# PROMOTING THE INTEGRITY OF THE INTERNATIONAL REGIME ON OIL POLLUTION COMPENSATION AND LIABILITY

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## 1. Introduction

The international regime for oil pollution liability and compensation is created by two principal treaties: the 1992 Convention on Civil Liability for Oil Pollution Damage and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.[2] Together, these treaties create a system of strict but limited liability for oil pollution damage whereby liability is shared between individual ship owners and the oil industry. The purpose of the regime is to "ensure that adequate compensation is available to persons who suffer damage caused by oil pollution" as well as to harmonise the applicable rules and procedures for determining questions of liability following oil spills from tankers, wherever they may occur.[3] The regime has achieved almost global application. 121 states are party to the 1992 Civil Liability Convention[4], whereas 102 states are also a party to the 1992 Fund Convention.[5]

The success of the international regime, however, relies not only on its widespread acceptance, but also on how it is implemented by the parties. States which are involved in the international regime have regularly stressed that "the uniform application of the Conventions [is] of prime importance."[6] According to this view, "uniformity of interpretation is crucial to the equitable functioning of the international compensation regime and to equal treatment of claimants in various Fund Members States."[7] At the same time, the achievement of uniformity is a major challenge given that the primary mechanism for implementing the international regime is through national legal systems and courts.

In the past, several proposals have been made to promote the integrity of the international regime. One suggestion is the creation of a special international tribunal to deal with oil pollution compensation claims.[8] This would ensure a coherent approach to the interpretation of the treaties, as a single organ would be responsible for interpreting the regime. Alternatively, it has also been suggested that the conventions could be amended to include a provision obliging states to require their national courts to take into account any international agreed admissibility criteria when deciding disputes arising

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[2] The texts of the treaties can be found at http://www.iopcfund.org/npdf/Conventions%20English.pdf <checked 12 March 2009>. It should be noted that there is a third layer of compensation available under the 2003 Supplementary Fund Protocol, also available at http://www.iopcfund.org/npdf/Conventions%20English.pdf <checked 12 March 2009>.
[3] See preamble to the *1992 Civil Liability Convention*.
[4] See http://www.imo.org/Conventions/mainframe.asp?topic_id=247 <checked 13 March 2009>. This figure represents 96.39% of World Tonnage. 38 states are still party to the 1969 Civil Liability Convention.
[5] See http://www.iopcfund.org/92members.htm <checked 31 March 2009>. The Islamic Republic of Iran has also expressed its intention to become a Member of the Fund from 5 November 2009.
[6] First Report of the Third Intersessional Working Group, Document 92FUND/WGR.3/3, at para. 7.2.7.
[7] Fifth Report of the Third Intersessional Working Group, Document 92FUND/WGR.3/15, at para. 10.1. See also *1992 Fund Resolution No. 8 on the Interpretation and Application of the 1992 Civil Liability Convention and the 1992 Fund Convention* (May 2003). Resolutions of the Fund are available at http://www.iopcfund.org/npdf/RES92E.pdf <checked 12 March 2009>.
[8] See *Report of the First Intersessional Working Group*, Document 92FUND/A.2/18.

under the regime.[9] This approach attempts to harmonise interpretation at the international level whilst leaving it to national courts to decide individual cases. So far, none of these proposals have been greeted with great enthusiasm. Indeed, the formal amendment of the 1992 Conventions itself may lead to fragmentation of the international regime as any amendments will only be binding on those states which accept them.[10] The purpose of this paper is therefore to consider ways in which the integrity of the international regime can be promoted and achieved within the current treaty framework.

## 2. Existing Mechanisms to Interpret the International Regime

As noted above, the success of the international regime relies upon states implementing the provisions of the Conventions into their national law. The primary mechanism for claiming compensation for oil pollution damage under the international regime is through national courts. The 1992 Civil Liability Convention provides that actions for compensation may be brought in the courts of states where pollution damage has been caused and "each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such claims."[11] Similarly, the 1992 Fund Convention provides that "each contracting state shall ensure that its courts possess the necessary jurisdiction to entertain … actions against the Fund …"[12]

