

Compensation for Economic Loss Following an Oil Spill Incident:
Building a New Framework for Thailand

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Abstract

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The Rayong Oil Spill of 2013 presents a useful example of the catastrophic consequences of a large oil spill in Thailand, consequences that can provide meaningful lessons for industry and government. Many local residents and businesses throughout the coastal communities in Rayong suffered economic loss largely due to damages to natural resources; however, under the existing legal regime, there is no effective comprehensive legal framework that directly and adequately regulates the compensation regimes that handle claims of economic-loss following an oil-spill incident. Equally, as an alternative to litigation, there is no adequate guidance for the regimes handling rapid compensation payments for such type of claims. In the aftermath of the Rayong Spill, the responsible bodies developed the out-of-court compensation program on the fly, struggling to find a proper way to respond to this unprecedented disaster—yet this response was so haphazard that it left some claimants without clear rights to compensation, or, conceivably, it even left them with unfair levels of compensation.

This study examines and evaluates the limits and potential advantages of the U.S. Oil Pollution Act 1990 and the systems used by the Gulf Coast Claims Facility in order to identify and adapt a new, comprehensive legal framework for setting up a claims facility to handle oil-spill compensation payments in Thailand. With the Thai context in mind and in light of the U.S.

approach, this study recommends a framework that (1) includes a statutory duty to establish a claims facility for oil spill compensation; (2) identifies a responsible agency to designate the responsible party; and (3) explicitly recognizes economic losses caused by an oil-spill regardless of ownership rights. Given the problem of transparency in Thailand, this dissertation also recommends creating a neutral body to supervise the compensation regime. It also makes concrete suggestions for how to design these future claims facilities to better respond to economic losses caused by oil spill incidents, including a structure that entails different phases, how to improve accuracy in how we calculate losses, how to set up an appeals process, among other considerations. Overall, the approach this dissertation recommends represents an innovative middle path that strives to find a better balance between the goals of efficiency and fairness, and it could also serve as a possible model for reevaluating economic loss compensation regimes, in general, including other types of industrial pollution beyond oil spill compensation.

Keywords: Oil Spill, Economic Loss, Interim Payments, Scientific Uncertainty, Future Loss, Mass Claims Resolutions, Peace Premium, Efficiency, Fairness, Oil and Gas Industry

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“Far and away the best prize that life has to offer is the chance to work hard at work worth doing”

