following oil pollution damage to the marine environment. The Italian *Patmos*¹² and *Haven*¹³ cases are exemplary. The use of expert opinion in relation to quantification of environmental damage has raised legal questions. It has seen the decline of the absolute authority of the judiciary in awarding compensation, which is a legal concept. It had witnessed the capitulation of the judge to the expert.

5.1.2.7 Long Term Effects of Oil Pollution Damage

The assessment of environmental damage would most often be done shortly following an oil spill incident, and is normally done in a bid to satisfy public pressures, which have continued to mount over the years. The negative fallout of these hasty assessments is that consideration is never paid to the long-term effect of the oil in the environment. It had been published some years after the *Exxon Valdez* incident, that crude oil found under beach surfaces was still contaminating fish and wildlife¹⁴. Its impact on marine plant and animal life cannot be ignored.

Conversely, public pressures brought to bear on political leaders in the wake of a tanker casualty have led such officials to resort to exorbitant claims for compensation, often undermining the fact that the environment does possess the capacity of natural recovery. It is questionable whether compensation payable after an oil spill would embrace the needs of future generations.

¹² Patmos Incident, Italy, March 21 1985

¹³ Haven Incident, Italy, April 1991

¹⁴ Lloyd's List, Casualty Report, 5 February 1993, p. 10

5.2 Compensability: Adequacy

One of the major controversies that surrounds the concept of compensability as a judicial remedy in general and in marine pollution claims in particular, is that linked to its adequacy. The rationale of compensation (which is quantitative in character) as a judicial remedy is to redress the victim's loss by translating recoverable damages into monetary terms. As a mechanism that seeks to make good the loss or damage suffered by a victim, compensation is expected to be adequate. In other words, it should be sufficient enough so as to place the victim to his pre-loss position. To be eligible for this role, it must be adequate, given that compensation is a common form of reparation where restitution in kind has proved impossible.

If the preceding factors are indications are to go by, then one could assert with a high degree of certainty that compensation for oil pollution damage as provided within the text of the CLC/FUND conventions leaves much to be desired. This is especially true when the adequacy of compensation within the scheme is examined *vis-à-vis* consequential loss, pure economic loss and restoration and re-instatement of the environment are concerned.

5.2.1 Consequential Loss

Claims for consequential loss are those that are grounded on the fact that the oil spill has actually infringed on the plaintiff's proprietary interests. The loss suffered occurs as a result of damage to the claimant's property. Since its inception, the IOPC Funds have faced very few difficulties with making payments for consequential loss.

The above notwithstanding, loss of this kind can sometimes be subjected to the rigours of differentiation from pure economic loss. Sometimes, it is difficult to say whether or not the damage suffered falls squarely within the meaning accorded this concept by the

CLC/FUND regimes, or whether the loss has passed the test of reasonable foreseeability.

Claimants have been known to recover compensation for damage caused to farms along the coastline¹⁵ and buildings¹⁶ ashore by oily sprays though such damage could not have been seen as a reasonably foreseeable consequence of an oil spill.

Apart from claims for oil actually fouling neighbouring vessels and port facilities, most claims for consequential loss are those brought by fishermen, fish farmers as well as those involved in aquacultural, onshore and offshore activities. As opposed to fishermen who seek to harvest fish in the wild, these latter groups of claimants own the stocks, which their facilities contain. While contamination of their stocks will be regarded as loss or damage to property, the law will consider their loss of earnings as consequential loss. Making assessment aimed at quantifying such losses present no problems. The market value of the stocks as well as the cost of contaminated equipment and gears can be easily ascertained.

It has not been uncommon to find situations in which stocks such as these are destroyed following government orders, or to preserve the confidence of the public, even in the absence of evidence showing the inability of the stocks to deplete prior to harvesting¹⁷.

¹⁵ Braer Incident, IOPC Fund Annual Report 1993, p.58

¹⁶ Braer Incident, IOPC Fund Annual Report 1995, p. 61

¹⁷ IOPC Fund Annual Report 1993, pp. 56,59

Likewise, the Fund has been known to pay compensation to such farmers as in the *Braer* incident at least for the 1991 harvest¹⁸.

The question that can be raised with respect to compensation for consequential damage is whether claims of this nature arise as a result of loss caused by contamination as stipulated by the convention. Even where such claims are justifiable, the degree to which they are adequate remains questionable.

5.2.2 Pure Economic Loss

Unlike consequential loss, pure economic loss is that loss which is sustained without physical damage to any given property. In the spectrum of marine pollution, pure economic loss is often the loss borne by persons engaged in businesses that are highly dependent on the various uses of the seas and its amenities. The CLC/FUND conventions both define pollution damage as “loss or damage caused outside a ship carrying oil...”.¹⁹ It is arguable that the definition awarded this phrase thus embraces compensation for pure economic loss.

Within this category of claimants, fishermen and hoteliers have found favour with the Fund from its very beginnings. At the same time, some of the most difficult claims in terms of principles that the Funds have had to contend with have come from this same group of claimants.

