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# THE DEEPWATER HORIZON DISASTER: AN EXAMINATION OF THE SPILL'S IMPACT ON THE GAP IN INTERNATIONAL REGULATION OF OIL POLLUTION FROM FIXED PLATFORMS

## INTRODUCTION

On April 20, 2010, the international community learned that the Gulf of Mexico had endured<sup>1</sup> what would ultimately become the world's largest oil spill in history<sup>2</sup> and what President Barack Obama would describe as "the worst environmental disaster America has ever faced."<sup>3</sup> British Petroleum's ("BP") Deepwater Horizon oilrig had exploded off the coast of Louisiana, killing eleven crewmembers.<sup>4</sup> By the time BP was able to engineer a successful means to cap the rig, eighty-six days had passed since the Deepwater Horizon began to expel oil into the environment,<sup>5</sup> and approximately 185 million gallons of crude oil had escaped into the Gulf of Mexico and the surrounding waters.<sup>6</sup> Oil leaked continuously from BP's Deepwater Horizon rig for approximately three months, causing extensive damage to the environment and devastating Gulf Coast tourism and fishing industries, especially those of Florida and Louisiana.<sup>7</sup>

Although the Deepwater Horizon exploded off the coast of the United States, hundreds of miles from any other country and with its greatest effects on the economies and environments of the Gulf Coast states, oil spills have traditionally been international concerns.<sup>8</sup> Historically, due to sea currents' abilities to easily transport oil slicks from their origin to neighboring countries'

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<sup>1</sup> Kate Galbraith, *Gap in Rules on Oil Spills from Wells*, INT'L HERALD TRIB., May 17, 2010, at 20, <http://www.nytimes.com/2010/05/17/business/energy-environment/17green.html>.

<sup>2</sup> Justin Gillis & Leslie Kaufman, *Oil Spill Calculations Stir Debate on Damage*, N.Y. TIMES, Aug. 5, 2010, at A16.

<sup>3</sup> Justin Gillis, *Where Gulf Spill Might Place on the Roll of Great Disasters*, N.Y. TIMES, June 19, 2010, at A1.

<sup>4</sup> Robbie Brown, *Official Denies BP Put Cost Ahead of Safety at Oil Rig*, N.Y. TIMES, July 23, 2010, at A12.

<sup>5</sup> Campbell Robertson & Henry Fountain, *BP Caps Its Leaking Well, Stopping the Oil After 86 Days*, N.Y. TIMES, July 16, 2010, at A1. The rig was finally capped on July 15, 2010. *Id.*

<sup>6</sup> Elizabeth Wilson, *Oil Spill's Size Swells*, CHEM. & ENG'G NEWS, Sept. 27, 2010, at 14.

<sup>7</sup> *Id.*

<sup>8</sup> Galbraith, *supra* note 1.

shores, states have recognized that oil spills involve important international responsibilities concerning economic, environmental, and diplomatic relations.<sup>9</sup> For example, in 2009, a Thai-owned oil well leaked off the coast of Australia, and caused a twenty-five mile by eighty-five mile oil slick that had significant impacts on both Indonesia and East Timor.<sup>10</sup> To direct the international prevention and regulation of such international oil spills, states have implemented multiple regional agreements and global conventions through the formation of the International Maritime Organization (“IMO”).<sup>11</sup>

While an extensive body of international law concerning oil pollution<sup>12</sup> has emerged, a significant gap still exists in the international regulation of such pollution. The current multilateral maritime conventions apply “primarily or exclusively to accidents involving tankers,”<sup>13</sup> failing to take into account pollution from fixed platforms like the Deepwater Horizon. Moreover, while two global conventions—addressed below in Part II.A.1—met in 1992 to address the growing international implications and dangers of oil spills caused by tankers,<sup>14</sup> the international community has yet to establish a global convention that specifically addresses the dangers of, and possible effective regulations for, oil spills from fixed platforms.<sup>15</sup>

The conventions currently in force are therefore not applicable to accidents, like the Deepwater Horizon disaster, which involve an explosion of or leak from a fixed, offshore oil platform.<sup>16</sup> Because “tankers move across international boundaries all the time” and “platforms remain fixed in place,” strict regulation of fixed platforms on an international scale has not yet been

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<sup>9</sup> *Id.*

<sup>10</sup> Meraiah Foley, *As Oil Enriches Australia, Spill Is Seen as a Warning*, N.Y. TIMES, Sept. 28, 2009, at A6; see also Galbraith, *supra* note 1. For example, the spill “seriously affected” Indonesian fishermen when the oil slick entered into their fishing grounds and negatively impacted their livelihood through a resulting lack of catch. *East Timor Wants Compo for Oil Spill Fallout*, ABC NEWS (Nov. 5, 2009, 7:15 PM), <http://www.abc.net.au/news/stories/2009/11/05/2734579.htm>.

<sup>11</sup> Galbraith, *supra* note 1.

<sup>12</sup> See *infra* Part I for the relevant conventions and agreements.

<sup>13</sup> Galbraith, *supra* note 1; see also Yee Huang, *International Law Implications of the BP Oil Spill*, CPRBLOG (June 9, 2010), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=FBF393AA-EE0A-FF0C-695B9BA163B50BDB>.

<sup>14</sup> International Maritime Organization Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, *opened for signature* Jan. 15, 1993, 1956 U.N.T.S. 255 [hereinafter 1992 CLC]; International Maritime Organization Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *opened for signature* Jan. 15, 1993, 1953 U.N.T.S. 373 [hereinafter 1992 Fund]; see also Galbraith, *supra* note 1.

<sup>15</sup> Galbraith, *supra* note 1.

<sup>16</sup> See *id.*; *infra* Part II.A.1.

successfully achieved.<sup>17</sup> The United Nations Convention on the Law of the Sea (“UNCLOS”)<sup>18</sup> comes closest to regulating platform pollution by addressing fixed platforms in its statutory language,<sup>19</sup> but its strength, addressed in Part I.B below, mainly rests in its “framework for international cooperation and its attempt to harmonize standards,”<sup>20</sup> rather than in its implementation of a uniform, international liability standard.

In order to compensate for this lack of codified regulation of fixed platform pollution, operators in the oil and shipping industries have created “private compensation regimes” such as the International Oil Pollution Compensation Funds (“IOPC”) and the Offshore Pollution Liability Association (“OPOL”).<sup>21</sup> These operators have voluntarily bound themselves to regulations implemented by private compensation regimes, which ensure that violators are held strictly liable for any oil pollution emitted by their equipment.<sup>22</sup> IOPC and OPOL collect damages from the liable party and detail in their agreements exactly how the injured parties may receive compensation.<sup>23</sup> Importantly, however, the agreements of both IOPC and OPOL place caps on the level of compensation that the regimes can collect per party, per incident, and per year.<sup>24</sup> Therefore, if a party to IOPC or OPOL were to cause a spill that cost more than its relevant, private compensation regime’s total liability limits, not all injured claimants would be able to obtain their due compensations.

As is explained below, the current collection scheme of due compensations for such accidents leaves victims injured by oil pollution at the mercy of either private compensation regimes or those limited, international agreements

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<sup>17</sup> See Galbraith, *supra* note 1.

<sup>18</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>19</sup> *Id.* art. 194, para. 3.

<sup>20</sup> See Huang, *supra* note 13.

<sup>21</sup> See *Introduction—The International Oil Pollution Compensation Funds*, INT’L OIL POLLUTION COMPENSATION FUNDS, <http://www.iopcfund.org/intro.htm> (last visited Oct. 17, 2011) [hereinafter *IOPC Introduction*]; *About OPOL*, OPOL—OFFSHORE POLLUTION LIABILITY ASS’N LTD, <http://www.opol.org.uk/about.htm> (last visited Oct. 17, 2011); SECRETARIAT OF THE INT’L OIL POLLUTION COMP. FUNDS, THE INTERNATIONAL REGIME FOR COMPENSATION FOR OIL POLLUTION DAMAGE—EXPLANATORY NOTE 1 (2011) [hereinafter EXPLANATORY NOTE], available at <http://www.iopcfund.org/npdf/genE.pdf>.

<sup>22</sup> See *IOPC Introduction*, *supra* note 21; *About OPOL*, *supra* note 21; EXPLANATORY NOTE, *supra* note 21, at 1.

<sup>23</sup> See *IOPC Introduction*, *supra* note 21; *About OPOL*, *supra* note 21; EXPLANATORY NOTE, *supra* note 21, at 1.

<sup>24</sup> See *IOPC Introduction*, *supra* note 21; *About OPOL*, *supra* note 21; EXPLANATORY NOTE, *supra* note 21, at 1.

currently in effect.<sup>25</sup> This arrangement is deficient for two reasons. First, compensation caps of private compensation regimes fail to encapsulate fully the damages incurred by these disasters, forcing innocent victims in the surrounding international environment to bear the remaining costs of repair and revitalization.<sup>26</sup> Second, the current international agreements fail to address adequately pollution from fixed platforms.<sup>27</sup> Therefore, it is important to examine how best to fill this gap in international law so that those most responsible and best able to absorb the cost of the accident will be held liable for such damages; otherwise, the innocent consumer will be forced to shoulder this undue burden.

In an effort to propose a solution that would alleviate this inadequacy, this Comment evaluates this “gap” in international law and the degree to which it is filled by private compensation regimes such as IOPC and OPOL. To this end, this Comment examines the Deepwater Horizon disaster’s impact on the current international agreements controlling oil pollution. As the largest oil spill in history, the Deepwater Horizon explosion has put to the test the effectiveness of compensation caps enacted by private compensation regimes and reemphasized the importance of enacting a global convention on oil pollution from fixed platforms. This Comment also examines the Deepwater Horizon disaster’s impact on both private compensation regimes’ regulations and liability caps, and on the international community’s recent reevaluation of the importance of a global convention specifically addressing fixed platforms. This Comment then argues that a global treaty—which addresses the international implications of oil spills from fixed platforms and assigns liability in a manner similar to those enforced by international conventions on tanker pollution and similar, regional agreements—is the most logical solution to fill this gap in international law and to create uniform, consistent liabilities regulating such environmental disasters.

Part I summarizes the current status of relevant international laws that govern both tanker and fixed platform oil spills, including the Convention for the Prevention of Pollution from Ships<sup>28</sup> and UNCLOS. Part II provides a

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<sup>25</sup> See *infra* Parts I–II.

<sup>26</sup> See *infra* Part III.B.1.

<sup>27</sup> See *infra* Part I.

<sup>28</sup> International Convention for the Prevention of Pollution from Ships, *done* Nov. 2, 1973, 1340 U.N.T.S. 184, *modified by* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships of November 2, 1973, *opened for signature* Feb. 17, 1978, 1340 U.N.T.S. 61 [hereinafter MARPOL 73/78].

general overview of the two private compensation regimes mentioned above—IOPC and OPOL—examines the changes that have been made to these regimes over the decades, and questions the motivations behind these changes. Part III analyzes the Deepwater Horizon disaster’s impact on both IOPC and OPOL and their current, established frameworks for regulating the international effects of oil pollution. It indicates that the Deepwater Horizon disaster has already affected the agreements of OPOL, and has begun to alter opinions concerning the need for a global treaty on fixed platform pollution. In addition, Part III argues that the routine increases in the compensation caps that occur after every major oil disaster in private compensation regimes simply do not effectively regulate pollution by fixed platforms. It instead proposes that, in light of the extensive Deepwater Horizon spill, a treaty—global in jurisdiction—that imposes strict liability on operators of fixed platforms is necessary to prevent, regulate, and maintain liability for such pollution.

#### I. AN OVERVIEW OF RELEVANT INTERNATIONAL LAW CURRENTLY GOVERNING OIL POLLUTION

To effectively evaluate the Deepwater Horizon disaster’s impact on international law, it is necessary to first understand the legal environment in which this disaster occurred. Therefore, an examination of the relevant international law currently addressing oil pollution from both ships and tankers follows.

##### A. *The International Convention on the Prevention of Pollution from Ships*

In 1973, the IMO promoted the International Convention for the Prevention of Pollution from Ships, and, in 1978, modified this convention with the Protocol of 1978 (collectively, “MARPOL 73/78”).<sup>29</sup> MARPOL 73/78 prohibits all “oil tankers, cruise ships, general cargo and container vessels, tugs, ferries, yachts and small pleasure craft” from releasing substances that would pollute the marine environment.<sup>30</sup> Annex I of MARPOL 73/78 regulates the discharge of oil and allows a port state, upon detecting a violation, to detain

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<sup>29</sup> *Id.*; see also John R. Lethbridge, *MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships)* (Transp., Water & Urban Dev. Dep’t, World Bank, Transport No. PS-4, 1991), available at <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1119275973157/td-ps4.pdf>.