This situation means that national courts have a huge influence on how the international regime is interpreted. Yet, national courts are not the only institutions involved in the interpretation of the Convention at present. In practice, very few cases make their way to court. In large part, this is due to the fact that the International Oil Pollution Compensation Fund[13], the international organization created under the 1992 Fund Convention to administer the treaty, actively seeks to settle claims for compensation out of court.[14] Indeed, the Assembly of the Fund has an express mandate under the 1992 Fund Convention to oversee the settlement of claims against the Fund.[15] This function has been delegated to an Executive Committee, an organ composed of fifteen members who are elected by the Assembly to act on its behalf in between regular session.[16] The mandate of the Executive Committee includes the power to "take decisions in place of the Assembly on matters referred to in Article 18.7 of the 1992 Fund Convention, in particular on claims for compensation referred to it by the Director", the ability to "consider new issues of principle and general policy questions relating to claims for compensation as they arise" and the power to "make such recommendations to the Assembly, for example on questions of principle of

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[9] See e.g. *Review of the International Compensation Regime – paper submitted by Australia, Canada, Denmark, the Netherlands, Norway, Sweden, and the United Kingdom*, Document 92FUND/WGR.3/5/1, at para. 2.36.

[10] An amendment is only binding on those states which have expressly accepted it; see *Vienna Convention on the Law of Treaties*, Article 40. Amendments to the international regime have been considered but states have been unable to agree on whether or not amendments to the international regime are needed; see *Ninth Report of the Third Intersessional Working Group*, Document 92FUND/WGR.3/26, at para. 6.16.

[11] *1992 Civil Liability Convention*, Article IX.2.

[12] *1992 Fund Convention*, Article 7(2). Alternatively, the Internal Regulations of the Fund provide that the Director may agree with a claimant to submit a claim to binding arbitration; Internal Regulations, Regulation 7.3.

[13] Hereinafter, "the Fund".

[14] Where a pollution incident involves the liability of both the ship owner and the Fund, it is common practice for the two of them to cooperate in setting up claims handling offices.

[15] *1992 Fund Convention*, Article 18(7).

[16] *1992 Fund Resolution No. 5 on Establishment of the Executive Committee* (October 1997). Resolutions of the Fund are available at http://www.iopcfund.org/npdf/RES92E.pdf <checked 12 March 2009>.

great importance, as the Executive Committee may deem appropriate."[17] The role of the Executive Committee is also governed by the policy of the Fund that it will only settle those claims which it is considered fall within the scope of the Convention.[18] This policy has led to the development of a consistent body of jurisprudence on the part of the Fund institutions as they have interpreted the Conventions on a case-by-case basis to decide whether or not to grant compensation.

Whereas the existence of this procedure to interpret the conventions at the international level has the potential to promote a unified approach to the interpretation of the international regime, it does not completely avoid the threat of fragmentation as claimants still have the right under the conventions to bring a claim in national courts if their claims are rejected by the Fund. In the litigation arising from the *Erika* incident in December 1999, the majority of the French courts have so far taken the view that they were not bound by the Fund's criteria for admissibility of claims and that it was for them to interpret the concept of pollution damage in the 1992 Conventions.[19] In litigation that has taken place in the United Kingdom, the Scottish and English courts have also been sceptical of interpretive decisions adopted by the Fund.[20] Indeed, in Scotland the Inner House of the Court of Session went as far as to say that "the fact that the [implementing legislation] refers to damage and loss in conjunction with causation without any further explanation points to an intention that these terms should be understood as coming fully armed, as it were, with concepts with which lawyers in this country are well familiar."[21] Clearly, this approach of interpreting the conventions against the backdrop of national law poses a substantial threat to the integrity of the international regime.[22]

## 3. The Status of Decisions of the International Fund

It does not follow from the fact that claims can be brought in the national courts that those courts have complete freedom of choice in how they interpret the 1992 Conventions. As an international treaty, the 1992 Conventions must be interpreted in the context of international law. Thus, whether or not the Fund institutions can play a role in harmonising interpretations of the 1992 Conventions will depend on the status of their decisions under international law.

The Fund institutions themselves have considered this issue but failed to come up with clear conclusions. The issue was addressed by the Fund

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[17] Ibid., para. (f).

[18] Document 92FUND/A.2/18, at para. 6.5.7. This policy distinguishes the role of the Fund from the role of ship owners and their insurers in the settlement of claims because the latter are free to take into account various considerations, such as public image when deciding whether to offer compensation to oil pollution victims.