Most legal systems have chosen to reject claims arising from pure economic loss on the ground that they will promote liability “ in an indeterminate amount for an indeterminate time to an indeterminate class”.²⁰ Notwithstanding the inclinations of some legal systems, the FUND (which is a medley of principles of law emanating from different legal systems), will continue to pay compensation for pure economic loss. Justification

¹⁸ The Braer Incident (UK.January 1993)

¹⁹ IOPC Fund Annual Report 1993,pp.56,59

²⁰ *Ultramares .v. Touche*, (1931) 225N.Y.179

for this could be that the regimes continue to grope for societal support and acceptance, as it strives to meet the needs and expectations of this same society as far as oil pollution from ships is concerned.

It is worth mentioning that while claims for pure economic loss are allowed by the Fund regime, some of these claims notably those from fish processing industries, hoteliers in the middle of the country, would be resisted by the compensation system (due to physical remoteness). These claims are treated as remote as per the rules of foreseeability. Infact, what the regime will look for is whether a sufficient link exists between the loss and the pollution incident, with each case being examined according to its merits. It should come as no surprise therefore that this has resulted in considerable uncertainty as to the admissibility of any claim.

Not even the criteria set up by the Fund's Seventh Inter-sessional Working Group mandated to find ways of mitigating these discrepancies have done much to help. This body laid down the criteria for determining reasonable proximity (causal link) between pollution incident and the loss based on; the geographical proximity between the activity and the contamination, degree of claimants' dependency on the activity, existence of alternative supply sources to the claimant and the extent to which the claimant's activity impacts the economic activity of the area affected by the spill. The last criterion does not promote man's quest for self-satisfaction.

Without prejudice to the wisdom that motivated this trend of thought, this last criteria should not be allowed to pre-empt the possibility of recovering damages for pure economic loss. If this were to provide justification for a cause of action leading to the payment of compensation, then what the Fund is doing, is aligning the interests of victims to those of the community within which they operate.

Generally, a small hotelier for example, will invest in his business single handedly. Alone he will bear all the attending risks to that investment. Among such risks, which could negatively impact his investment, are strikes from airlines, bad weather

conditions, and fire and oil pollution. These could result in poor bookings by tourists. At moments of risk taking, no considerations are given to the inter-relationship between his venture and the vicinity in which he finds himself. If compensation could be made available to him, arising out of a damage caused by any of the above risks, there should be no reason for not doing so primarily because his business does form an integral part of the economic activity within the area affected by the spill.

The uncertainty with which the Fund deals with claims relating to pure economic loss has been best demonstrated in the way in which claims by fishermen arising from different oil pollution incidents have been treated. A claim by fishermen following the *Aegean Sea*²¹ incident was allowed as the IOPC Fund held that, the absence of a valid fishing license was not a relevant pre- requisite for obtaining compensation for oil pollution damage.

Barely one year later, the position of the IOPC Fund shifted. It declared in the *Braer*²² incident that, because within the UK territorial waters, fishing without a valid license constitutes an illegal activity, a claim brought by a fisherman without a license would bar any rights for compensation by such a claimant made against the Fund.

By deciding each claim for pure economic loss on its merits, it could be said with a narrow margin of error that the Fund exercises discretionary powers in its awards. This could threaten the compensation regime to its very foundation. This illustrates and brings out one of the weaknesses of the CLC/FUND regimes.

²¹ Aegean Sea Incident, Spain, December 1992

²² Braer Incident United Kingdom, January 1993

As an international scheme striving for global recognition and acceptance, its scope of applicability and the degree of certainty in settling claims should reflect high levels of uniformity and homogeneity that would enable it gain the respect it deserves from the industry. Such qualities are not yet visible in the scheme. Small wonder therefore that a major oil importing nation like the USA has opted to go its own way.

5.2.3 Restoration and Re-Instatement

With reference to the conventions, claims for restoration or re-instatement are those that relate to recovering the cost of the measures taken to restore or re-instate the natural resources after the oil spill. These measures usually call for human intervention in the process of natural recovery. They serve as a catalyst to natural recovery and would sometimes demand that the entire resource be replaced by either replanting vegetation, or providing temporal makeshift habitats for marine wildlife where immediate restoration has failed. Such measures are aimed at restoring the natural resources to their pre-spill conditions.

Viewed superficially, such claims do not appear to present any problems in terms of monetary assessments, as all costs incurred can be readily quantified. The difficulty connected to claims for compensation for restoration or re-instatement measures arise in the application of convention provisions, as these instruments provide a questionable yardstick; the reasonableness of the restoration or re-instatement measures.

Considerations that are given by the Fund are tilted not primarily towards the claimant's right to receive compensation for such costs, but rather to the reasonableness or unreasonableness of the measures taken to effectively restore or re-instate the damaged resources. Thresholds for reasonableness on the other hand are influenced by the prospects of their success, their feasibility and to a large extent, the ability of the affected area to recover naturally. All the above factors are considerations that play an influential role in assessing the damage that the oil pollution may have caused to the

natural resources. Further considerations will be given to the advantages of the said measures. Reasonableness becomes subjective when the Fund simply estimates that certain measures of restoration or re-instatement are unreasonable, and opposes a claim for compensation.