<sup>30</sup> See Lethbridge, *supra* note 29.

the violating ship until it is found to comply with MARPOL 73/78.<sup>31</sup> Currently, 150 states are parties to MARPOL 73/78.<sup>32</sup>

Enforcement of MARPOL 73/78 has proven difficult, however, because this convention lacks provisions that specifically detail how a port state may detain an offending ship.<sup>33</sup> Additionally, certain jurisdictional issues further attenuate MARPOL 73/78's enforceability.<sup>34</sup> For example, port and coastal states affected by a violating ship merely have the authority to inform a flag state of its ship's violation; flag states, however, are averse to prosecuting their own ships for MARPOL violations.<sup>35</sup> IMO has recognized this significant ineffectiveness, as is witnessed in flag states' lack of convictions of reported ships.<sup>36</sup> Therefore, due to its weak enforceability provisions, MARPOL 73/78 does not provide a strong mechanism under which international oil disasters like the Deepwater Horizon can be regulated.

### *B. The United Nations Convention on the Law of the Sea*

In addition to MARPOL, states are also bound by UNCLOS, which is directly applicable to disasters like the Deepwater Horizon spill. In 1994, UNCLOS came into force.<sup>37</sup> To date, 156 countries have ratified the treaty.<sup>38</sup> The United States is not a party to the convention,<sup>39</sup> but many of UNCLOS'

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<sup>31</sup> See MARPOL 73/78, *supra* note 28, Annex I, reg. 4, para. 3(d); see also Rebecca Becker, Note, *MARPOL 73/78: An Overview in International Environmental Enforcement*, 10 GEO. INT'L ENVTL. L. REV. 625, 628–29 (1998).

<sup>32</sup> See INT'L MAR. ORG., STATUS OF CONVENTIONS SUMMARY (2011), <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Summary%20of%20Status.xls>. The United States is one of these parties. *Id.*

<sup>33</sup> See MARPOL 73/78, *supra* note 28, Annex I, reg. 4, para. 3(d); see also Becker, *supra* note 31, at 629. MARPOL simply states that the "Port State . . . shall take such steps as will ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the nearest appropriate repair yard available without presenting an unreasonable threat of harm to the marine environment." MARPOL 73/78, *supra* note 28, Annex I, reg. 4, para. 3(d).

<sup>34</sup> MARPOL 73/78, *supra* note 28; see also Becker, *supra* note 31, at 631.

<sup>35</sup> See Becker, *supra* note 31, at 631, 632–33; MARPOL 73/78, *supra* note 28.

<sup>36</sup> Becker, *supra* note 31, at 633 ("[O]ut of 1000 alleged violations that were reported to the IMO, 534 represented situations in which the flag states had not complied with this notification requirement. Of the 206 cases that reported some type of action taken, 111 found the vessel innocent or unprosecutable due to insufficient evidence. Seventy-seven of the cases resulted in fines, eight resulted in warnings, and ten resulted in unspecified actions." (citations omitted)).

<sup>37</sup> Scott J. Shackelford, *Was Selden Right? The Expansion of Closed Seas and Its Consequences*, 47 STAN. J. INT'L L. 1, 21 (2011).

<sup>38</sup> Huang, *supra* note 13.

<sup>39</sup> *Id.*

provisions are considered customary international law;<sup>40</sup> this fact thus provides the very avenue by which nonparties such as the United States can be bound.<sup>41</sup> Therefore, because UNCLOS' customs are accepted as binding international law, these provisions can bind even those countries, including the United States, that have not ratified the convention.

Article 194 of UNCLOS requires that ratifying countries "take all measures necessary to prevent, reduce, and control pollution of the marine environment from any source" and "ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."<sup>42</sup> Although UNCLOS' pollution articles predominantly discuss the regulation of oil pollution from vessels,<sup>43</sup> Article 194(3) importantly lists as under its control these "installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil,"<sup>44</sup> and this definition therefore includes the Deepwater Horizon as one of the convention's regulated facilities. In an attempt to ensure compliance from ratifying countries, UNCLOS mandates that these countries "adopt laws or regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities"<sup>45</sup> and further states that such laws "shall be no less effective than international rules, standards, and recommended practices and procedures."<sup>46</sup>

Although UNCLOS directly addresses international regulation of fixed, offshore drilling platforms like the Deepwater Horizon, and thus is the most comprehensive, current international treaty for oil pollution, its weakness lies in that it merely requires states to pass domestic laws that will monitor fixed platform pollution.<sup>47</sup> It therefore "lacks definitive procedures for determining liability, guaranteeing compensation, and enforcing the adoption of international rules" if a spill or explosion, caused by one state and affecting

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<sup>40</sup> *Id.* Customary international law is "evidence of a general practice accepted as law." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16 (2d ed. 2006) (quoting Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]).

<sup>41</sup> ICJ Statute, *supra* note 40; *see* BEDERMAN, *supra* note 40, at 16.

<sup>42</sup> UNCLOS, *supra* note 18, arts. 194(1)–(2).

<sup>43</sup> *See* Melissa B. Cates, Comment, *Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability*, 21 SAN DIEGO L. REV. 691, 695–96 (1984).

<sup>44</sup> UNCLOS, *supra* note 18, art. 194(3)(c).

<sup>45</sup> *Id.* art. 208

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

another state, were to occur.<sup>48</sup> Unlike MARPOL,<sup>49</sup> UNCLOS does not provide coastal or port states with any jurisdiction over pollution matters or with any other, specific rights to act upon or report to an international regulatory body if violations stemming from a fixed platform should affect a neighboring state.<sup>50</sup> UNCLOS, instead, relies solely on domestic laws, which are implemented by individual states and coupled with the international cooperation of those states, to enforce its provisions.<sup>51</sup>

Additionally, because UNCLOS leaves the codification of these laws to the discretion of individual state governments, it fails to provide adequately for a defined, international pollution standard or an international enforcement body that would establish whether these domestic laws sufficiently regulate international oil pollution.<sup>52</sup> As scholar Barney T. Levantino states, “an effective regime to prevent pollution of the oceans requires, in addition to the imposition of obligations on parties that use the oceans, the establishment of an authority to enforce these obligations with respect to violations which occur outside the jurisdiction of any particular state.”<sup>53</sup> Without an international regulatory body or defined standard of pollution, the responsibility to regulate pollution from platforms is placed on individual states, with independent regulatory schemes, and thus the international cooperation for which UNCLOS strives is lost.<sup>54</sup> Therefore, although UNCLOS is progressive in globally addressing the increasing prevalence of offshore drilling (and its potentially large impact on oil pollution), it yet lacks the specificity in international regulation and punishment to be a viable international treaty with the power to cover adequately pollution from fixed platforms.

## II. AN OVERVIEW OF PRIVATE COMPENSATION REGIMES

Although this legal background is instructive in understanding state liability for pollution, it is also important to look to the pertinent, private compensation regimes that were in place at the time of the Deepwater Horizon disaster. This Comment discusses below the implementation and subsequent

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<sup>48</sup> Cates, *supra* note 43, at 694.

<sup>49</sup> See MARPOL 73/78, *supra* note 28, Annex I.

<sup>50</sup> For UNCLOS' implementation of domestic remedies as opposed to a single, comprehensive international standard, see UNCLOS, *supra* note 18, art. 208.

<sup>51</sup> *Id.* arts. 208(1), (5); see Huang, *supra* note 13.

<sup>52</sup> Cates, *supra* note 43, at 694.

<sup>53</sup> Barney T. Levantino, *Protection of the High Seas from Operational Oil Pollution: A Proposal*, 6 *FORDHAM INT'L L.J.* 72, 89 (1982).

<sup>54</sup> See Cates, *supra* note 43, at 695.

historical development of both the private compensation regime for vessels—IOPC—and the private compensation regime for fixed platforms and offshore drilling—OPOL. To facilitate an understanding of the Deepwater Horizon’s effect on private compensation regimes, this Comment first details the specific agreements and regulations of each private compensation regime.

## A. *The International Oil Pollution Compensation Funds*

### 1. *Structure and Function of IOPC*

The International Oil Pollution Compensation Funds is a private compensation regime that, in the event of an oil spill from a vessel, imposes a liability scheme on its member organizations.<sup>55</sup> It originated from two international conventions: the 1969 International Convention on Civil Liability for Oil Pollution (the “1969 CLC”) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the “1971 Fund”).<sup>56</sup> The 1969 CLC covered pollution damage that occurred only in the territory or territorial sea of a party state and limited its scope to pollution from tankers.<sup>57</sup> It capped liability at either \$201 per ship’s tonnage or \$21.2 million, whichever amount was lower.<sup>58</sup> The 1971 Fund provided for \$95 million in total compensation for victims of such pollution.<sup>59</sup> This liability constituted funds covered by both the ship owner and the 1971 Fund.<sup>60</sup>

These conventions were subsequently amended in 1992 with two protocols—the 1992 Civil Liability Convention (the “1992 CLC”) and the 1992 Fund Convention (the “1992 Fund”).<sup>61</sup> Following the advent of these protocols, many states signed the 1992 CLC and subsequently denounced the 1969 CLC, and, in May of 2002, the 1971 Fund ceased to be enforceable

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<sup>55</sup> *IOPC Introduction*, *supra* note 21.

<sup>56</sup> International Convention on Civil Liability for Oil Pollution Damage, *adopted* Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter 1969 CLC]; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *adopted* Dec. 18, 1971, 1110 U.N.T.S. 57 [hereinafter 1971 Fund]; *see also* EXPLANATORY NOTE, *supra* note 21, at 1.

<sup>57</sup> 1969 CLC, *supra* note 56, arts. II, III(1). The convention defines “ship” as “any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.” *Id.* art. I(1); *see also* EXPLANATORY NOTE, *supra* note 21, at 7.

<sup>58</sup> 1969 CLC, *supra* note 52, art. V(1); *see also* EXPLANATORY NOTE, *supra* note 21, at 7.

<sup>59</sup> 1969 CLC, *supra* note 52, art. V(1); *see also* EXPLANATORY NOTE, *supra* note 21, at 7.

<sup>60</sup> 1969 CLC, *supra* note 52, art. V(1); *see also* EXPLANATORY NOTE, *supra* note 21, at 7.

<sup>61</sup> 1992 CLC, *supra* note 14; 1992 Fund, *supra* note 14; *see also* EXPLANATORY NOTE, *supra* note 21, at 1.

against its parties.<sup>62</sup> The 1992 CLC and 1992 Fund, which entered into force in 1996, established IOPC for compensation for pollution from vessels.<sup>63</sup> IOPC draws its financing from any person who received more than 150,000 tons of crude and contributing oil from a state that is a party to the 1992 CLC.<sup>64</sup>

The 1992 CLC holds its ship owners strictly liable for oil pollution caused by their vessels.<sup>65</sup> In other words, even if a ship owner is not found to be at fault, the 1992 CLC will hold that person liable for the tanker's damage, absent: (1) an act of war or natural disaster, (2) third party sabotage, or (3) negligence by public authorities in maintaining navigational aids.<sup>66</sup> Because liability is calculated proportionally to the tonnage of the offending ship, the extent to which an individual ship owner may be held liable is limited.<sup>67</sup> Additionally, the 1992 CLC is more expansive than its predecessors because it applies to damage that occurs in a member state's territory, territorial sea, or exclusive economic zone ("EEZ").<sup>68</sup> A ship owner is therefore now potentially liable to a member state up to 200 nautical miles from the coast of any member state.<sup>69</sup>

The 1992 Fund established IOPC to satisfy damage claims from tanker pollution that a party state may suffer but that the 1992 CLC cannot fully compensate under its liability caps.<sup>70</sup> Such partial compensation can arise under the 1992 CLC as a result of any of the following conditions: (1) the ship owner has invoked one of the exemptions under the 1992 CLC,<sup>71</sup> (2) the ship

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<sup>62</sup> EXPLANATORY NOTE, *supra* note 21, at 8. Ninety-eight states have signed both the 1992 CLC and the 1992 Fund, and nineteen states are members of the 1992 CLC but not the 1992 Fund. *Id.*

<sup>63</sup> 1992 Fund, *supra* note 14, art. XXVII(2); *see also* EXPLANATORY NOTE, *supra* note 21, at 3.