Theodore Roosevelt, Speech in New York, September 7, 1903

Dedication

To my parents

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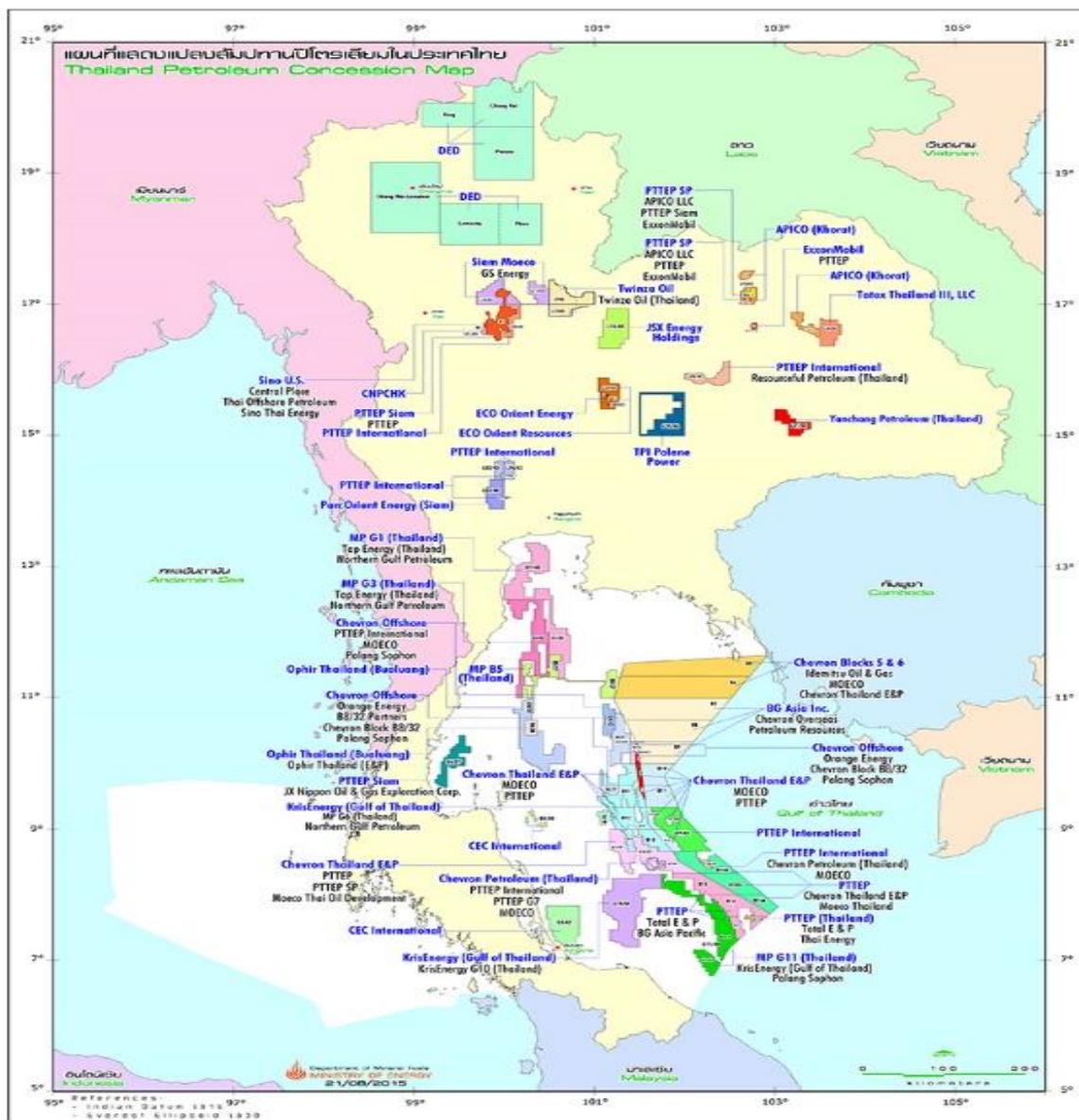
Abbreviations

CCC	Civil and Commercial Code
ECNEQ	Enhancement and Conservation of National Environmental Quality
EPA	Environmental Protection Agency
GCCF	Gulf Coast Claims Facility
NHRC	National Human Rights Commission
OPA	Oil Pollution Act

CHAPTER 1 INTRODUCTION

Offshore oil and gas operations are being carried out further from land, and in some cases, are taking place in sensitive locations where the livelihoods depend heavily on fishing and tourism for a large part of their income, such as the Gulf of Thailand and the Andaman Sea.

Figure 1. Thailand Petroleum Concession Map, Ministry of Energy of Thailand



Source: Ministry of Energy of Thailand (<http://www.dmf.go.th>)

1.1 BACKGROUND OF THE STUDY: THE STORY OF OIL-SPILL COMPENSATION REGIME IN RAYONG

1.1.1 THE INCIDENT GIVING RISE TO THE RAYONG OIL SPILL 2013

Despite the establishment of minimum requirements for preventing accidents in offshore oil and gas operations and transportations, the risk of offshore oil and gas incidents can never be eliminated entirely.