In the *Zoe Colocotroni*²³ case, the court rejected the proposed plan for restoration of the mangrove forest evaluated at US\$ 6 million because it was unreasonably high. Frequently, the use value of the natural resource to be restored or re- instated will enable the Fund to decide whether or not its cost, hence the compensation sought is reasonable.

As mentioned above, the CLC/FUND regimes do not award compensation as a medium for making good profits lost by the damage. Rather, compensation is provided as a remedy to a loss suffered, aimed at restituting the claimant to the pre-spill position. Claims for compensation for costs of restoration or re-instatement serve the same purpose. As such, one can infer that the level of compensation would be limited to the cost of restoration or re- instatement. This cost does not include the interim loss, that is, the loss that the claimant endures throughout the period that it takes to restore or re- instate the natural resource to its original condition.

Interim costs reflect the deprivation that arises from the non-use of the resource that the claimant endures. Such a loss could be evaluated and compensated. For compensation to be adequate it must include the actual cost incurred for restoration or re- instatement as well as that incurred from the interim loss. Anything short of this will make compensation under this heading inadequate as a judicial remedy.

²³ 628F.2d.652 (1st Cir. 1980)

CHAPTER 6

INSURANCE AND LIMITATION OF LIABILITY IN OIL POLLUTION CASES

Following the introduction of the strict liability regimes through the CLC and Fund, one would have expected that all deserving victims of oil pollution damage would receive compensation that would put them into the pre-spill position. Notwithstanding the imposition of strict liability by the regimes on the owner of the vessel following an oil pollution incident, it will not be uncommon to find situations in which the liability of the shipowner cannot be successfully invoked. This is due to the fact that he can completely exonerate himself from liability by pleading certain defences or by invoking limitations.

In this chapter, the notion of the limitation of liability, and its application in both the common and civil law systems will be examined. Its purpose in the domain of oil pollution will be discussed under 6.1. The latter half of the chapter (6.2 & 6.3) will deal with the concept of insurability and the limitation levels of the 1992 CLC and Fund Convention.

6.1 Development of Limitation of Liability

In maritime law, the liability of the shipowner for loss or damage caused to others is usually limited. This is the rule, which sets shipping apart from most other branches of commerce. The concept of limitations of liability has been in existence long before the conventions.

The basis for the existence of the right to limit liability was that, there was a need to encourage the adventurous pursuits of shipowners who were prepared to gamble their assets (the ship) by subjecting them to the uncertainties and perils of the sea. In the absence of such limitation, it was highly probable that a shipowner would abandon the ship together with the freight in the hands of third parties with valid claims against him. This of course was not economically beneficial to the aggrieved third parties that ran the risk of never recovering their losses, especially in cases where the liability of the shipowner was over and above the value of his assets.

Furthermore, it came to be realised that the third party with a valid claim stood a better chance of recovering some substantial proportion of his compensation if it was limited. This was better than dwelling in the uncertainties of not knowing whether or not they would ever receive the higher sums to which they were entitled.

The existence and application of the rule of vicarious liability was to favour the survival of the shipowner's right to limit his liability. It was considered fair that a person, who through his own fault caused loss or damage to another, should be liable without limit to that loss or damage. Conversely, rules of fairness and justice would not allow a shipowner to be fully liable (without limit) to another person for a loss or damage caused by the fault or neglect of his servants. Against this background, different legal systems developed rules relating to the right of the owner's ability to limit his liability.

6.1.1 Limitation of Liability under English Law

Under English admiralty law, the liability of the shipowner was unlimited, at least until well into the mid 18th century. Developments within other legal systems favoured a shift toward the limitation of the shipowner's liability for loss of cargo by theft of the master or crew, to the value of the ship and freight.¹ Eventually, limitation was extended to cover cases of theft by persons other than the crew and by fire.

¹ Responsibility of Shipowner's Act 1733

Despite the introduction of this rule, it was not to be until the early years of the 19th century that the notion of limiting the shipowner's liability for damage arising from collision cases began to filter into English admiralty law. Here, like in the prior situations, liability was limited to the value of the ship and the pending freight. A different standard for limitation was set by the Merchant Shipping Act 1958 of the United Kingdom, which incorporated the 1957 Limitation Convention. Under this Act, limitation was calculated by reference to the tonnage of the ship. This was thought to provide a more certain basis as far as indemnification was concerned, as opposed to the uncertain value of the ship and pending freight alternative. The uncertain value of the ship had the effect of rewarding an owner who did not spend money on maintenance by leading to lower liability, due to lower value of the vessel.

At that time, justification for this rule was founded on the grounds of public policy. It was one of the first instances in which state support for the shipping industry, and an acknowledgement of the risks run by shipowners was manifested. In *The Amalia*², Dr. Lushington was swift in pointing out in very clear and unequivocal terms that; "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons."