<sup>64</sup> 1992 Fund, *supra* note 14, art. XII; *see also* EXPLANATORY NOTE, *supra* note 21, at 5.

<sup>65</sup> 1992 CLC, *supra* note 14, art. IV; *see also* EXPLANATORY NOTE, *supra* note 21, at 2. The 1969 CLC defines a ship owner as

a person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company.

1969 CLC, *supra* note 56, art. I(3).

<sup>66</sup> 1992 CLC, *supra* note 14, arts. IV(2)–(3); *see also* EXPLANATORY NOTE, *supra* note 21, at 2.

<sup>67</sup> 1992 CLC, *supra* note 14, art. VI; *see also* EXPLANATORY NOTE, *supra* note 21, at 2.

<sup>68</sup> 1992 CLC, *supra* note 14, art. III; *see also* EXPLANATORY NOTE, *supra* note 21, at 2. The EEZ was not included in the 1969 CLC and the 1971 Fund's jurisdiction. *See* 1969 CLC, *supra* note 56, arts. II, III.

<sup>69</sup> For a definition of the EEZ, *see* UNCLOS, *supra* note 18, arts. 55–57.

<sup>70</sup> EXPLANATORY NOTE, *supra* note 21, at 3.

<sup>71</sup> These exemptions arise when an owner can prove that the damage resulted from: (1) "an act of war, hostilities, civil war, insurrection or a natural phenomenon of exceptional, inevitable, and irresistible character," (2) "an act or omission done with intent to cause damage by a third party," or (3) "the negligence

owner, with his insurance, is unable to financially repay the damages demanded of him, or (3) the damage has exceeded the ship owner's liability under the 1992 CLC based on the violating ship's total tonnage.<sup>72</sup> Prior to November 1, 2003, the 1992 Fund capped ship owners' total liability at \$204.5 million.<sup>73</sup> On November 1, 2003, the 1992 Fund was prospectively amended, with a more than fifty percent increase in compensation, to include a more comprehensive liability cap of \$307.5 million in total liability.<sup>74</sup>

In March of 2005, the 1992 Fund again increased states' available funds when the IOPC implemented the 2003 Supplemental Fund (the "Supplemental Fund").<sup>75</sup> Parties to the 1992 CLC were also given the option to enter into this additional, supplemental monetary resource.<sup>76</sup> If a party agreed to contribute to the Supplemental Fund, that fund would, in turn, further increase a party's total liability to approximately \$1.2 billion per incident.<sup>77</sup> Despite this substantial increase in liability, states still have the same incentive to sign the Supplemental Fund as would have motivated them to join the 1992 CLC and the 1992 Fund:

If a pollution incident occurs involving a tanker, compensation is available to governments or other authorities which have incurred costs for clean-up operations or preventive measures and to private bodies or individuals who have suffered damage as a result of the pollution . . . provided that the damage is suffered within a State Party.<sup>78</sup>

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or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function." 1992 CLC, *supra* note 14, art. III(2); *see also supra* note 58 and accompanying text.

<sup>72</sup> EXPLANATORY NOTE, *supra* note 21, at 3.

<sup>73</sup> 1992 Fund, *supra* note 14, art. VI; *see also* EXPLANATORY NOTE, *supra* note 21, at 3.

<sup>74</sup> EXPLANATORY NOTE, *supra* note 21, at 3.

<sup>75</sup> Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 16, 2003, *reprinted in* INT'L OIL POLLUTION COMP. FUNDS, LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE: TEXTS OF THE 1992 CONVENTIONS AND THE SUPPLEMENTARY FUND PROTOCOL 53–68 (2005) [hereinafter SUPPLEMENTAL FUND], *available at* [www.iopcfund.org/npdf/Conventions%20English.pdf](http://www.iopcfund.org/npdf/Conventions%20English.pdf); *see also* EXPLANATORY NOTE, *supra* note 21, at 5.

<sup>76</sup> EXPLANATORY NOTE, *supra* note 21, at 5.

<sup>77</sup> SUPPLEMENTAL FUND, *supra* note 75, art. IV(2); *see also* CLC and Fund Convention, ITOPF, <http://www.itopf.com/spill-compensation/clc-fund-convention> (last visited Nov. 11, 2011). This \$1.2 billion includes the amounts available under the 1992 CLC. *See id.*

<sup>78</sup> EXPLANATORY NOTE, *supra* note 21, at 7.

To date, twenty-one state parties are members of the Supplemental Fund.<sup>79</sup> Additionally, as of the September 2010 date of the IOPC Secretariat's report, no party has requested to withdraw compensatory funds from the Supplemental Fund.<sup>80</sup>

Importantly, the Supplemental Fund is strictly a supplement to the 1992 Fund. It continues to cover the same accidents and events that the 1992 Fund already covers—namely pollution by tankers and other vessels.<sup>81</sup> Therefore, because the explosion involved oil pollution from an offshore platform and not a vessel, victims of the Deepwater Horizon disaster are not eligible to obtain funds from the Supplemental Fund.

## 2. *Amendments to IOPC Protocols Prior to the Deepwater Horizon Disaster*

From its inception and throughout its history, IOPC's liability caps have been amended in response to each major tanker disaster. This repeated action, evidenced in the historical analysis below, reflects the IOPC conventions' constant inability to properly compensate victims of large-scale tanker pollution. As discussed previously in Part II.A.1, IOPC originally derived from the 1969 and 1971 pollution liability conventions. Prior to 1969, a vessel's tonnage governed a ship owner's total liability for damage caused by oil pollution.<sup>82</sup> In 1967, the *Torrey Canyon*, a British Petroleum supertanker carrying 119,000 tons of crude oil, shipwrecked off the coast of England.<sup>83</sup> As the largest shipwreck of its time, costing approximately \$23 million, the *Torrey Canyon* disaster surpassed the compensation scheme laid out in the contemporary treaty's tonnage-liability rules<sup>84</sup> and quickly became the catalyst

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<sup>79</sup> These parties are Barbados, Belgium, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, and the United Kingdom. See EXPLANATORY NOTE, *supra* note 21, at 10.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> SUPPLEMENTAL FUND, *supra* note 75, at 3.

<sup>82</sup> International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships art. iii, *done* Oct. 10, 1957, [1981] A.T.S. 2 [hereinafter 1957 Convention]; see also Michael Faure & Wang Hui, *The International Regimes for the Compensation of Oil-Pollution Damage: Are They Effective?*, 12 REV. EURO. COMMUNITY & INT'L ENVIRO. L. 242, 242 (2003).

<sup>83</sup> CONG. OF THE U.S. OFFICE OF TECH. ASSESSMENT, OIL TRANSPORTATION BY TANKERS: AN ANALYSIS OF MARINE POLLUTION AND SAFETY MEASURES 1, 34, 285 (1975).

<sup>84</sup> *Id.* at 286.

for the first major, reactive change in liability caps—the creation of the 1969 and 1971 conventions and the IOPC compensation regime.<sup>85</sup>

Then, in 1978, the *Amoco Cadiz* spill revealed the 1969 CLC and 1971 Fund's "ineffective and inadequate" handling of "major oil spill[s]."<sup>86</sup> The American-owned *Amoco Cadiz* sank off the coast of France and released 1.6 million barrels of oil and affected approximately 125 miles of French coastline.<sup>87</sup> It became the largest oil spill to date, and the disaster caused damages reportedly valued at around \$282 million.<sup>88</sup> The 1969 and 1971 conventions covered liability up to only \$95 million,<sup>89</sup> and thus, within ten years of their drafting, these conventions proved highly inadequate in responding to the exact disasters they were written to cover. The accident led to the drafting of 1984 protocols that again increased liability limits.<sup>90</sup> These amendments never entered into force, however, because they were contingent upon the participation of the United States.<sup>91</sup> The United States disagreed with the 1984 amendments' versions of limited liability and therefore declined to sign the protocols; thus, this next reactive mechanism was rendered ineffective.<sup>92</sup>

In 1991, the Cypriot-owned *Amoco Milford Haven*, carrying nearly a million barrels of oil, exploded off the coast of northern Italy.<sup>93</sup> Six Cypriot crewmembers were killed, and approximately 290,000 barrels of oil escaped into the Mediterranean Sea, affecting both Italy and France.<sup>94</sup> Following both

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<sup>85</sup> Faure & Hui, *supra* note 82, at 243; Agustin Blanco-Bazan, *The Erika Casualty, Legal Issues from the IMO View 2* (International Union of Marine Insurance 2000 Conference, London, Liability Workshop Paper, 2000). Blanco-Bazan states that, as a result of the *Torrey Canyon* disaster, the IMO realized the "need to adopt a treaty containing international public law rules to regulate the right of the coastal State to intervene in the high seas in cases of serious shipping accidents involving pollution damage caused by oil and other hazardous and noxious substances" and that "a private law treaty [was] also needed in order to regulate a global liability and compensation regime for victims of oil pollution damage." *Id.*

<sup>86</sup> Faure & Hui, *supra* note 82, at 245.

<sup>87</sup> *The World's Worst Oil Disasters: 8. Amoco Cadiz*, CNBC, [http://www.cnbc.com/id/36851250/The\\_World\\_s\\_Worst\\_Oil\\_Disasters?slide=4](http://www.cnbc.com/id/36851250/The_World_s_Worst_Oil_Disasters?slide=4) (last visited Oct. 15, 2011).

<sup>88</sup> *Spill Compensation: Cost of Spills*, ITOPIF, <http://www.itopf.com/spill-compensation/cost-of-spills> (last visited Oct. 15, 2011).

<sup>89</sup> 1969 CLC, *supra* note 56, art. V(1); 1971 Fund, *supra* note 56, art. V(1); *see also* EXPLANATORY NOTE, *supra* note 21, at 7.

<sup>90</sup> Faure & Hui, *supra* note 82, at 245.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *The World's Worst Oil Disasters: 10. MT Haven*, CNBC, [http://www.cnbc.com/id/36851250/The\\_World\\_s\\_Worst\\_Oil\\_Disasters?slide=2](http://www.cnbc.com/id/36851250/The_World_s_Worst_Oil_Disasters?slide=2) (last visited Oct. 15, 2011).

<sup>94</sup> *Id.*

the *Haven* and *Amoco Cadiz* disasters, the European members of IOPC again demanded higher liability caps so that they would be protected from disasters like these, which were proving more internationally prevalent.<sup>95</sup> The regime responded with the 1992 CLC and 1992 Fund, which were almost identical in substance and function to the 1984 protocols, except that these newer protocols lacked the prior, conditional cooperation of the United States.<sup>96</sup> The 1992 protocols continued to impose strict liability on ship owners, and this liability, linked to tonnage, could reach up to \$76.5 million.<sup>97</sup>

Finally, in 2000, IOPC reacted to the *Nakhodka* and *Erika* spills, discussed immediately below, and thus implemented the final changes to its protocols before the 2010 Deepwater Horizon disaster.<sup>98</sup> In 1997, a Russian-owned vessel, the *Nakhodka*, wrecked off the coast of Japan and dispersed approximately 50,000 tons of oil.<sup>99</sup> Clean-up claims alone reached \$86 million, and total pollution and economic damages have not yet been finalized.<sup>100</sup> Only two years later, Italy's *Erika* spilled over 20,000 tons of oil and polluted approximately 250 miles of French coastline.<sup>101</sup> Although the exact level of damages has not been calculated, the French oil company, Total, has already been assessed approximately \$500,000 for negligent maintenance of the ship.<sup>102</sup> Final damage estimates are expected to exceed compensation available under the 1992 CLC and 1992 Fund.<sup>103</sup> Responding to these extensive pollution incidents, IOPC increased the total liability of an individual party under the 1992 CLC and Fund by another fifty percent,<sup>104</sup> rendering parties strictly liable for up to \$115 million in compensation damages for oil pollution from tankers.<sup>105</sup>

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<sup>95</sup> Faure & Hui, *supra* note 82, at 246.

<sup>96</sup> *Id.*

<sup>97</sup> 1992 CLC, *supra* note 14, art. 6(1); *see* Faure & Hui, *supra* note 82, at 246.