[19] See e.g. Documents 92FUND/EXC.38/12, at paras. 3.2.31 and 3.2.35; 92FUND/EXC.36/10, at paras. 3.1.34 and 3.1.36. Nevertheless, the French courts have on the whole tended to reach the same conclusions on questions of liability as the Fund.

[20] See *Landcatch v IOPCF* 1999 SLT 1208; [1998] 2 Lloyd's Rep 552; *Algrete Shipping Co v International Oil Pollution Compensation Fund* [2003] Lloyd's Rep 327.

[21] *Landcatch v IOPCF* 1999 SLT 1208, at 1218 per the Lord Justice Clerk (Lord Cullen). Lord McCluskey made a similar point when he said "the issue is whether or not the words used in the sections governing damage are apt to extend the liability of the responsible shipowner much wider, so as to make him potentially liable to compensate an indeterminate number of claimants who would not, under common law, had had a claim, because their claims would have been regarded as too remote. I cannot see that the legislature would have left such as result to inference"; at 1223.

[22] See L. DE LA FAYETTE, 'The Concept of Environmental Damage in International Liability Regimes' in M. Bowman and A. E. Boyle (eds), *Environmental Damage in International and Comparative Law* (2001) at pp. 149-189.

Assembly in May 2003 when it adopted Resolution No. 8 on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention. The resolution starts by noting the need to implement and apply the Conventions uniformly in all States Parties and it finishes by asserting that "the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions."[23] Yet, this resolution is stated in very weak language which falls far short of obliging national courts to take into account Fund decisions. [24] At the same time, the resolution does not rule out that decisions of the Fund could be legally binding as a matter of international law.

There are two areas of international law that may provide further insight into the status of decisions of the Fund: the law of international institutions governing the powers of international organizations and the law of treaties relating to treaty interpretation.

First, it is clear that, as a matter of international institutional law, international organizations can have powers of interpretation conferred upon them. Many international institutions possess express powers to adopt authoritative interpretations of their constituent treaties. For instance, the Agreement Establishing the World Trade Organization specifies that the Ministerial Conference and the General Council of the Organization are able to adopt interpretations of the Agreement and of related multilateral trade agreements.[25]

In contrast, the Fund institutions have no express power of interpretation under the 1992 Fund Convention. Nevertheless, it could be argued that such a power falls within the general powers of the Fund Assembly in its task of supervising the proper execution of the Convention[26] or its residual power to perform any function that is necessary for the proper operation of the Fund.[27] This last provision confirms the application of the principle of implied powers to the Fund, whereby "under international law, [an organization] must be deemed to have those powers which, although not expressly provided in the [constituent instrument], are conferred upon it by necessary implication as being essential to the performance of its duties."[28] .

Even if it could not be convincingly argued that the Fund has a power of interpretation as a matter of international institutional law, the general principles of the law of treaties acknowledge a central role for the parties to a treaty in its on-going interpretation.[29] As explained by Sinclair, "it follows

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[23] *Resolution No. 8*, supra note 7.

[24] Indeed, the impact of the resolution would appear to have been limited and it has not prevented national courts from reaching the opposite conclusion on the interpretation of the conventions than the position taken by the Fund institutions. The most striking example is the Slops incident where the Greek Supreme Court held that the international regime was applicable to floating storage units, a decision that was a contradiction to the policy on this issue adopted by the Fund. See analysis in J. HARRISON, 'Conflicting Interpretations – The Slops Incident and the Application of the International Oil Pollution Liability and Compensation Regime to Offshore Storage and Transfer Operations' (2008) 20(3) *J. Env. L.* 455-464.

[25] *Agreement Establishing the World Trade Organization*, Article IX.2. This provision allows the WTO Ministerial Conference or General Council to adopt an authoritative interpretation of the WTO agreements by a three-fourths majority of the Members.

[26] *1992 Fund Convention*, Article 18(13).

[27] *1992 Fund Convention*, Article 18(14).

[28] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 182.