Convenience was also another reason for which English law advocated the application of this rule. In *The Bramley Moore: Alexandra Towing Co.v. Millet*³, Lord Denning pointed out that, though the concept of limitation of liability could not be considered as rational justice, it was convenient for the purposes for which it was intended.

The above notwithstanding, one of the unique characteristics of limitation of liability under the English law was that, though the shipowner could limit his liability, the onus of proving that the incident did not occur as a result of his *actual fault or privity* rested on him. The use of these words is indeed meaningful and significant in the entire scope and

² *The Amalia* (1863) Br. & Lush. 151; 176 E.R. 323, 1 Moo. P.C:N.S. 471 p. 473

³ *The Bramley Moore: Alexandra Towing Co.v. Millet* 3. (1964) P.200, 200.

structure of shipping law, and is discussed below. In this way, all the victim had to prove, was the causal link between the incident and the loss or damage suffered.

6.1.2 Limitation of Liability Under Civil Law

In civil law, the shipowners' right to limit liability existed long before the notion was adopted in English law. Codified customary law as practised in the Mediterranean as far back as the 13th and 14th centuries, the *Consolato Del Mare* contained in its 33rd chapter, the rule that "the owners of shares in a vessel are not liable in respect of claims against the vessel in excess of their share."⁴ French legislation in 1681 recognised the principle of limitation of liability as it provided that, " the owners of the vessel shall be responsible for the acts of the master, but shall be discharged by abandoning the vessel and the freight."⁵ Later ordinances were to confirm limitation of liability by abandonment of the ship and pending freight.⁶ This right could be denied the shipowner where claimant could prove that the incident was caused by the *faute personnel*, personal fault of the defendant shipowner. All civil law countries both in Europe and in South America then adopted this rule.

The meeting points between the two major legal systems insofar as the notion of limitation was concerned, lies in the fact that both systems found the necessity of limiting liabilities in respect of shipowners. Secondly, such limitations were calculated on the value of the ship and of the pending freight. The reference made by the civil law system to abandonment does not alter the position.

However, under common law, limitation of liability was considered to be a privilege of the shipowner, but not a right. As such, the defendant who intended to rely on this privilege bore the onus of proving that the incident did not occur as a result of his *actual fault or privity*. Under civil law, the defendant could successfully plead his right to

⁴ Essays on Maritime Legislation Vol. I p. 253

⁵ *Ibid.*

⁶ French Code of Commerce 1807 Article 216

limitation, unless the claimant could prove that the incident was caused by the *faute personnelle*, personal fault of the defendant shipowner.

This distinction between the two systems merits some comments. In English law, the shipowner was denied the right to limit his liability unless he could prove that the incident did not occur as a result of his *actual fault or privity*, thereby connoting blameworthiness. For all intents and purposes, *actual fault or privity* has been judicially interpreted in a way to break limitations. Thus a right to limitation will be denied him even if the incident resulted from something which he reasonably ought to have known or done as in *The Lady Gwendolen*⁷. In this case, the shipmaster had repeatedly sailed at high speed. Due to thick fog and excessive speed, *The Lady Gwendolen* collided with another ship, causing it to sink. The court held that the plaintiff could not invoke the right to limitation. This accident could have been avoided had the ship superintendent examined the ship's log, as he ought to have done.

In ruling on limitations, courts apply the *alter ego* principle, that is, they look beyond the shipmaster to see who, under certain circumstances was responsible for the management of the ship. Thus they impute liability on to the top management of the ship. The *alter ego* doctrine in shipping has become more easy to apply by virtue of the introduction of the "designated person" under the ISM Code.

Again, where the shipowner chooses, or pretends not to have known something the existence of which he ought to have known, and knowledge of which he would have used to prevent an incident, he would be barred from pleading his right to limitation.⁸ For the purposes of this system as well as the CLC, turning a blind eye on something, or refraining from inquiring will suffice as knowledge. *Faute personnelle* could be regarded as much more restrictive. It denotes the doing of something, or actually omitting to do something.

⁷ *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, pp. 340, 344 ,348

⁸ *The Eurysthenes* (1976) 2 Lloyd's Rep. 171,CA

It is worth pointing out that though the two legal systems had somewhat different approaches the international maritime community for various reasons saw the necessity of accepting limitation. This recognition and acceptance led to the creation of global regimes aimed at limiting the liability in 1924 and again in 1957. There is also the global limitation regime embodied in the 1976 Convention on the Limitation of Liability for Maritime Claims (LLMC). Regrettably a discussion of this regime does not fall within the scope of this dissertation. The notion of limitation developed under the two legal systems described above, greatly influenced the concept of limitation of liability with respect to oil pollution damage claims as much as they influenced the global limitation regimes.