On July 27, 2013, the leaked pipeline owned by the Petroleum Authority of Thailand, Global Chemical Plc. (PTTGC),¹ caused an emission of massive oil spill in Rayong's Gulf of Thailand while oil was being transferred from an undersea well to a tanker. The pipeline leaked crude oil into the Gulf of Thailand off the coast of Koh Samet, a popular tourist island in Rayong Province.² The epicenter of this oil leakage was located in the Gulf of Thailand, 35 kilometers from Ao Phrao beach on Koh Samet.³

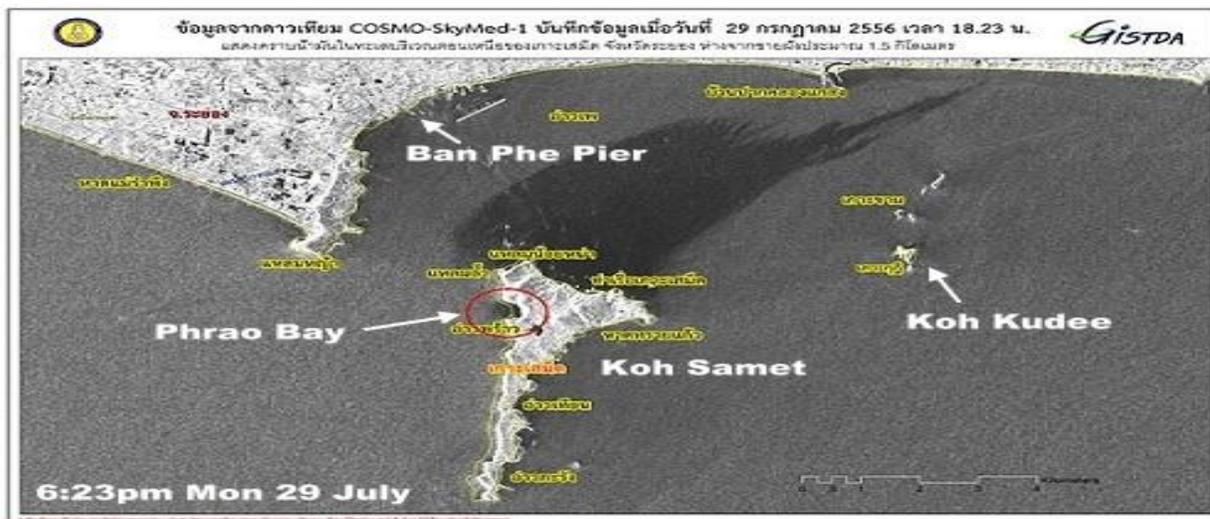
1 PTTGC is a subsidiary of PTT Public Company Limited. As of September 9, 2015, the percentage of equity ownership of PTTGC is as follows: 48.89% owned by PTT Plc, 21.13% owned by foreign investors, 20.32% owned by domestic investors and 9.66% owned by Thai NVDR Co.,Ltd. Following the privatization of the state enterprise "Petroleum Authority of Thailand", PTT Public Company Limited or "PTT" was registered on October 1, 2001 "under Corporatization Act B.E. 2542 (A.D. 1999). PTT inherited from its predecessor or business operations, rights, debts, liabilities, assets and personal. Having the Ministry of Finance as the largest shareholder (51.1%), the company was listed on. PTT Plc owns extensive submarine gas pipelines in the Gulf of Thailand, a network of LPG terminals throughout the Kingdom, and is one of the largest corporations in the country and is also the only company from Thailand listed in Fortune Global 500 companies. (The company ranks 81st among top 500 on the Fortune 500.) PTTGC was listed in the Top 10 of the Dow Jones Sustainability Indices (DJSI) for two consecutive years. See PTTGC, Annual Report 2015 (2016), <https://pttgc.listedcompany.com/misc/AR/20160314-pttgc-ar2015-en-02.pdf>.

2 See *Laura Beans, 50 Tons of Crude Oil Spill in Thailand*, ECOWATCH (July 31, 2013), <https://www.ecowatch.com/50-tons-of-crude-oil-spill-in-thailand-1881782611.html>. ("The tiny island of Koh Samet is about 2 km off the coast of the Thai mainland. It has the long pale beaches, forests and beautiful geography.")