<sup>98</sup> Faure & Hui, *supra* note 82, at 247.

<sup>99</sup> T.H. MOLLER, THE NAKHODKA OIL SPILL RESPONSE—THE TECHNICAL ADVISER'S PERSPECTIVE 1, 4 (1997), available at [http://www.itopf.com/\\_assets/documents/paj\\_97.pdf](http://www.itopf.com/_assets/documents/paj_97.pdf).

<sup>100</sup> *Id.* at 6.

<sup>101</sup> Faure & Hui, *supra* note 82, at 247; *Total Guilty of French Oil Spill*, BBC NEWS (Jan. 16, 2008), <http://news.bbc.co.uk/2/hi/europe/7192085.stm>.

<sup>102</sup> *Paris Appeals Court Upholds Total Conviction for 1999 'Erika' Oil Spill*, FRANCE24 (Mar. 30, 2010), <http://www.france24.com/en/20100330-paris-appeals-court-upholds-total-conviction-1999-erika-oil-spill>.

<sup>103</sup> *See* 1992 CLC, *supra* note 14, art. 6, paras. 1.1(a)–(b); EXPLANATORY NOTE, *supra* note 21, at 3 (describing the total liability caps granted under the 1992 protocols); *Spill Compensation: Cost of Spills*, *supra* note 88.

<sup>104</sup> Faure & Hui, *supra* note 82, at 247.

<sup>105</sup> *See id.*

Additionally, to combat the continual deficit in compensation liability funds that disasters like the *Nakhodka* and *Erika* spills have unveiled, the European Commission developed an additional, third-tier fund known as the Compensation for Oil Pollution in Europe.<sup>106</sup> The IMO subsequently adopted this model as an opt-in fund for IOPC to supplement the liability caps under the current protocols.<sup>107</sup> Because it is voluntary and applies only to those parties that ratify it, this third-tier fund does not directly affect the 1992 CLC and 1992 Fund.<sup>108</sup>

Therefore, based on the above historical review, it is clear that IOPC is a “reactive” private compensation regime.<sup>109</sup> Its protocols have been “amended after each new incident” to meet the ever-escalating compensation demands of those who have been injured by increasingly “greater oil spills.”<sup>110</sup> These repeated and reactive amendments have led scholars to question the overall validity and effectiveness of liability caps in private compensation regimes, a topic that is discussed in Part III.B.1.

## *B. The Offshore Pollution Liability Association*

### *1. Structure and Function of OPOL*

Just as individual states have signed onto IOPC to better regulate pollution from tankers, the international community has also established OPOL as a means to control pollution from fixed platforms.<sup>111</sup> OPOL is an indefinite and voluntary compensation regime that regulates liability for oil pollution caused by offshore facilities.<sup>112</sup> OPOL’s definition of “offshore facility” includes wells, drilling units, platforms, offshore storage/loading systems, and pipelines, yet excludes any “abandoned well, installation or pipeline; or any ship, barge or other craft not being used for the storage of Oil.”<sup>113</sup> Its agreement covers

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<sup>106</sup> Amended Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures, 2002 O.J. (C277) [hereinafter Amended Proposal]; see also Faure & Hui, *supra* note 82, at 248.

<sup>107</sup> Faure & Hui, *supra* note 82, at 248 (explaining that liability caps under this third-tier fund span from approximately \$5.78 million to the maximum cap of \$115 million); see also Amended Proposal, *supra* note 106.

<sup>108</sup> Faure & Hui, *supra* note 82, at 248.

<sup>109</sup> *Id.* at 249.

<sup>110</sup> *Id.*

<sup>111</sup> *About OPOL*, *supra* note 21.

<sup>112</sup> Offshore Pollution Liability Agreement (2010), <http://www.opol.org.uk/downloads/opol-agreement-oct10.pdf> [hereinafter OPOL Agreement]; see also *About OPOL*, *supra* note 21.

<sup>113</sup> *About OPOL*, *supra* note 21; see also OPOL Agreement, *supra* note 112, cl. I(8).

offshore facilities located in the United Kingdom, Denmark, Germany, France, Ireland, the Netherlands, Norway, the Isle of Man, and the Faroe Islands,<sup>114</sup> and it limits its jurisdiction to facilities located within the jurisdiction of these states.<sup>115</sup> OPOL retains jurisdiction over pollution should it disperse from a facility within its jurisdiction to an area outside the seas of the nine countries listed above, so long as the facility is located within a party state's jurisdiction.<sup>116</sup>

Importantly, OPOL does not create a contractual agreement among states.<sup>117</sup> Instead, it creates a contract among current and future operators of offshore facilities maintained for the exploration or production of oil and gas.<sup>118</sup> Two types of claimants may bring suit against an operator: (1) a "Public Authority" (a government, local, or municipal authority) may request compensation for remedial costs incurred during pollution prevention, mitigation, or elimination measures, and (2) any other party (including a Public Authority) may bring a claim for "direct loss or damage caused by contamination," excluding damage to the offending facility.<sup>119</sup> OPOL, therefore, fashions a means by which entities injured by oil pollution caused by an offshore facility can file claims directly against the operators of those facilities.<sup>120</sup> The agreement mandates that all claims be filed within one year of any offending event and that the injured claimant and violating party arbitrate all arising disputes in London.<sup>121</sup>

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<sup>114</sup> OPOL Agreement, *supra* note 112, cl. I(4).

<sup>115</sup> *About OPOL*, *supra* note 21.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*; see also Kissi Agyebeng, *Disappearing Acts—Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration*, CORNELL L. STUDENT PAPERS 1, 27 (2006).

<sup>118</sup> OPOL Agreement, *supra* note 112, pmb. (stating that "the Parties to this Contract are Operators of or intend to be the Operators of Offshore Facilities used in connection with exploration for or production of oil and gas"); see also *About OPOL*, *supra* note 21; Agyebeng, *supra* note 117, at 27. OPOL Agreement defines an operator as

a Person which by agreement with other Persons has been authorized to manage, conduct, and control the operation of an Offshore Facility, subject to the terms and conditions of said agreement, or which manages, conducts and controls the operation of an Offshore Facility in which only it has an interest.

OPOL Agreement, *supra* note 112, cl. I(10).

<sup>119</sup> *About OPOL*, *supra* note 21.

<sup>120</sup> Agyebeng, *supra* note 117, at 27; see *About OPOL*, *supra* note 21.

<sup>121</sup> OPOL Agreement, *supra* note 112, cls. IX, XI.

Like IOPC, OPOL holds operators strictly liable for damage caused by their offshore facilities.<sup>122</sup> Again, this strict liability ensures that an operator's liability remains in all instances except for those caused by: (1) an act of war, (2) negligence by a third party with the intent to cause damage, (3) negligence by a state, or (4) contributory negligence by the claimant.<sup>123</sup> The OPOL Agreement currently caps any party's liability at \$250 million per incident,<sup>124</sup> and divides this \$250-million limit into two subgroups: (1) a \$125-million cap for remedial damages that can be claimed only by Public Authorities, and (2) a \$125-million cap for pollution damages.<sup>125</sup> The agreement provides for the possibility of utilizing any surplus from either subgroup to buttress an overpayment in the other.<sup>126</sup> For example, if an incident caused \$150 million in damages due to Public Authorities and only \$75 million for pollution damage, such an accident would still be fully covered under OPOL. Public Authorities can receive up to \$125 million "plus that portion, if any, of the maximum amount referred to in sub-paragraph 2 [pollution damage] which, under the circumstances of the Incident, is not in fact due hereunder."<sup>127</sup> Therefore, the \$50 million surplus from pollution damages in the aforementioned example could be applied to the Public Authorities subgroup to help pay out relief funds to victims. Additionally, the agreement mandates that a party pay no more than \$500 million per year in claims.<sup>128</sup> If a party fails to pay any claim required by OPOL, the remaining parties to OPOL must contribute to the unresolved claim in an amount proportionate to the number of offshore facilities it operates.<sup>129</sup>

OPOL's agreements are enforceable through Article IX and XI's exclusive arbitration provisions.<sup>130</sup> Arbitration must occur in London and all disputes are "settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules."<sup>131</sup> OPOL's main weakness is that it caps liability at \$250 million per incident. As will be shown below utilizing the Deepwater Horizon disaster's

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<sup>122</sup> *Id.* cl. IV(A); *About OPOL*, *supra* note 21.

<sup>123</sup> OPOL Agreement, *supra* note 112, cl. IV(B); *About OPOL*, *supra* note 21.

<sup>124</sup> OPOL Agreement, *supra* note 112, cl. IV(A).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *About OPOL*, *supra* note 21; OIL & GAS UK, MANDATORY FINANCIAL REQUIREMENTS FOR OIL INDUSTRY OPERATIONS IN THE UKCS 3, *available at* <http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=1170>.

<sup>129</sup> *About OPOL*, *supra* note 21; OIL & GAS UK, *supra* note 128.

<sup>130</sup> OPOL Agreement, *supra* note 112, cls. 9, 11.

<sup>131</sup> *Id.* cl. 9.

damage statistics and calculations,<sup>132</sup> oil pollution from fixed platforms can be even more costly, and as internationally important, as that from tankers. With each new, major oil disaster and the subsequent international effects, pollution damages will simply exceed compensation caps and require repeated amendments to liability limits to compensate effectively those injured by the pollution. Additionally, OPOL's limited jurisdiction, covering pollution caused only by offshore facilities located in those countries listed above,<sup>133</sup> weakens OPOL's overall international effectiveness. As will be asserted below,<sup>134</sup> especially in the wake of the Deepwater Horizon spill, a more comprehensive, internationally applicable liability scheme for offshore pollution is necessary to regulate and prevent major environmental and economic disasters like the Deepwater Horizon oil spill.

## 2. *Amendments to the OPOL Agreement*

OPOL's amendments,<sup>135</sup> like those of the IOPC protocols, also indicate the "reactive" nature of private compensation regimes to major oil disasters. As is examined again in Part III.A below, OPOL, prior to the Deepwater Horizon's explosion off the coast of Louisiana, limited a party's liability to only \$120 million per incident.<sup>136</sup> In an August 2010 emergency meeting in response to the Deepwater Horizon incident,<sup>137</sup> parties to OPOL amended OPOL's agreement to reflect a new, higher liability cap of \$250 million per party per offshore oil pollution incident.<sup>138</sup> Additionally, OPOL added the current annual cap of \$500 million per party.<sup>139</sup> Similarly to the amendments to the IOPC protocols, these changes—which took effect in October of 2010<sup>140</sup>—were therefore "reactive" to the salient and far-reaching effects of the Deepwater Horizon explosion.

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<sup>132</sup> See *infra* Parts III.A–B.

<sup>133</sup> About OPOL, *supra* note 21.

<sup>134</sup> See *infra* Part III.D.

<sup>135</sup> 1969 CLC, *supra* note 52, art. V(1); 1971 Fund, *supra* note 52, art. V(1); 1992 CLC, *supra* note 14, art. VI(1).

<sup>136</sup> Humphrey Douglas, *United Kingdom: Gulf of Mexico Oil Spill: Likely Impact on UK Regulation and Contractual Arrangements*, MONDAQ (Oct. 20, 2010), <http://www.mondaq.com/article.asp?articleid=113370>.

<sup>137</sup> ENERGY & CLIMATE CHANGE COMM., UK DEEPWATER DRILLING—IMPLICATIONS OF THE GULF OF MEXICO OIL SPILL, 2010-1 H.C. 450-I, at 4.5.3 (U.K.).

<sup>138</sup> *Id.*

<sup>139</sup> OIL & GAS UK, *supra* note 128, at 3.

<sup>140</sup> *Id.*

### III. ANALYSIS: DEEPWATER HORIZON'S EFFECT ON THE GAP IN INTERNATIONAL REGULATION OF OFFSHORE DRILLING FACILITIES

The 2010 Deepwater Horizon disaster, although the most severe oil spill in history—and one of the most widely publicized—has still managed to lodge itself in the gap in international regulation of offshore platform pollution. Both IOPC and OPOL fail to adequately address the damage already caused by the Deepwater Horizon. In addition, the detrimental impacts and the resulting pollution that the spill will continue to have on the ecology, tourism, and economy of the Gulf Coast states have begun to affect the regulation and administration of these compensation regimes. Thus, both IOPC and OPOL must substantially alter their structures and agreements if they hope to combat potential similar disasters.