6.1.3 Limitation of Liability in Oil Pollution:

The CLC/FUND 1969/71, 1992 Conventions

It should be recalled that the CLC/FUND conventions were built upon three cardinal doctrines; strict liability, limitation of liability and compulsory insurance. The liability of the shipowner for oil pollution damage was strict. There was no need for the victim to prove fault on the part of the shipowner. By itself, this rule was hard on the shipowner. To undermine the rigours of the *Rylands v. Fletcher*⁹ rule, defences such as war or related activities, natural phenomenon, act or omission of a third party, wrongful act of any government, proportionate fault of the victim could erase the shipowner's liabilities.¹⁰ Without doubt these exceptions could bring about a reduction of the victim's chances of recovering any compensation for oil pollution damage. At the same time, a shipowner may find it difficult to invoke these defences, and as such, will be faced with strict liability.

The CLC/FUND subscribed to a limitation regime acknowledging a traditional privilege. Its purpose was two fold; the one to compensate the stringent basis of liability it

⁹ *Rylands v. Fletcher* (1868), L.R.3 H.L 330, (1868), L.R. 1 Ex. 265 pp.270-280

¹⁰ CLC 69 Article III(2) (a-c) Fund 71 Article 4(2)(a),(3), CLC 92 Article III(2)(a-c)

ushered in, and the other, to apportion the burden of oil spills between the shipping and oil importing industries.

Another reason for having limitation of liability was the role of the insurance interest in this domain. By virtue of CLC 1969,¹¹ the shipowner can limit his liability to an aggregate amount for each ton of the ship's tonnage. The same convention extinguishes this entitlement to limitation if the *actual fault or privity* of the owner resulted in the incident.¹²

As regards the right to limitation in the 1992 instruments, the shipowner has an entitlement to limit his liability to an aggregate depending again on the tonnage of the ship¹³. Limitation amounts are set as follows; 3 million Special Drawing Rights (SDR) for vessels of 5000 units of gross tonnage, 3 million SDR, plus 420 SDR per additional unit of gross tonnage for vessels of 5000-140,000 units of gross tonnage, and 59.7 million SDR for vessels of 140,000 units of gross tonnage and above.¹⁴ Unlike its original version, the loss of the right to plead limitation of liability arises not from the *actual fault or privity* of the owner, but only where it is proved "that the damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such a damage would probably result."¹⁵

The interpretation of the wordings of this provision is more onerous on the claimant, as such a claimant is faced with a double-barrelled task. Firstly, he is required to prove that he has suffered damage as a result of the alleged wrongful act or omission of the shipowner. Secondly, he must prove *mens rea* and *actus reus* on the shipowner's part, as if it were penal proceedings, and that the shipowner should have contemplated the occurrence of the damage. In fact, the 92 regime converted the privilege existing under the 69/71 regime into a right, and made it next to impossible for a claimant to impute conduct barring limitation on the shipowner.

¹¹ Civil Liability Convention 1969 Article V (1)

¹² *Ibid.*

¹³ CLC 1992 Article V(1) (a)

¹⁴ *Ibid.* Article V (1) (b)

¹⁵ CLC 92 Article V (2)

Like the 1957 Global Limitation Convention, the 1969/71 CLC/FUND regimes are silent as to the party on whom the onus of proving the absence of *actual fault or privity* lies. All the regimes provide for, is an empowerment to limit liability,¹⁶ as well as conduct that will bar the defendant shipowner from invoking that privilege. They do not require the shipowner to produce any evidence to show absence of *actual fault or privity*. A pitfall of this vacuum is that variations relating to the burden of proof may exist under different national laws. The CLC/FUND regimes may be subjected to varying interpretations on this matter, and as such the principles of law prevalent within the forum before which an action is brought will be mirrored.

Conversely, it can be inferred that, the silence of the 1969/71 CLC/FUND regimes could be construed as meaning that the onus of proving the absence of conduct barring limitations lies on the shipowner. It is incumbent on him to prove that neither he, his crew nor any other person for whom he may have had authority was responsible for the incident. Such an inference could be drawn from the consideration that, the shipowner who elects to lay claim of a privilege to limit liability must be in a position to prove the absence of *actual fault or privity* on his part. Rules of equity will also favour this line of reasoning.

It had been mentioned that the important role that the insurance market was expected to play to render the liability and compensation regimes for oil pollution damage effective was one of the factors that favoured the adoption of the limitation of liability into the CLC/FUND. This role as well as its impact is examined below.

6.2 The Concept of Insurability in Oil Pollution Damage

Rules of strict liability and limitation of liability were born out of the desire of ensuring that the victims of oil pollution damage were promptly and adequately compensated whenever the need arose. This intention would have been defeated where the claimants are faced with a bankrupt shipowner. Furthermore, a ship may be completely

¹⁶ CLC 69 Article V (2)

damaged or wrecked following upon a maritime casualty. Claimants in this situation will find it needless to attach a maritime lien on such a *res*.

To forestall this situation, the CLC/FUND regimes instituted the requirement of compulsory insurance or other financial security on all ships carrying more than 2,000 tons of crude oil as cargo¹⁷. By so doing, the shipowner insures his liabilities *vis-à-vis* third parties arising under the conventions. Within the realm of the CLC/FUND regimes, this is an indemnity insurance, obtainable via P&I Clubs. A right of direct action against the insurer is also recognised.