[29] There is a link between the two areas of international law being discussed here. The WTO Appellate Body has held that "we consider that a multilateral interpretation pursuant to Article IX.2 of the WTO Agreement can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to

naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it are legally entitled to interpret it."[30] In this respect, Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties requires a treaty interpreter to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[31] In addition, Article 31(3)(b) of the same Convention requires a treaty interpreter to take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[32] It would appear from these two provisions[33] that subsequent agreements of the parties and subsequent practice of the parties must be taken into account when interpreting and applying treaty provisions.[34]

There is no particular form that an interpretation must take under Article 31 of the Vienna Convention on the Law of Treaties. Whereas an "agreement" may suggest a distinct decision of the parties, "practice" is a much broader concept. Nevertheless, it is implied that both types of interpretation must reflect the "common understanding of the parties."[35] It does not follow that each and every party must have individually taken part in the agreement or in the practice and it will suffice that all parties have acquiesced in the decision as an authentic interpretation. Some commentators go further, arguing that "institutional practice, even when controverted by some members, has an inherent value."[36] Yet, it is difficult to reconcile this position with the text of the Vienna Convention or with judicial authorities. As noted by Judge Spender in the *Advisory Opinion on Certain Expenses,* "it is not evident on what ground a practice consistently followed by a majority of Members States not in fact accepted by other Member States could provide any criterion of interpretation which the Court could properly take into consideration in the discharge of its judicial function."[37] Therefore, it would appear that any significant dissent will prevent a decision or a practice of the parties from qualifying under Article 31(3)(a) or (b). At the same time, as noted above, it is not necessary that all parties have positively consented to an interpretation under Article 31(3)(a) and (b); acquiescence may suffice.

It follows from this analysis that parties to the 1992 Conventions have an implied power to interpret the treaties even in the absence of an express

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Article 31(3)(a) of the Vienna Convention, as far as the interpretation of the WTO Agreements is concerned"; *EC – Regime fo the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R/RW/USA, at para. 383. The difference between these two areas, however, is that international institutional law may specify that a decision may be made by a particular organ of an institution, whereas, as will be seen below, the law of treaties merely requires that an interpretation reflects the agreement of the parties.

[30] I. SINCLAIR, *Vienna Convention on the Law of Treaties* (2nd edn, 1984, Manchester University Press) at 136.

[31] 1969 *Vienna Convention on the Law of Treaties*, Article 31(3)(a).

[32] 1969 *Vienna Convention on the Law of Treaties*, Article 31(3)(b).

[33] These rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties are widely considered to be a reflection of customary international law and they are regularly cited and followed by international and national courts and tribunals. See e.g. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, at para. 41; see also *The Republic of Ecuador v Occidental Exploration & Production Co (No. 2)* [2007] 2 Lloyd's Rep. 352 at para. 25, per Sir Anthony Clarke MR.

[34] See Report of the International Law Commission to the General Assembly, *Yrbk Int'l L. Commission*, 1966, vol. II, at p. 222. The report makes clear that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation." (emphasis added)

[35] Ibid..

[36] See J. E. ALVAREZ, *International Organizations as Law-Makers* (2005, Oxford University Press) at p. 89.

[37] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 151, at 191-192. The majority did refer to institutional practice as part of their reasoning on the correct interpretation of the United Nations Charter. However, as Judge Spender notes, it was possible to come to the same conclusion without having to rely on this practice.

treaty provision on the matter. The possibility of the parties adopting authoritative interpretations under the law of treaties is recognized in the preamble to Fund Assembly Resolution No. 8.[38] However, that resolution does not clarify which decisions of the Fund are relevant for this purpose. It is therefore still necessary to ask which decisions of the Fund, if any, qualify as authoritative interpretations. As will be discussed below, no generalisations can be made and it is necessary to consider the status of such decisions on a case-by-case basis. However, certain key factors can be highlighted.

One factor that must be considered is who is involved making the decision. Decisions by the Executive Committee may be difficult to classify as authentic interpretations given that they are made by a mere fifteen states. In practice, however, all decisions of the Executive Committee are submitted to the Assembly for approval so it could be argued that the Assembly is deemed to adopt those decisions as its own. Once they have been adopted by the Assembly, there is a much stronger argument that they represent a common understanding of the parties.