Importantly, the Deepwater Horizon disaster impacted approximately 68,000 square miles of ocean, roughly comparable in size to the state of Oklahoma.<sup>141</sup> This far-reaching disaster has caused international scholars and lawyers, envisioning potentially greater disasters, to question the adequacy of the current international regulation of pollution from fixed, offshore platforms.<sup>142</sup> In response to this concern, private compensation regimes, which are reactive in nature, have altered their compensation schemes, and the general attitude toward the value of a global treaty on the subject has also begun to shift.<sup>143</sup> This Comment examines the effects the Deepwater Horizon spill has had on this gap in international law and projects its future effects on international regulations of pollution from fixed platforms. Additionally, it argues that a global treaty that would impose strict liability on operators for oil spills from fixed platforms is necessary to regulate both liability and due compensation fully and effectively.

#### A. *The Deepwater Horizon's Direct, Evidenced Effects on Private Compensation Regimes*

Currently the largest oil spill to date, the Deepwater Horizon disaster has impacted more than just ecologies, environments, tourism industries, and economies. It has also begun to affect the agreements of private compensation regimes, and these modifications to the affairs of private compensation regimes

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<sup>141</sup> Justin Gillis, *An Oil Slick To Rival Oklahoma*, N.Y. TIMES (July 28, 2010, 1:28 PM), <http://green.blogs.nytimes.com/2010/07/28/an-oil-slick-to-rival-oklahoma>.

<sup>142</sup> See, e.g., Huang, *supra* note 13.

<sup>143</sup> See *id.*

elucidate the greater, long-term impact that the Deepwater Horizon incident will likely have on both IOPC and OPOL. Both IOPC and OPOL have historically been reactive when responding to each major oil pollution disaster, simply updating their protocols and regulations concerning liability caps rather than by reevaluating the effect of their regimes.<sup>144</sup> With each new and more costly accident, these protocols quickly become outdated and insufficient;<sup>145</sup> the respective member parties then demand further increased liability caps to better cover the escalating damages.<sup>146</sup> These historically “reactive” efforts, therefore, reveal private compensation regimes’ heightened, but ultimately ineffective, efforts to keep up with the increasingly costly damages incurred because of larger tankers and platforms that hold ever-greater quantities of oil.

For example, in an attempt to mitigate the overwhelming damage caused by the Deepwater Horizon explosion, BP allocated \$20 billion to finance a relief fund to aid those affected by the disaster.<sup>147</sup> Twenty billion dollars from one party for one incident far exceeded any caps in place by either IOPC or OPOL at the time of the disaster. In April 2010, IOPC capped liability for its parties at \$307.5 million, with an optional fund that totaled liability at \$1.2 billion for those who chose to enter into the Supplemental Fund.<sup>148</sup> When the Deepwater Horizon exploded, OPOL had limited a party’s liability to only \$120 million per party, per incident.<sup>149</sup> Responding to the Gulf Coast spill, OPOL’s board held an emergency meeting in August 2010 to discuss increasing liability caps to \$250 million per party, per incident and \$500 million per party aggregated per year for fixed platform pollution.<sup>150</sup> The board subsequently approved the caps, and, in October 2010, they entered into force.<sup>151</sup>

Although the recent increases in both IOPC and OPOL caps reveal that IOPC and OPOL are reactive regarding large-scale disasters, these caps pale in comparison to the \$20-billion relief fund which BP has agreed to finance. History has shown that these simple increases fail to cure the ever-impending problem of insufficient liability available under private compensation regimes.

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<sup>144</sup> See *supra* Parts II.A.2, II.B.2.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions, BP (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

<sup>148</sup> See EXPLANATORY NOTE, *supra* note 21, at 5; *supra* text accompanying notes 21, 73.

<sup>149</sup> See *supra* notes 128–32 and accompanying text.

<sup>150</sup> ENERGY & CLIMATE CHANGE COMM., *supra* note 137, at 4.5.3.

<sup>151</sup> OIL & GAS UK, *supra* note 128.

With each historical disaster that surpasses the current cap, as evidenced by the *Torrey Canyon*, *Amoco Cadiz*, and *Erika* spills, and now the Deepwater Horizon explosion, the liability schemes of these private compensation regimes are inevitably rendered outdated, sometimes before even entering into force,<sup>152</sup> and then are immediately ripe for amendment.

*B. The Deepwater Horizon Disaster's Potential Effects on Private Compensation Regimes*

*1. A Proposed Model Eliminating Compensation Caps*

The degree to which the BP compensation fund exceeds the current liability caps of IOPC and OPOL<sup>153</sup> calls into question the feasibility of liability caps for oil pollution from tankers and fixed platforms.<sup>154</sup> Economists argue that, under limited liability principles, violators are not provided with an “appropriate (economic) incentive for prevention” of environmental disasters like the Deepwater Horizon explosion.<sup>155</sup> Compensation caps on damages leave vessel and platform operators less than entirely accountable for their actions.<sup>156</sup> If operators can avoid part of the cost of their negligence or mismanagement of facilities, the balance of costs for these operators therefore often can weigh in favor of limiting precautionary measures rather than vigilantly monitoring their facilities and relevant safety regulations.<sup>157</sup>

One proposal economists recommend for alleviating this problem is for private compensation regimes to simply remove all compensation caps.<sup>158</sup> By eliminating these liability limits, private compensation regimes would hold parties fully responsible for all damage they incur and would no longer force victims to bear the difference between total damages caused by the operator's pollution and total compensation allowed under the regime. This proposal also retains a mandate that installation owners maintain compulsory insurance.<sup>159</sup> Therefore, if a violating party does not have sufficient assets to completely

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<sup>152</sup> Faure & Hui, *supra* note 82, at 251.

<sup>153</sup> Although the IOPC Fund does not directly regulate fixed platforms, its model for compensation is instructive for future changes in private oil pollution compensation regimes. For a discussion of IOPC and OPOL's liability caps, see *supra* Parts II.A.2 and II.B.2.

<sup>154</sup> See Faure & Hui, *supra* note 82, at 249.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

satisfy a claim, the party's insurance company must remit the remaining payment.<sup>160</sup> Advocates of this proposal argue that, by implementing these safeguards, a total elimination of compensation caps would successfully encourage oil operators to regulate their vessels and platforms responsibly because parties would be fully, rather than only partially, responsible for any damage caused by their facilities.<sup>161</sup>

As noted above, BP has financed a \$20-billion relief fund to compensate those injured by the Deepwater Horizon disaster.<sup>162</sup> This amount far exceeds IOPC's \$1.2-billion supplemental cap and OPOL's newly approved \$250-million cap.<sup>163</sup> The Deepwater Horizon explosion, originating from a fixed platform, is most analogous to a disaster governed under OPOL's guidelines;<sup>164</sup> the difference between OPOL's \$250-million cap and BP's \$20-billion relief fund is stunning. This readily apparent, eightyfold discrepancy very likely will cause economists, environmentalists, and other influential advocates to reconsider seriously both the efficacy of the caps placed on operators by these private compensation regimes and the ability of these regimes to compensate victims adequately. It is unlikely, however, that private compensation regimes will, as this model recommends, completely eliminate compensation caps. Instead, evidence from past oil pollution disasters supports the less effective, but more probable, outcome of a continuation in the escalation of liability limits for operators of both tankers and fixed platforms—but possibly at a higher percentage increase than past amendments in light of BP's \$20-billion compensation fund.<sup>165</sup>

## 2. A Possible Change in “Abstract Claims”

In addition to exposing the need for a possible modification in compensation caps, the Deepwater Horizon incident highlights the need to allow “abstract claims” in a demand for compensation from offending operators. The 1992 CLC and the 1992 Fund restrict the ability of those injured by a party to the CLC so that they may recover only for environmental damages of “reasonable measures of reinstatement, either undertaken or to be

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<sup>160</sup> *Id.* at 252.

<sup>161</sup> *Id.* at 249.

<sup>162</sup> *See supra* note 147 and accompanying text.

<sup>163</sup> *See supra* text accompanying notes 77, 124.

<sup>164</sup> *See supra* Parts II.A.1 and II.B.1.

<sup>165</sup> *See supra* Parts II.A.2 and II.B.2.

undertaken.”<sup>166</sup> Therefore, the 1992 CLC covers only those claims in which injured parties can allege that they sustained a “quantifiable economic loss” that must be compensated in order to restore the environment.<sup>167</sup> Under the 1992 CLC and the 1992 Fund, injured victims cannot recover compensation from violating operators for the “abstract claims” of irreparable harm to the environment, including the loss of the use and enjoyment of the land and the decrease in the monetary valuation of the environment.<sup>168</sup>

In light of the Deepwater Horizon disaster, private compensation regimes like IOPC and OPOL may reevaluate their decision to deny compensation for these environmentally “abstract claims.” Although recent studies have shown that the damage caused by the Deepwater Horizon explosion is not, to date, as extensive as originally projected,<sup>169</sup> this contentious research has nevertheless revealed that its harmful effects have certainly been substantial enough to question the continued exclusion of compensation claims like “use and enjoyment of,” or “devaluation of,” contaminated land.<sup>170</sup> For example, the conservative estimates suggest that twenty-six percent of the oil spilled by the Deepwater Horizon either washed ashore or remained in a form that could cause further damage to Gulf Coast shorelines.<sup>171</sup> Despite such a relatively small percentage, that total equals “more than 53 million gallons of oil, five times the size of the *Exxon Valdez* spill in Alaska.”<sup>172</sup>

Specifically, the Deepwater Horizon disaster substantially impacted the Gulf Coast states, especially Louisiana and Florida. Releasing more than 185 million gallons of oil into the proximate waters, it affected fishing and tourism

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<sup>166</sup> See E.H.P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE AND DAMAGE ASSESSMENTS 346 (2001). The 1992 Convention “applies exclusively” to “pollution damage” caused in specific areas of the sea. 1992 CLC, *supra* note 14, art. III. “Pollution damage” is defined as either the

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

or “the costs of preventive measures and further loss or damage caused by preventive measures.” *Id.* art. II(3).

<sup>167</sup> BRANS, *supra* note 166, at 346.

<sup>168</sup> *Id.* Instead, as addressed in *supra* note 166, environmental compensation is limited in the 1992 CLC solely to compensation for “costs of reasonable measures of reinstatement actually undertaken or to be undertaken.” 1992 CLC, *supra* note 14, art. II(3).

<sup>169</sup> Gillis & Kaufman, *supra* note 2.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

industries, the economy, and the surrounding environment.<sup>173</sup> The devastating spill threatened eight national parks,<sup>174</sup> more than 8,000 species of plants and animals, and several thousand marine species.<sup>175</sup> Only sixteen percent of the oil dispersed naturally, and only seventeen percent was confined using containment equipment.<sup>176</sup> The Gulf of Mexico is projected to prove more resistant than originally anticipated (based on comparisons to the *Ixtoc I* disaster<sup>177</sup>), but much of this resiliency has been credited to the Gulf's ecological conditions, and not to the spill's limited effects.<sup>178</sup> The Gulf, at 643 quadrillion gallons, is an extremely vast and adaptive body of water—bacteria have evolved to metabolize oil because 690,000 barrels of oil naturally seep into the Gulf of Mexico each year, and the Gulf's warm environment encourages these bacteria to metabolize the oil.<sup>179</sup> Thus, the Gulf of Mexico's resilience is not applicable to oil pollution disasters that occur in other bodies of water; rather its resilience was specific to this accident.<sup>180</sup> Had such a massive spill occurred in a less resilient ocean, the result could have been more disastrous and deleterious to the environment. It is therefore possible that these claims concerning the devaluation of land, as well as the use and enjoyment of it, may soon be included either as amendments to the 1992 CLC or in a new, global treaty regulating oil pollution from fixed platforms. Part III.D below considers whether such proposals for a new treaty are relevant and actionable under international law.

### 3. *Inapplicability of Private Compensation Regimes to Some States*

Finally, a massive oil spill like the Deepwater Horizon reminds the international community that, because some operators are restricted by domestic laws that bar them from entering private compensation funds or regimes like OPOL, these regimes can never truly bridge this gap in international law or provide a comprehensive, unified system of compensation for those injured by offshore operators. For example, in 1990, the United States

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<sup>173</sup> *Gulf Coast Oil Spill: One Year Later*, NAT'L PARKS CONSERVATION ASS'N, <http://www.npca.org/oilspill> (last visited Oct. 21, 2011).