3 See Athena Casarotto, et al., *Documentation and Analysis of the Rayong Oil Spill Characterizing the Health, Economic, and Social Impacts of the Incident and Response*, Mar. 7, 2014, https://web.wpi.edu/Pubs/E-project/Available/E-project-031114-163830/unrestricted/Final_Rayong_Oil_Spill_Report.pdf.

PTTGC declared that the volume of the oil spill was 54,340 liters, controversially, however, the satellite images indicated that the spill covered approximately 9 square km of water when it first occurred.⁴ Some of the oil slick flowed to Koh Samet Island where it accumulated at Ao Phrao Bay, as shown by Figure 2.

Figure 2. Satellite Image of Rayong Oil spill on 29 July 2013 (by GISTDA)



Source: Richard Barrow (<http://www.richardbarrow.com/>)

This incident led to the rapid evacuation of locals and tourists in the area and eventually resulted in the closure of Ao Phrao beach for the clear up and revitalization. Certain nearby beaches

⁴ The volume of oil that spilled has become a topic of debate, and the satellite images can be subject to different approach of interpretations. PTTGC declared that the volume of the oil spill was 54,340 liters (PTT Global Chemical, 2013). However, according to some experts, there are many different ways to calculate the volume. One method of calculating the oil spill is by using a satellite image of its area and calculating a volume from that. Another method is by using the amount of dispersant reported and using the ratio of dispersant to oil. A volume of oil spilled can be calculated by the ratio of dispersant to oil recommended. PTTGC used 32,000 liters of Slickgone NS, to disperse the oil by PTTGC. The ratio of dispersants dictates that 1 liter of Slickgone NS can recover up to 30 liters of crude oil. Therefore, the calculation will result in somewhere between 640,000 and 960,000 liters of oil that was spilled. The volume of oil that has spilled can also be calculated from the area of the satellite image. The satellite image shown in Figure 2 has been used resulting in the ellipse shape with the radii of 750 meters and 4150 meters (Phuket Gazette, 2013) and the thickness of the light crude oil is 0.0000254 meter (International Spill Control Organizations, n.d.). The formula for the volume of oil spilled is the area of the slick times its thickness (Skytruth, n.d.), where the area can be calculated by multiplying the two radii with pi. Therefore, the volume of the oil that was spilled from this calculation was 248,240 liters.”) See Casarotto et al., *supra* note 3, at 22-26.

were also closed due to uncertainty about water toxicity and contamination (including the side-effect of using of the dispersant). In addition, concerns have been growing about the oil spill and the inconsistent information released, partly due to scientific uncertainty and the complexity of marine ecosystem, worsening the economic impacts in fishing industry and tourism sector in terms of consumers' confidence even further following the negative publicity of the spill.

1.1.2 ECONOMIC IMPACTS OF THE SPILL

The oil spill incident caused not only environmental damage but also had a serious economic impact on coastal communities where livelihoods depend heavily on fishery and tourism. Following the Rayong Oil Spill in July, 2013, claimants including those from the fishing industry and the tourism sector in particular, have demanded for economic loss compensations from the PTTGC as a responsible party.⁵ Many different stakeholders were economically affected as a result of the spill, both directly and indirectly. Although the economic impact has not been fully known, a number of reports found that fishermen in the area, as well as hotels, restaurants, and other businesses tied to tourism, felt the most immediate effect.⁶

(1) THE FISHING INDUSTRY

The loss of marine lives such as fish, blue crab, oysters, and squids in the area caused a major loss of income towards the shoreline or small-scale fishermen. On 27 August, 2013, approximately 500 local fishermen held a protest demanding better compensation from the responsible party.⁷ A fishermen leader claimed that they lost, averagely, 60-70% of their normal

⁵ See Casarotto et al., *supra* note 3, at 22-26.