Although compulsory insurance is not a new concept in international law¹⁸, its use is not frequent. Its principal objective is to cater for third party liabilities. As opposed to ship or cargo insurance where the value of the subject-matter of the insurance contract is known and easily assessed, liability insurance would require that the insurer seriously considers whether or not he is prepared to take the risk of covering uncertainties. Normally, the shipowner can expect better and adequate insurance coverage for third party liabilities if the insurers are certain of, and can calculate the highest limits of the risks they accept to run. The limitation of liability serves to make the insurer's risk assessable, and therefore premia affordable.

By imposing compulsory insurance on the shipowner, the regime ensures that, some evidence of financial responsibility flows from the shipowner. This is a guarantee that the shipowner is in a position to honour any liabilities that he may incur arising under the convention. It is for this reason that the P&I clubs offer a comparatively extensive coverage *vis-à-vis* third party liability than the general insurance market.

To drive home the importance attached to compulsory insurance, all tankers to which this requirement is applicable, are required to be issued a certificate attesting to the

¹⁷ CLC 1969 Article VII (1), CLC 1992 Article VII (1)

¹⁸ International Convention for the Unification of Certain Rules relating to Damage Caused by Aircrafts to Third Parties on the Surface 1933 (The Rome Convention).

appropriate coverage. This responsibility lies with the flag state of the ship. In this way, the shipowner manifests his consent to act as the guarantor for the liabilities arising out of the conventions. To strengthen this provision, contracting states must ensure by providing in their national law that, ships carrying more than 2,000 tons of crude oil in bulk as cargo must have an insurance certificate. In this way, even ships registered in non-contracting states must show proof of P&I coverage insofar as they intend to trade to a contracting state. The significance of this is that, it enables victims of oil pollution damage to bring direct action against the insurer for oil pollution damage. However, even with this requirement, the insurer can still limit his liability under CLC. The threshold of his limitation will not exceed that provided in article V (1) of the convention.

From the preceding, it can be deduced that insurability has ensured the success of the liability and compensation regimes for oil pollution damage. In its absence, the survival of the conventions remains questionable. Strict liability in the absence of financial security to back it up is worthless. Victims faced with an insolvent shipowner would go without compensation. These factors being apart, this writer contends that insurability as employed in the CLC is not flawless.

Firstly, by limiting the size of the tankers entitled to subscribe for compulsory insurance to those carrying more than 2,000 tons of crude oil as cargo, the regimes have exonerated potential polluters from providing evidence of financial security. The wisdom behind this decision could have been motivated by economic considerations. The financial burden imposed by the compulsory insurance regime is heavy. The tonnage limit therefore, may have aimed at exempting small ships from this burden.

Be that as it may, there is no guarantee that oil cannot be discharged or spilled from a tanker carrying some 1,200 tons of crude. Even fewer guarantees can be provided against the possibility that such a spillage will not cause serious pollution damage. In the absence of the compulsory insurance regime, claimants who suffer damage from this category of ships can only seek recourse to national law for recompense if available.

A second shortcoming that can be registered against the regime of compulsory insurance and the notion of insurability is that it gives the insured an implied right to pollute. The intention of this provision may have been good, (insuring liabilities arising out of the convention). However, by subjecting the shipowner under such a stringent financial regime, is tantamount to saying that he has to buy a right to pollute. This is more evident when the rationale behind third party liability insurance is examined. The allegation that insurability provides the shipowner an implied right to pollute is buttressed by the possibility that a claimant can take direct action against the insurer, while the shipowner, especially an insolvent one goes free.

The knowledge that upon the payment of a premium (which constitutes consideration in law) some other entity or person would be legally bound to pay compensation for oil pollution damage, may provide incentive to a owner of an unseaworthy vessel to venture out to the sea. The more unseaworthy a vessel is, the higher the probability that it will succumb to the perils of the sea, and the greater the risk of accidental spillage. On the other hand, it can be argued that most underwriters will provide coverage for a vessel that is classed and certified as seaworthy by a renowned classification society. However, the shipowner's temptation to use a vessel because he has financial back up flowing from the P&I club should not be completely dismissed. The frequent detention of vessels classified as "rust buckets" by port state control officers during port state control inspections can support this contention.

Another factor, which this writer identifies to be more of a concern than a flaw that arises out of the requirement of compulsory insurance, is that, linked to the preservation of interest. As mentioned earlier, risk underwriters will demand that a vessel be appropriately classed and remain classed prior to the provision of the insurance coverage, and during the validity of the coverage. Their pre-occupation is principally that the vessel in question is safe and fit for the purposes for which it is intended, and is therefore linked directly to the safety requirement of the ship, and not the protection of the environment. In this way, their interests are better preserved, as safer ships will mean fewer accidents and even fewer claims for compensation.