<sup>174</sup> *Id.*

<sup>175</sup> THOMAS C. SHIRLEY ET AL., *BIODIVERSITY OF THE GULF OF MEXICO: APPLICATIONS TO THE DEEP HORIZON OIL SPILL 1* (2010).

<sup>176</sup> Gillis & Kaufman, *supra* note 2.

<sup>177</sup> See *infra* Part III.C.1.

<sup>178</sup> John McQuaid, *The Legacy of the Gulf Spill: What To Expect for the Future?*, YALE ENV'T 360 (Aug. 9, 2010), <http://e360.yale.edu/content/feature.msp?id=2302>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

passed the Oil Pollution Act of 1990 (“OPA”).<sup>181</sup> This domestic law mandates damage caps different from those found in private compensation regime agreements, thus rendering OPA incompatible with such private, international agreements.<sup>182</sup> Unlike the specifically tailored private compensation regimes of IOPC and OPOL, OPA applies both to the owners, operators, or charterers of vessels and to the lessees or permit-holders of offshore facilities.<sup>183</sup> Under the statute, liability per spill can reach up to \$22 million for tankers, \$75 million plus clean up costs for offshore platforms, and \$350 million for onshore facilities and deep-water ports.<sup>184</sup> Additionally, individual states can increase a violator’s liability through added state regulations, thus providing for possibly unlimited liability for operators of tankers and platforms if they pollute in U.S. waters.<sup>185</sup> OPA also does not permit parties liable for gross negligence to benefit from its limited liability scheme.<sup>186</sup> Domestic enforcement mechanisms, through civil, administrative, and criminal penalties (in the form of both fines and imprisonment), are also available through OPA.<sup>187</sup>

Because the United States originally decried the CLC’s imposed liability caps and narrow application, yet subsequently implemented a similar structure through OPA,<sup>188</sup> international lawyers have criticized OPA for enabling large-scale transporters and facilities (as well as oil companies owning cargo but not facilities) to escape legal liability for major spills.<sup>189</sup> Despite the possibility for increased limits compared to private compensation regimes, OPA is still not comprehensive enough to scare operators of oil facilities into “taking all

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<sup>181</sup> 33 U.S.C. § 2701 (2006); Faure & Hui, *supra* note 82, at 246; *see also* 33 U.S.C. § 2704.

<sup>182</sup> Michael A. de Gennaro, *Oil Pollution Liability and Control Under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, 37 VAND. J. TRANSNAT’L L. 265, 269, 272 (2004); *see also* 33 U.S.C. § 2704; 1992 Fund, *supra* note 14, art. VI(3).

<sup>183</sup> 33 U.S.C. § 2701(32); *see also* de Gennaro, *supra* note 182, at 273; Larry Schnapf, *Oil Pollution Control Act: An Overview for the Business Lawyer*, BUS. L. TODAY (Nov. 10, 2010), <http://www.abanet.org/buslaw/blt/content/2010/10/0002a.pdf>.

<sup>184</sup> 33 U.S.C. §§ 2704(a)(1), (3), (4); *see also* Schnapf, *supra* note 183, at 2.

<sup>185</sup> 33 U.S.C. § 2718(a); *see also* de Gennaro, *supra* note 182, at 272, 275; Browne Lewis, *It’s Been 4380 Days and Counting Since Exxon Valdez: Is It Time To Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 109 (2001); Schnapf, *supra* note 183, at 3. However, only eleven states have elected to supplement OPA’s regulation scheme with unlimited liability statutes. *Id.*

<sup>186</sup> 33 U.S.C. § 2704(c)(1)(A); *see also* de Gennaro, *supra* note 182, at 275. Without access to OPA’s limited liability, parties guilty of gross negligence could be responsible for the full value of the damages. *Id.*

<sup>187</sup> 33 U.S.C. §§ 1321(b)(6), (7); 33 U.S.C. § 1319(c); *see also* Schnapf, *supra* note 183, at 7–8.

<sup>188</sup> De Gennaro, *supra* note 182, at 269.

<sup>189</sup> For example, despite the fact that in 2003 Exxon Mobil was the “largest transporter of oil on world oceans,” OPA was incapable of rendering complete compensation for the *Exxon Valdez* oil spill. *Id.* at 273 n.15.

possible precautions to prevent spills.”<sup>190</sup> Importantly, OPA, like the private compensation regimes, does not entertain proper economic incentives for operators to monitor and regulate oil pollution.<sup>191</sup> For example, BP earned approximately \$14 billion in gross profits in 2009.<sup>192</sup> Under OPA’s liability scheme,<sup>193</sup> the maximum liability that the United States could impose upon BP equals only a small percentage of one year of BP’s profit. By impacting such a minimal fraction of BP’s overall profit margin, OPA provides little economic incentive for oil operators to implement potentially costly, yet needed, safety and regulatory measures that could help prevent, or at least reduce, the disastrous consequences of massive oil spills like the Deepwater Horizon.

Additionally, domestic pollution regulation (which relies on individual states’ domestic laws), like OPA, eliminates the possibility of creating a “single forum for adjudicating damage claims” from offshore drilling pollution.<sup>194</sup> It inherently engenders enforceability problems concerning “conflicting laws, forum shopping, and other related enforcement problems” both globally and domestically.<sup>195</sup> Conflicts between two countries with differing liability schemes—for example, one imposing strict liability and the other unlimited liability—would increase the desire to forum shop for the most favorable jurisdiction, evade proper yet unfavorable jurisdiction, or commit other such hedging actions. Therefore, if individual states each create their own pollution liability statutes (like the United States did with OPA), it becomes increasingly difficult to adopt an effective, globally recognized standard of liability, enforcement, or punishment.

The U.S. Congress, by enacting OPA, failing to preempt state law, and declining to join onto a more standardized definition of liability (as found in private compensation regimes like IOPC or OPOL) left its individual states without a concrete and comprehensive standard by which to establish jurisdiction over foreign operators who pollute U.S. waters.<sup>196</sup> In addition, state courts, due to administrative and legal expenses, delay in the judicial process,

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<sup>190</sup> *Id.* at 275.

<sup>191</sup> *Id.* at 276.

<sup>192</sup> *BP Delivers on Promises in “Very Good” 2009 as 4Q Profits Jump 70 Per Cent*, BP (Feb. 2, 2010), <http://www.bp.com/extendedgenericarticle.do?categoryId=2012968&contentId=7059471>.

<sup>193</sup> See *supra* notes 171–72 and accompanying text.

<sup>194</sup> De Gennaro, *supra* note 182, at 275.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 277; see also Damon L. Vickers, *Deterrence or Prevention—Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and Oregon Senate Bill 242*, 28 WILLAMETTE L. REV. 405, 421 (1992).

and difficulty in obtaining original jurisdiction over foreign parties in order to compel foreign violators to submit to individual state liability statutes, truly provide little enforcement power under OPA.<sup>197</sup> Therefore, without more stringent measures, individual domestic laws, like OPA, will neither deter operators of vessels and platforms from investing in risky ventures nor prevent them from cutting back on safety measures for their facilities.

Thus, private compensation regimes fail to provide an adequate or comprehensive solution for the gap in international law that leaves open regulation of oil pollution from fixed platforms. By allowing for only moderate compensation caps, regimes like IOPC and OPOL are forced to become “reactive.” In response to major oil disasters, these regimes must amend their agreements and increase their requisite liability caps so as to sufficiently cover the most recent disasters. Additionally, individual states often pass domestic laws that conflict with the regulations of these private compensation regimes, rendering it impossible for the voluntary agreements of IOPC and OPOL to become a globally comprehensive and effective liability scheme. Such domestic laws of these individual states further create inconsistencies in liability standards, weakening the overall effectiveness of private compensation regimes. Because private compensation regimes have proven unsuccessful in fully regulating oil pollution from fixed platforms, it is necessary to look next at the Deepwater Horizon spill’s impact on international treaties as well as to examine a potential global treaty’s ability to fill this gap in international law.

### *C. The Deepwater Horizon’s Effect on International Law*

#### *1. Disasters with International Implications, Caused by Offshore Oil Platforms, Prior to the Deepwater Horizon Disaster*

Because private compensation regimes have, overall, proven ineffective, and because this Comment aims to prove that a global treaty is the most effective mechanism to regulate disasters as influential as the Deepwater Horizon, this Comment now looks to a similar disaster to reveal the analogous lack of guiding, international treaties. The international prevalence of offshore drilling platforms has steadily increased in the last thirty years.<sup>198</sup> As the number of existing offshore platforms increases in the international

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<sup>197</sup> De Gennaro, *supra* note 182, at 277.

<sup>198</sup> See Cates, *supra* note 43, at 691.

community, the risk of pollution from these newly built platforms rises correlatively. For example, in recent history, there have been oil platform explosions in the North Sea, the Gulf of Mexico, and the Persian Gulf.<sup>199</sup> The extensive oil pollution caused by such platform explosions has revealed that “transboundary pollution in the marine environment of neighboring nations” is now a real threat to the international environment.<sup>200</sup>

For example, in 1977, Ixtoc I, an oil platform operated by a private Mexican contractor under contract with a Mexican national oil company, exploded in the Bay of Campeche, Gulf of Mexico.<sup>201</sup> Ixtoc I released more than 3 million gallons of oil into the Gulf of Mexico, and the resulting damage had international implications.<sup>202</sup> Although the oil came from a Mexican-run oil platform, the pollution still extended far enough to injure the fishing and tourism industries of Texas, as well as the surrounding environment.<sup>203</sup> Mexico, however, avoided suit in U.S. domestic courts because it was able to rely on U.S. foreign sovereign immunity rules.<sup>204</sup>

Due to the lack of relevant international treaties addressing oil spills from platforms, the United States could not sue Mexico in an international tribunal for the extensive environmental and economic damage that Ixtoc I caused.<sup>205</sup> Although UNCLOS directly addresses the possibility of oil pollution from fixed platforms, it leaves the codification of applicable laws to individual States and thereby lacks the international mechanism necessary for effectively regulating oil pollution.<sup>206</sup> More specifically, the United States could not sue Mexico under UNCLOS because:

1. There exists no international responsibility which anyone could exercise against Mexico for the blowout of Ixtoc I in terms of conventional international law.

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<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 692.

<sup>202</sup> *Id.*; *BP's Gulf Battle Echoes Monster '79 Oil Spill*, REUTERS, May 24, 2010, available at <http://www.reuters.com/article/idUSTRE64N57U20100524>.

<sup>203</sup> Cates, *supra* note 43, at 692; James E. Fender, Note, *Trouble Over Oiled Waters:—Pollution Litigation or Arbitration—The Ixtoc I Oil Well Blow-Out*, 4 SUFFOLK TRANSNAT'L L.J. 281, 282–83 (1980).

<sup>204</sup> *BP's Gulf Battle Echoes Monster '79 Oil Spill*, *supra* note 202.

<sup>205</sup> C. Richard Bath, *Mexico, the United States and Selected Law of the Sea Issues*, 35 INTER-AM. ECON. AFF. 1, 21 (1981).

<sup>206</sup> *See supra* Part I.B and accompanying notes.

2. No article on conventional international law obligates Mexico to pay any reparations to a state because of pollution caused by Ixtoc I.  
 . . . .
5. To this date there exist 33 international conventions covering marine pollution, but none of them apply to Ixtoc I. Therefore, there is no existing international law that is applicable.  
 . . . .
7. UNCLOS III asserts that it is the sovereign right of each state to exploit its natural resources in conformity with the obligation to protect and preserve the marine environment. Mexico has made every effort, at extreme cost, to contain the blowout to avoid damage to marine ecology or to other states. In so doing, Mexico has complied with international law.<sup>207</sup>

Therefore, at the time of the Ixtoc I disaster, no international law or treaty specifically dictated fault or regulatory procedures that could directly apply to a platform-based oil spill with international implications; only domestic law, under which Mexico was able to avoid suit,<sup>208</sup> would have applied.