Another factor to be taken into account in deciding on the status of a decision is the degree of support that it has attracted. Interpretative decisions which have been adopted by consensus of Fund Members are more likely to qualify as authentic interpretations than decisions which have been adopted against the backdrop of significant disagreement between Fund Members.[39]

A further complication, however, is the interrelationship between the Fund Convention and the Civil Liability Convention. In many respects the 1992 Fund Convention is not a self-standing instrument in that it defines certain key terms, such as “ship”, “oil”, “pollution damage”, by reference to the 1992 Civil Liability Convention.[40] At the same time, not all parties to the 1992 Civil Liability Convention are a party to the 1992 Fund Convention.[41] Does this mean that the parties to the 1992 Fund Convention, acting through the Fund, are incapable of adopting authentic interpretations to that treaty? It is suggested that this is not necessarily the case. Here it is relevant to recognise that meetings of the Fund institutions are open to states which are not party to the 1992 Fund Convention.[42] Indeed, such observer states may participate in deliberations in matters of direct concern to them, albeit without a vote.[43] In other words, it is possible that decisions of the Fund institutions may sometimes reflect the common understanding of parties to both the 1992 Conventions. It is therefore suggested that even on the basis of the existing text of the 1992 Convention, it is possible to argue that national courts may already be obliged, as a matter of international law, to take into account some decisions of the Fund institutions, provided that they represent the “common understanding of the parties.” This analysis demonstrates that there is scope

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[38] *Resolution No. 8*, supra note 7.

[39] It is for this reason that the Greek Supreme may have been justified in refusing to follow the policy of the Fund on the interpretation of “ship” in the 1992 Conventions, as the particular policy decision at issue in that case would appear to have been adopted amidst some hesitancy by states. See Document FUND92/A.4/32, at para. 24.10. See also *Report of the Second Intersessional Working Group*, Document 92FUND/WGR.2/4. Indeed, following the decision of the Greek Supreme Court, some states called on the policy decision to be reconsidered; see Document 92FUND/EXC.42/14, at paras 3.3.29-3.3.31.

[40] See *1992 Fund Convention*, Article 1. See also 2003 Supplementary Fund Convention, Article 1.

[41] All parties to the 1992 Fund Convention must also be parties to the 1992 Civil Liability Convention; *1992 Fund Convention*, Article 28(4).

[42] Rules of Procedure for the Assembly of the Fund, Rule 4. See also Rules of Procedure for the Executive Committee, para. (i).

[43] Rules of Procedure for the Assembly of the Fund, Rule 6.

within the existing treaty framework for interpretations to be agreed at the international level through the Fund in order to promote the uniform interpretation and application of the international regime.

At the same time, this analysis also suggests that improvements can be made to the way in which authoritative interpretations are adopted. As described above, they are presently incidental to the process of settling claims against the Fund. Interpretations are first reflected in the report of the Executive Committee which is then adopted by the Assembly. The status of interpretative decisions may be strengthened, if they were adopted as separate resolutions of the Fund which made an express reference to Articles 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. By doing so, little doubt would be left over the intention of the parties in exercising their inherent powers of interpretation.

It is also apparent that the Fund may not be the only, or even the most appropriate, institution to adopt interpretations of the international regime. The International Maritime Organization (IMO) could play a key role in this context as it already has a role in supervising both 1992 Conventions; it is the IMO which is responsible for the adoption of amendments to the two treaties, a task generally undertaken by the IMO Legal Committee.[44] A similar arrangement would also be possible for the adoption of authentic interpretations. The advantage of this approach is that the all parties to the 1992 Conventions take part in the process on an equal footing. Even in this case, it does not mean that the Fund institutions must have no role at all in the process of interpretation. It would still be open for the Fund institutions to first consider issues of interpretation that arise under the international regime and then propose authoritative interpretations to the IMO Legal Committee. Such interactions between the two institutions are already common in other spheres in which their mandates overlap.[45]

## 4. Monitoring Implementation of the International Regime

If the above arguments are accepted, it follows that some decisions of the Fund regarding the interpretation of the international regime may be binding and contracting parties which fail to implement these decisions will be in breach of their international obligations. The obligation to implement the 1992 Conventions is an obligation of result. In other words, how states fulfil their obligation to implement the international regime may vary depending on whether they take a monist or a dualist approach to the incorporation of international law into its national legal system.[46] Whilst it should be left to the discretion of state to decide how they implement the international regime, whether they implement the regime clearly cannot be discretionary.