⁶ *Id.*

⁷ See *Fishermen Want 'Fair' Oil Spill Damages*, BANGKOK POST (Aug. 28, 2013), <http://www.bangkokpost.com/print/363668/>

rate of catches, and he went on to observe that a lot of fish are seemingly extinct.⁸ Eventually, this led to debt accumulation for fishermen, especially when their fixed cost of fuel stayed constant but their harvests decreased despite having travelled for a longer distance than the normal pre-spill distance.⁹

Similarly, the consequence of the oil spill faced by Rayong fishermen also serially impacted seafood merchants. A study found that people in this sector suffered a decrease in earnings from 1000 THB to only 100 THB per day.¹⁰ For instance, apart from the negative impact on domestic market and consumption, fish exported to Taiwan and Singapore were stopped due to fear of contamination, where the storage cost was raised correspondingly to the duration of time the product is left in the storage.¹¹ To illustrate, the pricing charged for the freezer storage was rapidly increased from 3 THB/kg per month to 6 THB/kg in the next month, and 9 THB/kg for the next following month, and etc.¹² Even though some seafood could be sold to merchants at fish markets, the agreed price for the seafood was often significantly decreased by half.¹³

With regards to the long-term impact of the spill, local villagers and fishermen of the eastern province of Rayong complained that the oil spill in July 2013 was still affecting Rayong beaches and local fisheries even in 2015.¹⁴ Even at the nearby Mae Ramphueng Beach which is also in Rayong province, an inspection in 2015 has similarly revealed that crude oil stains were

⁸ See Casarotto et al., *supra* note 3, at 63.

⁹ To illustrate, a fishermen complained that he has to spend 5 hours (post-spill) instead of 5 minute (pre-spill) in order to find some fish, but they still experienced high loss due to the severe decrease in the quantity of their catch and, resulting in the substantial loss of earning that could not compensate for their travelling cost, especially given high fuel prices. See *id.* at 41.

¹⁰ See *id.* at 63.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 41.

¹⁴ *Rayong beach still affected by 2013 oil spill*, THAIVISA NEWS (Mar. 3, 2015), <https://www.thaivisa.com/forum/topic/805239-rayong-beach-still-affected-by-2013-oil-spill/>

still apparent along the beachline, and many kinds of seashells, reportedly, turn black due to hardened crude oil stains on their shells.¹⁵

To sum up, a number of local fishermen claimed that they have earned substantially less income from fishing after the 2013 spill, forcing many of them to sell their boats, changing their ways of life. In this regards, the representative of the fishermen association in Rayong claimed that, their pre-spill income was approximately 2,000-3,000 THB per day, but after the spill has caused severe difficulty to their earning, some of them have to sell their fishing boats and turn to selling vegetables instead, allowing them to earn as small income as only 60-70 THB per day.¹⁶

(2) THE TOURISM INDUSTRY

Tourism is a large component of the Thai economy. The average direct income from tourism contributing to the Thai GDP is 2.42 trillion THB, and when includes the indirect income from tourism-related business activities, the overall income from tourism sector is said to account for 20.2 percent of Thailand's GDP.¹⁷ In 2015, the Travel and Tourism Competitiveness Report published by the World Economic Forum ranked Thailand at 35th of 141 nations.¹⁸ Among the metrics used to arrive at the ranking, Thailand scored high on "Natural Resources" (16th of 141 nations).¹⁹ Undoubtedly, Thailand is one of the world's main tourist destinations, where the largest

¹⁵ *Id.*

¹⁶ *Id.* ("A representative of the local fishermen, claimed that the 2013 oil spill had severely affected the life of the local fishermen. He said local fishermen could make small cashes, not enough to make their living, and this prompted many of them to sell their fishing boats and turn to other careers.")

¹⁷ See *Tourism income in Thailand to hit 2.42 trillion baht*, EVOLUTION TOUR, <http://evolutiontour.com/content/85-tourism-income-in-thailand-to-hit-242-trillion-baht> (last visited Dec. 24, 2016); see also World Economic Forum, *The Travel & Tourism Competitiveness Report 2015* (2016), http://www3.weforum.org/docs/TT15/WEF_Global_Travel&Tourism_Report_2015.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

driver of tourism in Thailand is for “beaches and sun”. Unquestionably, such a form of tourist activities would likely to be driven away by the image of oil stains coving Thai beaches.