## 2. *Deepwater Horizon's Detrimental Impact on the International Environment Demands an International Treaty*

In the wake of the damage caused by the Deepwater Horizon, those injured by the disaster, like those affected by Ixtoc I, sought an international avenue through which they could delegate both liabilities and compensation. However, as discussed in Parts I.A and I.B above, no international treaty to date specifically and effectively addresses this issue. As was the case with Ixtoc I, UNCLOS refers to ramifications for oil pollution from fixed platforms, yet still fails to provide an international mechanism for regulating oil pollution.<sup>209</sup> As this Comment has shown, the devastating and far-reaching damages of the Deepwater Horizon disaster cannot be adequately regulated by the compensation schemes of private compensation regimes like IOPC and OPOL.<sup>210</sup> As long as such regimes maintain low liability caps, they will remain reactive regimes incapable of handling larger oil disasters.<sup>211</sup> Additionally, the

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<sup>207</sup> Bath, *supra* note 205, at 19–20.

<sup>208</sup> See *supra* note 204 and accompanying text.

<sup>209</sup> See *supra* notes 192–93 and accompanying text.

<sup>210</sup> See *supra* Part III.B.

<sup>211</sup> See *supra* Parts II.A.2 and II.B.2.

preclusion of some parties from joining private compensation regimes, due to the incompatibility of their states' domestic laws with the regulations of the regimes, forfeits these regimes' ability to solve comprehensively the gap in international regulation.<sup>212</sup> Therefore, as the Deepwater Horizon incident has helped to reveal, this gap in regulation can be completely satisfied only by creating that which is so evidently missing: an international treaty that (1) strictly regulates pollution specifically from fixed platforms, and (2) develops a framework for implementing such regulation.

The international community has already begun to address this need for an international treaty specifically tailored to fixed platforms. Prior to the Deepwater Horizon spill, leading petroleum agencies had planned to hold a conference in 2011, in Portland, Oregon, to discuss regulation of oil production in the Arctic.<sup>213</sup> The American Petroleum Institute and several other U.S. agencies were conference sponsors, and the main emphasis of the conference was set to center on preparations for drilling in the Arctic.<sup>214</sup> However, upon realizing the extensive damage caused by the Deepwater Horizon, the agenda of the conference was rumored likely to change to discuss ways to regulate better and prevent international disasters caused by oil leaking from fixed platforms;<sup>215</sup> however, although the conference did spend a considerable portion of its time discussing the Deepwater Horizon spill, the schedule of the conference did not specifically address fixed platforms.<sup>216</sup> Currently, rather than simply relying on an express agreement like a multilateral treaty, some countries (including Norway, Britain, France, and Germany) have volunteered assistance and equipment in order to aid the United States' recovery after the Deepwater Horizon spill.<sup>217</sup> By beginning this discussion of a more global alternative by possibly altering the agenda at the Arctic conference, these oil agencies have recognized the inadequacy of the current standards, at least at some level. Therefore, the Deepwater Horizon's pervasive economic and financial impact has already begun to modify the desire for a multinational agreement concerning liability for pollution from fixed platforms, and this action will hopefully catalyze a codified, far-reaching system regulating oil pollution from such fixtures.

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<sup>212</sup> See *supra* Part III.B.3.

<sup>213</sup> Galbraith, *supra* note 1.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*; *IOSC 2011 Program and Schedule Information*, INT'L OIL SPILL CONF., [http://iosc.org/program\\_schedule.aspx](http://iosc.org/program_schedule.aspx) (last visited Nov. 7, 2011).

<sup>217</sup> Galbraith, *supra* note 1.

#### D. A Proposal for an International Treaty Imposing Strict Liability

The Deepwater Horizon disaster clearly evidenced the need for an international treaty that effectively resolves the conflicting liabilities operators face for oil pollution from fixed, offshore platforms. The most effective proposal to regulate such environmental hazards, offered as a solution to better regulate accidents like the Deepwater Horizon, advises that states convene at an international conference to create a *global* treaty that would rely on the theory of strict liability and that would be applicable in *all* zones of the sea.<sup>218</sup> The treaty would apply to any state party that maintains jurisdiction over an operating, offshore oil platform, and be an instructive guide following the aftermath of the Deepwater Horizon disaster.<sup>219</sup>

##### 1. Strict Liability Under the Treaty

A global treaty governing fixed platforms must impose strict liability upon the operators of platforms to regulate effectively pollution stemming from these facilities.<sup>220</sup> The tort theory of strict liability is based on the premise that a party who “undertakes an ‘abnormally dangerous activity’”<sup>221</sup> should be held responsible for “liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.”<sup>222</sup> The doctrine holds those who created the risk strictly accountable because that person is “best able to predict and allocate the risk of loss” and “can spread loss through slightly higher prices to consumers whereas an innocent victim cannot.”<sup>223</sup> Classic examples of strict liability in tort are found in legislation for explosives and the handling of ultra-hazardous substances.<sup>224</sup> Because the drilling of oil is an abnormally dangerous activity—as evidenced by the extensive damage caused by disasters like the Ixtoc I and Deepwater Horizon explosions—it follows that those working with fixed platforms for the purpose of drilling oil should be held strictly liable for any damage caused, regardless of the operators’ negligence or lack thereof.<sup>225</sup>

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<sup>218</sup> Cates, *supra* note 43, at 693.

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*; Agyebeng, *supra* note 117, at 34.

<sup>221</sup> Cates, *supra* note 43, at 702.

<sup>222</sup> BLACK’S LAW DICTIONARY 998 (9th ed. 2009).

<sup>223</sup> Cates, *supra* note 43, at 703.

<sup>224</sup> *See generally* M. Stuart Madden, *Strict Products Liability Under Restatement (Second) of Torts § 402A: “Don’t Throw out the Baby with the Bathwater,”* 10 TOURO L. REV. 123 (1993).

<sup>225</sup> Cates, *supra* note 43, at 703.

Additionally, one important source of international law, “the general principles of law recognized by civilized nations,”<sup>226</sup> also indicates that strict liability is applicable to fixed platform regulation. For example, several states in the United States have passed domestic laws that label the drilling of oil on land as “abnormally dangerous.”<sup>227</sup> California, concerned that the “drilling of an oil well is an ultra hazardous activity because it necessarily involves the risk of serious harm to lands, waters, fish, wildlife, and personal property of others,” classified the drilling for oil on land as an “abnormally dangerous activity.”<sup>228</sup> Offshore drilling on fixed platforms raises concerns analogous to those presented by California, and thus offshore platform activity should also be governed by strict liability rules. The Deepwater Horizon and Ixtoc I accidents have proven that oil pollution from offshore drilling can have devastating and far-reaching effects upon the environment, fishing and tourism industries, and property interests which reach beyond mere national concerns. Therefore, parties participating in offshore oil drilling, inseparably related to those in landed oil drilling—which several states have already recognized as “abnormally dangerous”<sup>229</sup>—should also be held strictly and internationally liable for possible, future pollution incidents.

Currently enforceable regional treaties concerning the regulation of oil pollution also lend credence to the proposal that parties participating in

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<sup>226</sup> ICJ Statute, *supra* note 40, art. 38. The statute provides four categories of sources in international law:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

*Id.* “General principles of law recognized by civilized nations” are those principles that “emanate from principles endorsed by the developed domestic legal systems of different states.” G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 177 (1993).

<sup>227</sup> Madden, *supra* note 224; Cates, *supra* note 43, at 702; *see also* CAL. GOV’T CODE § 8670.67.5 (West 2011); Green v. Gen. Petroleum Corp., 270 P. 952 (Cal. 1928).

<sup>228</sup> David J. Walmsley, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514, 550 (1972); *see also* CAL. GOV’T CODE § 8670.67.5 (West 2011).

<sup>229</sup> Walmsley, *supra* note 228, at 550.

offshore drilling be held strictly liable for their operations.<sup>230</sup> The 1976 Convention on Civil Liability for Oil Pollution Damage from Offshore Operations (the “1976 Convention”) is applicable only to states bordering the North Sea, Baltic Sea, or North Atlantic Ocean, yet it provides an excellent model for holding parties strictly liable for offshore drilling operations.<sup>231</sup> This regional treaty utilizes the theory of strict liability for oil pollution from fixed platforms and holds operators strictly liable for any transnational damage that may be caused by oil that escapes from an “installation.”<sup>232</sup> Importantly, an “installation” is defined as “any well or other facility, whether fixed or mobile, which is used for the purpose of exploring for . . . crude oil from the seabed or its subsoil.”<sup>233</sup> The treaty covers pollution that occurs under the jurisdiction of a Controlling State.<sup>234</sup> It affects the “territory, including the internal waters and territorial sea, of a State Party or in the areas in which, in accordance with international law, it has sovereign rights over natural resources.”<sup>235</sup> The operator may escape some or all liability only in extremely exceptional circumstances, such as: (1) if damage “resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character,”<sup>236</sup> (2) if the well had been abandoned for more than five years prior to the accident, or (3) if the damage was caused by the victim.<sup>237</sup>

## 2. *Jurisdictional Extent of the Treaty*

In addition to concerns with levels and degrees of liability, it is also important to consider the extent to which a treaty on pollution from fixed platforms should extend its jurisdiction. By proposing a treaty that is global,

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<sup>230</sup> Cates, *supra* note 43, at 697.

<sup>231</sup> Convention on Civil Liability for Oil Pollution Damage from Offshore Operations art. 18, *done* May 1, 1977, 16 I.L.M. 1450 [hereinafter 1976 Convention]; *see also* Cates, *supra* note 43, at 697.

<sup>232</sup> 1976 Convention, *supra* note 231, art. 3(1); *see also* Cates, *supra* note 43, at 703–04. The treaty defines an “operator” as “the person, whether licensee or not, designated as operator for the purposes of this Convention by the Controlling State, or, in the absence of such designation, the person who is in overall control of the activities carried on at the installation.” 1976 Convention, *supra* note 231, art. 1(3). The “Controlling State” is “the State party which exercises sovereign rights for the purpose of exploring for and exploiting the resources of the seabed and its subsoil in the area in or above which the installation is situated.” 1976 Convention, *supra* note 231, art. 1(4).

<sup>233</sup> 1976 Convention, *supra* note 231, art. 1(2)(a); *see also* Bernard A. Dubais, *1976 London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, 9 J. MAR. L. & COMM. 61, 64 (1977).

<sup>234</sup> 1976 Convention, *supra* note 231, art. 2.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* arts. 3(3)–(5).

<sup>237</sup> *Id.*

rather than regional, in nature, the treaty's application is no longer limited to those areas "under the direct jurisdiction of individual states," but rather allows the treaty to hold parties strictly liable for damage that they may cause in any zone of the sea.<sup>238</sup> Scholars have previously argued that a global convention that regulates fixed platforms and extends its jurisdiction beyond that of its party states is unnecessary because:

Great geographical differences between various regions make efforts towards global cooperation both extremely complicated and unnecessary. As the presence of oil rigs and assorted platforms seems to be most evident in coastal waters the pollution problems they cause are better tackled by regional agreements that take into account the different conditions of any particular area.<sup>239</sup>

However, as Kissi Agyebeng points out, UNCLOS was passed as a global treaty that, as such, regulates activities that occur anywhere in the entirety of the oceans.<sup>240</sup> The success of UNCLOS, therefore, is instructive that treaties regulating pollution on an international scale is, in fact, achievable. A treaty like UNCLOS thus exists as a model for a global fixed platform treaty.

By creating a treaty which can both (1) regulate pollution from offshore platforms in maritime zones not traditionally covered by regional treaties or national jurisdiction, and at the same time can (2) mandate strict liability and a concrete definition of the instances in which parties are liable, this newly proposed treaty can eliminate the fundamental problems engendered in UNCLOS. Liability then would no longer be left to the discretion of individual states; rather, the treaty would engender a "binding and uniform civil liability regime with global reach for pollution damage resulting from offshore operations."<sup>241</sup>

As previously stated, the Deepwater Horizon explosion released oil into the surrounding waters and environment, affecting approximately 68,000 square miles of ocean.<sup>242</sup> The extent of this maritime reach equaled approximately the size of Oklahoma.<sup>243</sup> During the height of the disaster, the explosion's repercussions extended to the U.S. federal water boundaries, or the U.S.

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<sup>238</sup> Agyebeng, *supra* note 117, at 5.

<sup>239</sup> MARIA GAVOUNELLI, POLLUTION FROM OFFSHORE INSTALLATIONS 43 (1995) (citations omitted).

<sup>240</sup> Agyebeng, *supra* note 117, at 5. See also *supra* Part I.B for a description of UNCLOS and its inadequate treatment and jurisdictional aspects of offshore facilities.