What we are concerned with here is the consequences of failing to comply with this obligation to implement the 1992 Convention and any authoritative interpretations adopted by the parties. Although the 1992 Conventions do not contain any provisions on this matter, it is generally accepted in international law that “the breach of an engagement involves an

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[44] *1992 Fund Convention*, Articles 32-33.

[45] E.g. the drafting of the 2003 Supplementary Protocol which was originally considered through the Third Intersessional Working Group of the Fund and was subsequently adopted at a diplomatic conference convened by the IMO. A similar interaction has taken place in relation to the drafting of a protocol of amendment to the HNS Convention.

[46] See the comments of the Director in Document 92FUND/A.11/35, at para. 6.8.

obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[47] The principles concerning responsibility and reparations are governed by the law of state responsibility.[48] Yet, it is difficult to apply the law of state responsibility to the international regime created by the 1992 Conventions for a number of reasons.

Firstly, it is not clear who can invoke the responsibility of a state for failure to implement the treaties. An injured state is defined under the International Law Commission's Draft Articles on State Responsibility as follows: [49]

> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
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> (a) that State individually; or
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> (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
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> (i) specially affects that State; or
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> (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Whereas the obligation to implement the 1992 Conventions is owed to the other parties to the treaties, none of them would necessarily qualify as an injured state under this definition. Nevertheless, states which are party to the 1992 Convention may still be able to invoke the responsibility of a state which has failed to properly implement the Conventions, including any authoritative interpretation, as a non-injured state.[50] Although such states cannot claim reparations for themselves, they can call for the responsible state to take measures to comply with its obligation to implement the international regime, as well as to make reparations to the beneficiaries of the obligation.[51] Beneficiaries of the obligation in this context could include the Fund itself, as well as ship-owners, both of which are subject to the international regime for liability and compensation as implemented through national legal systems. States which have failed to properly implement the international regime in a manner compatible with interpretations adopted by the parties could therefore be asked to make reparations to the beneficiaries who may have suffered a loss as a result of this failure.

Whilst the law of state responsibility appears to provide some remedy at the international level, it also has a number of drawbacks. First, it is not clear that individual states will have sufficient incentive to invoke the responsibility of another party to the 1992 Conventions which has failed to implement the regime. Indeed, individual states may not have access to appropriate information in order to make an informed decision on this issue. On the other hand, other entities which may have a direct incentive to bring a claim, such as the Fund or ship owners, are not legally competent to do so as they are not themselves a party to the relevant obligations. More significantly, even if a

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[47] *Factory at Chorzow*, Jurisdiction, 1927, PCIJ, Series A, No. 9, at 21.
[48] See J. CRAWFORD, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002, Cambridge University Press).
[49] *Draft Articles on State Responsibility*, supra note 48, Article 42.
[50] *Draft Articles on State Responsibility*, supra note 48, Article 48.
[51] Ibid..

state did want to bring a claim, there is no available judicial forum for this purpose. As the 1992 Conventions do not provide for the compulsory settlement of disputes, it would not be possible to pursue any contested claim through international litigation unless the treaties were modified to this effect.

These shortcomings in the law of state responsibility have prompted states to come up with other ways in which to promote compliance with international obligations protecting common interests. Many such regimes now include special mechanisms for monitoring the implementation of treaties. These range from simple reporting procedures to mechanisms through which an institution is created in order to actively monitor and investigate compliance. Many such non-compliance procedures are generally considered to be "softer" than traditional dispute settlement procedures because they are aimed at securing compliance through support and encouragement rather than strict enforcement. This managerial approach to compliance relies on persuading states that it is in their interest to implement their international obligations.[52] Some compliance regimes, however, also recognise that there are limitations to persuasion and therefore they include a power to impose sanctions on non-complying states.[53]