The President of Rayong Tourism Association claimed that, after the news about the oil spill widely spread in the first week, the impact on tourism industry was exacerbated severely, leading to a 50-60% decrease in a number of tourists following the oil spill.²⁰ Similarly, according to the Chairman of the Rayong Hotels Association, there was 100 percent booking cancellations immediately after the 2013 oil spill incident, and the loss of earnings they suffered could not be adequately compensated by the initial remedial measure carried out by the PTTGC.²¹

As a consequence, the group consisting of six business hotel operators had filed a lawsuit against PTTGC at the Rayong Provincial Court in July 2014, given the deadline imposed by the statute of limitations.²² Basing on a view that the environment normally rehabilitates itself in 10 years, the business operators were demanding compensation for the loss of earnings covering the period of at least 5 years.²³ In addition, a lawyer representing the group alleged that, initially, the group notified the Energy Ministry about its request for the damages of 241 million THB, but because the tourism group had not received any responses from the company after such message was forwarded to the company by the Ministry, the group subsequently decided to sue the company for 350 million THB.²⁴

20 See Casarotto et al., *supra* note 3, at 65.

21 Achara Wisetsri, *Six Businesses File Bt350m Lawsuit Against PTTGC*, THE NATION, (July 23, 2014), <http://www.nationmultimedia.com/news/national/aec/30239226>.

22 See *id.*

23 See *id.*

24 See *id.*

(3) OTHER IMPACTED BUSINESSES

This group includes businesses that mainly are individuals and small-scale businesses providing other goods and services, locating in the coastal area of the Rayong Province, such as, the street vendors (e.g. ice-cream trucks operators), the laundry services, the dentists or the pharmacists locating nearby the tourist areas, the transportation service providers (e.g. taxies), for instance.²⁵ Arguably, even the inland stores in Rayong could also claim that they suffered loss of earning due to the decrease in a number of tourists travelling into the Rayong Province.²⁶

In summary, although, according to the Ministry of Energy, the Rayong Spill incident in 2013 is the fourth major oil spill in terms of magnitude but is the worst spill in terms of its economic impacts on the coastal residents and businesses in the Thai history, given its location allowing the crude oil to reach the shore in a tourist beach in Rayong Province. A study suggested that, among the different types of businesses, the restaurants and seafood merchants reported a revenue decrease of up to 100%, whereas the least impacted industry, based on the population of this study, was the non-seafood merchants where the economic loss was reported to be of almost 30% on average.²⁷