<sup>241</sup> Agyebeng, *supra* note 117, at 5.

<sup>242</sup> Gillis, *supra* note 141.

<sup>243</sup> *Id.*

EEZ.<sup>244</sup> In fact, more than a third of the Gulf of Mexico's EEZ was closed to fishing during the summer of 2010 due to dangerous environmental concerns caused by the Deepwater Horizon spill.<sup>245</sup> The expansive effects of the disaster therefore reveal that an accident caused by a fixed platform could easily extend beyond the maritime jurisdiction of a state. If another state's jurisdiction does not overlap or meet that state's jurisdiction, and if pollution were to seep beyond an EEZ into the high seas, a global treaty that did not cover all zones of the sea would allocate some pollution left by a fixed platform outside the jurisdiction of the treaty and leave little or no incentive for a responsible party to repair the damage. Therefore, it is imperative that a global, uniform, and jurisdictionally all-encompassing treaty be considered to fill this gap in international law.

### 3. *Parties to the Treaty*

Another important aspect to consider when drafting a treaty is whom the treaty would bind. By using the 1976 Convention, the Civil Liability Conventions, and other similar conventions and agreements regulating oil pollution as guides,<sup>246</sup> individual states would be made parties to the global treaty and operators of the offending oil platforms would remain liable for any damage incurred by oil pollution originating from the operator's facilities in violation of the treaty. Although the operators would not be signatories to the treaty, they would still be bound to the terms of the treaty as the nationals of state parties. States often impose domestic legislation in order to codify into their domestic law the regulations found in treaties to which states are parties;<sup>247</sup> here, therefore, the signatory states would impose domestic legislation binding the operators to the terms of the global treaty. An operator would be defined similarly to the 1976 Convention as a "person, whether licensee or not, designated as operator for the purposes of this convention by

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<sup>244</sup> *Fishery Closure Boundary as of 6pm Eastern Time 21 June 2010*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., [http://sero.nmfs.noaa.gov/sf/deepwater\\_horizon/BP\\_OilSpill\\_FisheryClosureMap\\_062110.png](http://sero.nmfs.noaa.gov/sf/deepwater_horizon/BP_OilSpill_FisheryClosureMap_062110.png) (last visited Oct. 22, 2011).

<sup>245</sup> *Deepwater Horizon Santa Rosa County Action Plan Update #44*, OILSPILLNEWS, <http://www.oilspillnews.net/oil-spill-clean-up/deepwater-horizon-santa-rosa-county-action-plan-update-44> (last visited Oct. 22, 2011); see also *Deepwater Horizon/BP Oil Spill: Fisheries Closure and Other Information*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., [http://sero.nmfs.noaa.gov/deepwater\\_horizon\\_oil\\_spill.htm](http://sero.nmfs.noaa.gov/deepwater_horizon_oil_spill.htm) (last visited Oct. 22, 2011).

<sup>246</sup> See 1976 Convention, *supra* note 231, pmb1.; 1969 CLC, *supra* note 56, pmb1.; 1992 CLC, *supra* note 14, pmb1.

<sup>247</sup> See generally Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1998).

the Controlling State, or, in the absence of such designation, the person who is in overall control of the activities carried on at the installation.”<sup>248</sup> States would, therefore, not be liable for damages caused by individual operators; instead, the treaty would hold operators located in party states liable for their offshore operations.

#### 4. *Limits on Liability Under the Treaty*

The 1976 Convention is also an instructive model on how to structure compensation caps in an international treaty. It imposes compensation caps, similar in theory but different in implementation, to those found in the IOPC and OPOL agreements.<sup>249</sup> The 1976 Convention creates a committee, composed of one representative from each state party, which may propose at any time to increase these liability caps.<sup>250</sup> A vote from three-fourths of the state party members can ratify such a proposal.<sup>251</sup> Such a rulemaking body, codified in the treaty, allows the treaty to handle, adaptively and more adequately, increasingly expensive and extensive disasters caused by fixed platforms like the Deepwater Horizon explosion. The 1976 Convention even allows for unlimited liability in limited circumstances:

1. This Convention shall not prevent a State from providing for unlimited liability or a higher limit of liability than that currently applicable under Article 6 for pollution damage caused by installations for which it is the Controlling State and suffered in that State or in another State Party; provided however that in so doing it shall not discriminate on the basis of nationality. Such provision may be based on the principle of reciprocity.
2. The courts of each State Party shall apply the law of the Controlling State in order to determine whether the operator is entitled under the provisions of this Article and paragraph 1 of Article 6 to limit his liability, and, if so, the amount of such liability.<sup>252</sup>

This model evidences that it is certainly possible for parties to be held fully liable for damage caused by their installations. Its adaptive amendment structure—although seemingly similar to what the “reactive” private

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<sup>248</sup> See 1976 Convention, *supra* note 231, art. 1(3).

<sup>249</sup> *Id.* art. 6; see Dubais, *supra* note 233, at 66.

<sup>250</sup> 1976 Convention, *supra* note 231, art. 9; see also Dubais, *supra* note 233, at 66.

<sup>251</sup> 1976 Convention, *supra* note 231, art. 9; see also Dubais, *supra* note 233, at 66.

<sup>252</sup> 1976 Convention, *supra* note 231, art. 15; see also Dubais, *supra* note 233, at 73.

compensation regimes have historically done in response to large pollution disasters—would be easier to implement because the treaty codifies a committee to recommend amendments.<sup>253</sup> This scheme would therefore be ideal for a global treaty regulating oil pollution from offshore platforms.

##### 5. *Provisions for Non-economic Damages Under the Treaty*

In addition to provisions that mandate strict liability, global jurisdiction over the sea, and compensation caps that can be amended by super-majority vote, a global treaty that properly regulates oil pollution from fixed platforms must also provide compensation for victims for both economic and non-economic damages. As discussed above, current compensation schemes provide only for economic damages suffered by victims of oil pollution.<sup>254</sup> However, the Deepwater Horizon disaster and its devastating impact on the Gulf of Mexico's tourism, fishing, and environmental industries have clearly indicated the substantial impact a massive oil spill from a fixed platform can have on the "use and enjoyment of" or "devaluation of" land.<sup>255</sup>

It is therefore imperative to define "pollution" in this global treaty so as to include "devaluation of land" and the loss of "use and enjoyment of land." The 1992 CLC and the 1992 Fund currently limit the definition of "pollution damage" to include only the "costs of reasonable measures of reinstatement actually undertaken or to be undertaken,"<sup>256</sup> and thus fail to provide adequate compensation for these "abstract claims" that spills like the Deepwater Horizon disaster clearly can and do create.<sup>257</sup> To compensate victims effectively and fully, a global treaty must therefore provide for instances when land can no longer be enjoyed as a tourist beach, a fishing location, or wildlife habitat. Without defining "pollution damage" to include these non-economic, "abstract claims," a global treaty regulating oil pollution from fixed platforms will still fail to leave victims fully recovered after massive oil disasters.

##### 6. *Summary Remarks*

By (1) holding parties strictly liable for their abnormally dangerous oil drilling, (2) limiting compensation while providing a straightforward and

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<sup>253</sup> 1976 Convention, *supra* note 231, art. 9.

<sup>254</sup> See *supra* notes 166–68 and accompanying text.

<sup>255</sup> See *supra* notes 166–75 and accompanying text.

<sup>256</sup> 1992 CLC, *supra* note 14, art. III(2); see *supra* notes 166–68 and accompanying text.

<sup>257</sup> See *supra* notes 173–75 and accompanying text.

accessible means for adapting the caps, and (3) leaving an open avenue for unlimited liability in certain instances, the 1976 Convention provides an excellent model for an international treaty that is capable of regulating offshore platforms and being applied globally.<sup>258</sup> After the Deepwater Horizon disaster, it has become readily apparent that, to help compensate victims of such disasters, the international community needs a mechanism more effective than the private compensation regimes. A global treaty—which imposes strict liability on the responsible party regardless of the maritime zone to which the damage extends, and that contains reasonable, adaptive compensation caps that can be increased by a vote of the parties (with the possibility of unlimited liability)—is the best solution to regulate disasters like the Deepwater Horizon explosion. Additionally, in order to fully compensate victims and hold operators completely liable, such a treaty must define “pollution damage” so that operators are liable for non-economic damages, such as devaluation of land. Fortunately, international actors have now begun to realize the need for such a regulatory scheme.<sup>259</sup>

### CONCLUSION

As the analysis above has evidenced, the regulatory schemes currently in force, implemented by both private compensation regimes and international treaties, fall short of addressing the crucial gap in international law concerning pollution from fixed platforms. The staggering size of BP’s \$20-billion relief fund, established to compensate those affected by the Deepwater Horizon explosion in the Gulf of Mexico, coupled with the widespread effects of the disaster, have emphasized the importance of filling this gap and have called into question the methods available to seek compensation from operators of fixed platforms. Private compensation regimes currently fail to compensate adequately those injured by oil spills from fixed platforms, and it has become readily apparent that contemporaneous damage caps have historically fallen well below the requisite compensation needed to satisfy all injuries.<sup>260</sup> Simple increases in compensation caps in response to each new incident are not sufficient remedies. Instead, a global treaty, imposing strict liability and creating flexible compensation caps with the added possibility for unlimited liability, is necessary in order to fully resolve this gap in international law.

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<sup>258</sup> 1976 Convention, *supra* note 231, arts. 3, 7, 15.

<sup>259</sup> E.g., Steven Lee Myers, *Cooperation Is Pledged by Nations of the Arctic*, N.Y. TIMES, May 13, 2011, at A12.

<sup>260</sup> See *supra* Parts II.A.2 and II.B.2.

With the power of a global treaty of strict liability, which would “regulate the entirety of the oceans”<sup>261</sup> and encompass both the economic and non-economic impacts of each spill, states would be able to more uniformly predict their liability for oil pollution and could better prepare so as to avoid further disasters from offshore platforms. Additionally, a global treaty would provide for a consistent standard of enforcement against offending operators and would remove any confusion concerning liability limits and compensation avenues.<sup>262</sup>

However, despite the stirrings among the international community for a multinational treaty that directly addresses pollution from offshore platforms, the most likely, although less preferable, outcome is a simple increase in compensation caps for private compensation regimes.<sup>263</sup> Realistically, although a treaty would more successfully create uniformity in pollution and liability standards, it is unlikely that all states would sign a strict liability treaty that would include provisions on compensation caps. The convention and subsequent treaty would likely, however, garner sufficient approval to be relatively effective, because it would concern the narrow, and thus “feasible,” topic of oil pollution from offshore platforms.<sup>264</sup> However, some states, like the United States, have imposed domestic laws (such as OPA) that are incompatible with liability caps.<sup>265</sup> These states would be unable to adhere to such a treaty without repealing their domestic laws, a highly unlikely outcome. To make this treaty more palatable to states like the United States, it would have to allow for significant reservations to certain portions of the treaty, particularly the liability caps, so that the treaty would not violate current domestic laws. However, too many reservations from the treaty would negate its necessary purpose of creating a uniform, global standard of liability for regulation of oil pollution from fixed platforms.

In the wake of the Deepwater Horizon disaster, in order to regulate offshore platform pollution, the international community will, probably and regrettably, continue its historical trend and converge on an imperfect solution. The international community will likely further increase the private compensation

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<sup>261</sup> Agyebeng, *supra* note 117, at 5.

<sup>262</sup> *See id.* at 33.

<sup>263</sup> Historically, private compensation regimes have simply increased their compensation caps in response to major oil disasters from both fixed platforms and tankers. *See* Parts II.A.2 and II.B.2. The hurdles to create and affirm a global treaty are likely too steep to be overcome at this juncture, but, inevitably, only a global treaty will fully bridge this gap in international law.

<sup>264</sup> Cates, *supra* note 43, at 707–08.

<sup>265</sup> De Gennaro, *supra* note 182, at 6.

regime compensation caps, with potentially a greater percentage increase in the wake of the \$20-billion compensation funds allocated for the Deepwater Horizon spill.<sup>266</sup> However, without a global treaty enforcing clear and uniform regulations, accidents like the Deepwater Horizon will continue to leave states without sufficient direction. States will continue to implement varying systems that regulate potential international disasters from fixed platforms, and this ambiguity will leave victims without full and due compensation for their injuries.

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<sup>266</sup> See Parts II.A.2 and II.B.2.

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