On the other hand, the shipowner will be required to pay higher premiums if the P&I Clubs are faced with frequent third party liability claims. To avoid this, the shipowner has an interest to ensure that his vessel is properly maintained. In this way he, as well as the risk underwriter, have an interest to preserve. Should such preservation of interest indirectly lead to the promotion of environmental protection, then the regime of compulsory insurance can be said to have a deterrent effect on the shipowner. As such, it merits its place within the realm of the international liability and compensation regimes. If it is otherwise, then, there is a need to revisit the conventions to give them that effect.

6.3 Limits of the 1992 CLC/FUND Conventions

The CLC 1992 Convention extended the definition of pollution damage, which among other things include "... contamination resulting from the escape or discharge of oil from the ship...for impairment of the environment ...reasonable measures of reinstatement actually undertaken or to be undertaken."¹⁹ This definition embraces damage to the environment, and as such constitutes one of the main hurdles to this convention as explained below.

It should be recalled that one of the main purports of the liability and compensation regimes is to provide swift and adequate compensation to the victims of oil pollution damage. The Fund has been reputed for swift settlements of claims. However, the difficulties that surround the assessment of claims for damage to the environment could result in prolonged uncertainties regarding the total amount of admissible claims. By extension, this is prejudicial to victims with valid claims who will have to experience long delays in the settlement of their claims.

¹⁹ CLC 92 Article I(6) (a), Fund 92 Article 1(2)

According to the provision cited earlier, compensation for damage to the environment is limited to the cost of reinstatement actually undertaken or to be undertaken by the claimant. It follows therefore that where the claimant is unable to undertake restoration or reinstatement measures due to the intensity of the damage, such a claimant would not receive any compensation, even though it is visible that some damage has been suffered. Although the objective of the convention is purely environmental, and not one aimed at enriching government coffers, a situation as that described above is similar to that of letting the loss lie where it falls mentioned earlier. A situation as this may be rare, but an eventuality of this kind should not be ruled out. Furthermore, an immediate assessment of reinstatement measures to be undertaken may fail to reflect long term reinstatement requirements.

By limiting compensation obtainable with respect to damage to the environment to the cost of reinstatement measures actually undertaken or to be undertaken, a dividing line between recoverability and irrecoverability of claims has been drawn. At the same time, this requirement may provide an incentive to contracting states to seek recompense outside the convention insofar as certain claims are concerned, as for example under municipal law. The IOPC Fund has witnessed such a situation in the *Haven*²⁰, *Aegean Sea*²¹ and the *Braer*²² incidents.

CLC 1992 has replaced the requirement of exoneration of liability or limitation of liability from *actual fault or privity* on the shipowner with “personal act or omission committed with the intention to cause such damage, or recklessly and with knowledge that such damage would probably result.”²³ This indicates that it must be proved that the shipowner could have reasonably foreseen the consequences of his act or omission. The onus of proving reasonable foreseeability lies on the claimant. This burden is a heavy one, and has been considered as a *quid pro quo* for the higher limits of liability

²⁰ The Haven incident (Italy, 1991)

²¹ Aegean Sea (Spain, 1992)

²² Braer incident (UK, 1993)

²³ CLC 1992 Article III

introduced by the 92 regime. Until the claimant can discharge this burden, the shipowner can enjoy the right to limit his liability.

Due to the fact that it is difficult for claimants to prove that the shipowner's conduct was such that he cannot rely on his right to limit liability, it is argued that this provision has played favourably into the hands of the insurance market. Some scholars argue that there is a need to abolish limitations, as is the case with other oil pollution liability and compensation regimes. It is alleged that this provision found its way into the convention thanks to third party liability underwriters.

Although the 1992 instruments contain certain flaws, it is generally accepted that its merits by far outweigh its demerits. Among other things, it has expanded the scope of applicability of the regime by providing a wider geographical scope.²⁴ It provides compensation with respect to costs incurred for reasonable preventive measures²⁵ even when no spills occur. It is enough that there was grave and imminent threat of oil pollution damage. Furthermore, spills of bunker oil from unladen tankers are covered as well as those emanating from combination tankers under certain circumstances.

Another advantage introduced by the 1992 instrument was the uplifting of the threshold of compensation by both the CLC and Fund Conventions. They also provide a much more simplified procedure for any further increase.²⁶ The list of persons against whom it is prohibited to bring an action for oil pollution damage has been extended.²⁷

In light of the foregoing observations, it comes as little surprise that the administrators of the 1992 instruments deem it important that more and more states should denounce the original version of the CLC/Fund in favour of the 1992 regime. As more member states denounce the "old regime" in favour of the "new regime", the total quantity of contributing oil, on which contributions are assessed, continues to diminish. The end result will be an increased financial burden on the remaining states.

²⁴ CLC 1992 Article II (a)

²⁵ CLC Article II (b)

²⁶ CLC Article XI Inter:15

²⁷ CLC 1992 Article III (4)

The fear that the 1971 states will be unable to pay compensation in the wake of a major incident owing to the unavailability of funds will be more real as Italy awaits its accession to the 1992 regime on the 16th of September 2000. Her denunciation of the 1971 regime goes operational come October 8th 2000. To date, Italy remains a major contributor to the 69/71 regime.