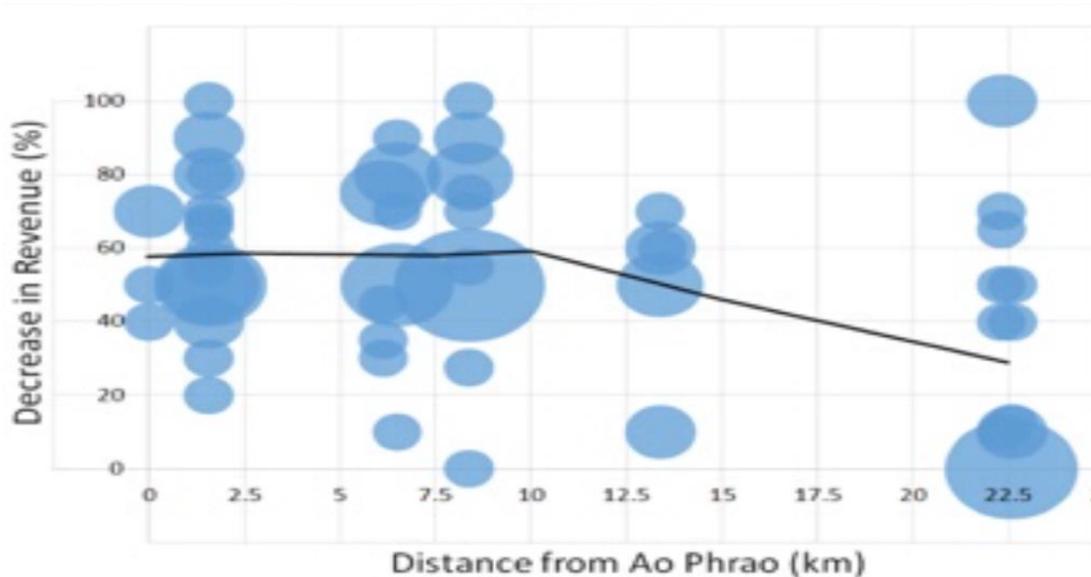
Interestingly, in terms of the relationship between the distance from Ao Phrao (the central area of the spill) and the percentage of the decrease in revenue, the study found that there was , averagely, 60% decrease in revenue for distances closer than 10 km from Ao Phrao, before dropping steadily to only at about 30% decrease in revenue at the distance of 22.5 km away from Ao Phrao, as shown below.²⁸ As such, it can be seen that the economic impacts caused by the spill

²⁷ See Casarotto et al., *supra* note 3, at 65.

²⁸ *Id.* at 59-87.

were experienced differently by individuals, depending on the geographical proximity to of the spill, as shown by figure 3 below:

Figure 3. Decrease in Revenue by Distance from Ao Proa (km)



Source: The Report Documentation and Analysis of the Rayong Oil Spill Characterizing the Health, Economic, and Social Impacts of the Incident and Response, on 7 March 2014. (https://web.wpi.edu/Pubs/E-project/Available/E-project-031114-163830/unrestricted/Final_Rayong_Oil_Spill_Report.pdf)

In addition, the study also suggested that, the spill had a negative impact on some nearby beaches or other communities, like the Ban Phe Area for instance, more in terms of economic impact than physical or environmental impact, given such community's heavy reliance on fishery.²⁹ This is largely due to the negative publicity or the reputational impact of the spills that could impact a certain nearby community more financially than environmentally.

²⁹ *Id.* In addition, reportedly, some seafood sellers in Ban Phe Area could not sell their seafood products due to consumers' health concerns for example, of cancer, forcing them to reduce the price substantially or to use the products for personal consumption.

1.1.3 THE VOLUNTARY COMPENSATION PROGRAM FUNDED BY THE PTTCG

In its effort to remedy the oil spill victims suffering economic loss as rapidly as possible, the PTTGC has expressed the promise of full and fast compensation and executed the voluntary compensation program, following a very general protocol as provided in Table 1 below:

Table 1. Compensation by Industry. ³⁰

Local Business Stakeholders	Amount (THB)
Fishermen	30,000 THB per boat (*for 30 days i.e. 1000 THB per day) ³¹
Restuarant	15,000 THB per restaurant
Koh Samet Taxi	24,000 THB per vehicle
Laundry services	15,000 THB per company
Street Merchant	9,000-45,000 THB per shop according to size

³⁰ *Id.* at 71.

³¹ Allegedly, the representatives from the Fishermen community in Rayong, attending the meeting to negotiate with the representatives from PTTGC in order to conclude the agreement on compensation protocol, expressed their dissatisfaction regarding the amount of compensation offered by the PTTCG and asked for the criteria that were used for arriving at these figures. The fishermen claimed that the PTTGC representatives did not provide them with the answer about the compensation criteria and merely informed them that if they disagreed with the proposals the meeting would then use the majority vote to conclude the agreement instead. Because there were only a few people of on the fishermen side (which would clearly have constituted a minority vote at that meeting), the fishermen representatives subsequently decided to walk out, informing the secretary to record their disagreement officially. They also claimed that the minimum level of compensation at this stage that they might possibly have agreed upon should, at least, account for the period of 60 days instead of 30 days, and at the amount of 2000 THB per day instead of 1000 THB per day, basing on the approximate amount of actual loss they suffered as a consequence of the spill. See Patsara Jikkham & Paritta Wangkiat, *In Rayong, Oil Spill Recovery is Only Surface Deep*, BANGKOK POST (July 27, 2014), <http://www.bangkokpost.com/print/422650/>.