There is currently no compliance procedure under the international oil pollution regime, although the issue has been tentatively raised on several occasions at meetings of the Fund. At the Third Intersessional Working Group, it was suggested that Fund Members should be under an obligation to inform the Director of how they had implemented the 1992 Conventions.[54] This idea was subsequently taken up by the Fund Assembly at its ninth session in 2004 when it instructed the Director to write to all Member States to enquire whether the 1992 Conventions had been fully implemented into their national law.[55] Despite several attempts at doing so, the Director was unable to obtain this basic information from all Fund Members and he was further instructed to discontinue his efforts at the eleventh session of the Assembly in October 2006.[56] Rather he was directed to concentrate on assisting those states who had informed him that they had not fully implemented the Conventions into their national law.[57]

Although states have accepted a role for the Director in receiving information from states on the implementation of the international regime, so far there has been little appetite for creating a mechanism to actively investigate compliance.[58] Whereas the Executive Committee receives reports on court cases taking place in the courts of parties, its mandate does not formally extend to monitoring whether or parties are in compliance. Yet, it would seem to be appropriate that there was some multilateral mechanism to oversee compliance given the "prime importance"[59] attached to promoting uniformity in the application of the Convention. Indeed, such an approach

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[52] See generally, A. CHAYES & A. H. CHAYES, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995); J. KLABBERS, 'Compliance Procedures', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2006, Oxford University Press) ch. 43.
[53] See e.g. D. W. DOWNS, D. M. ROCKE, and P. N. BARSOOM, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 *Int'l Org* 379.
[54] See Document 92/FUND/WGR.3/9, at para. 25.8.
[55] See Document 92FUND/A.9/31, at para. 33.4.2.
[56] Document 92FUND/A.11/35, at para. 6.12.
[57] Document 92FUND/A.11/35, at para. 6.12.
[58] See e.g. Document 92FUND/A.11/35, at para. 6.9. A similar view was advanced in the discussions of the Third Intersessional Working Group; see Document 92FUND/WGR.3/9, at para. 25.8.
[59] See supra, at footnote 6.

would fall squarely within the mandate of the Fund to oversee "the proper execution of the Convention and of its own decisions."[60]

There would appear to be at least two distinct aspects of compliance which could be covered by an international mechanism. First, there is a question whether the legislation enacted by states in order to implement the 1992 Convention is compatible with their international obligations. This is a systematic issue that requires to be considered in relation to all Members of the Fund. Secondly, there is also a question of whether decisions rendered by national courts are compatible with the international legal framework, including both the treaties and any authoritative interpretations that have been adopted. It should be clearly understood that a compliance mechanism would not serve an appellate function through which decisions of national courts could be challenged. The status of a decision of a national court would remain unaltered by compliance proceedings. Rather the role of the compliance procedure would be to investigate whether or not the judgment of a national court is in conformity with the requirements of the international regime and, if not, call for the state concerned to take measures to bring its national law and institutions into compliance. In this sense, compliance mechanisms are purely forward-looking.

In designing a compliance mechanism, several issues should be addressed. First, which institutional framework should host the regime? Should it be the Fund or the IMO[61]? Second, what would be the composition of the compliance committee? Should it be composed of independent experts or state representatives and how should they be selected? Third, what would be the consequences of a finding of non-compliance? Should the emphasis be solely on encouraging compliance through offering advice, assistance and support or should sanctions also be available? It is this last question that is perhaps the most controversial. It is not as clear that these institutions currently have the legal power to order sanctions to be imposed on non-complying states. It is probable that such a power would have to be expressly conferred by an amendment to the existing 1992 Conventions.[62] Nevertheless, it remains possible within the existing treaty framework to design an effective compliance procedure, building upon practice in other regimes, to encourage states to properly implement the treaties underpinning the international regime.

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[60] *1992 Fund Convention*, Article 18(13).

[61] One possibility that has been suggested is that the 1992 Conventions should be included in the IMO Audit Scheme. It was agreed at the thirteenth session of the Fund Assembly that the Director should not pursue the possibility of including the 1992 Conventions in the IMO Voluntary Audit Scheme at this stage but that the issue should remain part of the on-going communications between the two organizations; see Document 92FUND/A.13/25, at para. 5.9. In the opinion of this author, the inclusion of the 1992 Conventions in the IMO scheme may not be appropriate because the existing scheme largely deals with regulatory treaties imposing standards on shipping, rather than treaties which create a system of liability and compensation. Different skills and expertise may be required to consider whether or not there is compliance with these two types of treaty.

[62] Compare Article 18 of the Kyoto Protocol which provides "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."