CHAPTER 7

CONCLUSION

From its very beginnings, the entire notion of liability and compensation for oil pollution damage as embodied in the CLC/FUND has been concerned with the apportionment of liability between the shipping and oil industries on the one hand, and search for a balance between the different interests arising from an oil spill on the other hand. During the 30 years of its existence, the CLC/FUND regimes have covered a lot of ground as far as establishing the framework for attributing liability and the payments of compensation are concerned. This progress can be noted as follows;

- it has moved away from a marked absence of legal responsibility on the part of the shipowner following an oil spill incident to instituting a regime of strict liability;
- it has evolved from inadequate compensation evident in the 1969/71 regime to one that has significantly increased the amount of compensation payable an increase embodied in the 1992 Protocol;
- it has successfully woven an intricate web that has favoured the growth of mutual understanding between the parties liable for oil pollution damage . This, notwithstanding the fact that these parties cry out loud against the weight of their financial burden under the convention. The revised version of the CLC/FUND conventions have introduced even better and higher benefits to claimants as pointed out in chapter 6.

However, the story of the CLC/FUND regimes in both their original and revised versions has not been a complete success story. Most of the demerits of the regime are connected with the vagueness with which certain provisions of the convention have been drafted. The absence of precise definitions has given rise to differences

in interpretations of some of the convention provisions in different jurisdictions. These varied interpretations have prevented the uniform application of the regime.

Apart from the differences in interpretation, another question is beginning to draw public attention. This is related to the objection frequently raised by the IOPC Fund with respect to the ability of governments or agencies acting on their behalf to recover compensation for damage to the environment. The notion of *locus standi* and the concept of *parens patriae* have often been considered by the Fund as not providing governments or agencies acting on their behalf enough standing to bring suit against the Fund for damage to the environment. In fact the Fund contends that *parens patriae* creates a regulatory right in favour of governments to manage natural resources. This right it argues, is distinct from ownership. As such, it does not create a proprietary interest in the natural resources in favour of governments. In the absence of a proprietary interest, a government cannot be heard to espouse an action with respect to oil pollution damage to the environment.

In response to these arguments, governments have contended the contrary. Although this issue is yet to be settled by national courts of member states, it would not be surprising that it will raise great concerns sooner than later. More and more governments are vesting such proprietary interests on themselves through statute. This is more so when one considers the great attention that oil pollution incidents attract from the general public as well as from the mass media.

Considerable debate has raged relating to compensation payable for damage to the environment. The fact that the environment is not tangible is partly responsible for this debate. To many minds, the notion of the environment remains abstract. Worse still, no market value can be attributable to the environment. The difficulties that surround the quantification of damage to the environment and consequently the threshold of payable compensation leaves much to be desired. The elaboration of uniform rules needed for the quantification of damage to the marine environment will not be a bad idea. Here again the existence of uniform rules may not solve the problem, given that, oil spills at different places will have different effects on different marine ecosystems.

It is clear from the provisions of the convention, and from the practices of the Fund that not all types of claims will satisfy the requirement of recoverability. The implication of this is that, not all victims of an oil pollution damage will be in the position to benefit from the regimes. As such, it will not be surprising that questions are raised to that effect. To contend that all claims are recoverable under the convention, will be tantamount to opening the floodgates of litigation. If this were to be allowed, then corresponding increments of the contributions to the Fund should be envisaged. This depends to a large extent on the political will of the member states to the convention. The issue to ascertain here, is to what degree are governments, members of the regime willing to place a heavier economic burden on their oil industries.

There is a possibility that the limitation thresholds instituted by the convention may not meet the claims of certain victims especially where there is a catastrophic spill. This has created apprehension within the ranks of CLC/FUND member states. To show that this could pose a threat to the credibility of the regime, IMO, following a proposal made by the UK is considering a revision of the limitation thresholds. The burden on the oil companies will be further increased. The oil and shipping industries have contributed their quota. Maybe the establishment of a third tier compensation scheme, funded by contributions from environmental conscious groups, with the dual purpose of providing compensation to oil pollution damage victims, and the restoration of damaged environment could be worth considering.

From the preceding discussion, one thing stands out clear. All the different parties and interests involved in the liability and compensation regimes are not completely satisfied. On the one hand, the victims of oil pollution damage are sometimes not fully compensated, especially when their claims are made after a major spill. The case of the *Braer* speaks for itself, at least as far as the 1969/71 regime is concerned. The question that the international community has to answer is where does the regime go from here?

The answer to this question cannot be found in developing either unilateral municipal legislation, or multilateral regional legislation. Only unified global action can effectively redress this situation. If the international regime has come this far, it is because its merits outweigh its demerits. The community of states has been responsible for its success from its inception. It will not be too demanding to assume that responsibility for the sake of future generations. The choice of protecting the marine environment from oil pollution damage is a worthy cause. It represents mankind's response to the higher command. For these reasons, the efforts should continue.

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