As of March 2014, the number of official documents of oil-spill claims received were 8813 cases in total. The cases can be classified into different sectors as shown in Table 2 below:

Table 2. The number of cases received and cases have been compensated. ³²

Categories of Claimants	total official documents received = 8813 cases	cases have been given compensation= 1892
1. Hotels and Restaurant	1363 cases	174 cases
2. Fishermen	2675 cases	1175 cases
3. Health	1 case*	0 cases
4. Others	4774 cases	543 cases

A number of oil spill victims suffering economic loss have not been satisfied with the compensation program offered by the PTTCG. After it was revealed that some victims had waited for a month without receiving the compensation as promised, non-governmental organizations—such as EnLAW Thai Foundation, Greenpeace Southeast Asia, and the Good Governance for Social Development and the Environment Institute—expressed their concern about the compensation program especially in terms of compensation criteria and transparency.³³

Most drastically, fishermen criticized the inadequacy of the compensation amount of 30,000 THB, covering only for a one-month period of economic loss caused by the oil spill incident (1000 THB x30 days), with a practically limited right to appeal, since they claimed that the impact of the spill on their earnings definitely last longer than one month, and some even claimed that

³² See Casarotto et al., *supra* note 3, at 38.

³³ *Id.* at 94. See also Press Release, Green Peace, Thailand's Civil Society Statement: The oil spill and the leaked pipeline (Aug. 2, 2013), <http://www.greenpeace.org/seasia/Press-Centre/Press-Releases/Thailand-Civil-Society-Statement-The-oil-spill-en/>. [hereinafter Thailand's Civil Society Statement].

they averagely earned 2000 THB per day before the spill.³⁴ As such, the compensation measure taken by PTTGC has been widely criticized by many spill victims for being an unjustifiably inadequate short-term solution.³⁵ Fishermen concerned with the long-term contamination subsequently attended a public hearing in August 2015 to discuss the potential long-term impact of the spill and the appearance of the petroleum tar balls, remaining mostly at the seafloor, appearing several times on the beach even after 2013.³⁶

Following the dissatisfaction with the allegedly unfair compensations offered under the voluntary compensation program in the aftermath of the Rayong Spill, 450 fishermen in Rayong filed the lawsuit against PTTGC [Case no. 1150/2557(2014)] for 400 million THB compensation for damage caused by the oil spill.³⁷ Similarly, a group of tourism business operators in Rayong had also filed a lawsuit against PTTGC [Case no. 7/2557(2014)] in July 2014.³⁸

1.2 THE STATEMENT OF THE PROBLEM: THE INADEQUACIES OF THE EXISTING REGIME OF THAI LAWS

Statistically, according the Marine Department, Ministry of Transportation, between 1976 and 2016, there were 225 oil-spill incidents in the Thai waters, none of which have resulted in a lawsuit against the responsible party in Thai courts—except the 2013 Rayong spill—and the

34 See Jikkham & Wangkiat, *supra* note 31.

35 See, e.g., K. Rattanasiri, *Over a month after PTTGC's Oil spill disaster. It is NOT OVER*, GREEN PEACE. BLOG (Sept. 9, 2013, 7:32 PM), <http://www.greenpeace.org/seasia/th/news/blog/over-a-month-after-pttgc-oil-spill-disaster-/blog/46528/>.

36 Some local fishermen believe that these were created due to the inappropriate use of dispersants to quickly remove the oil from the surface of the sea water, so the oil was instead sunken into the seafloor. See, e.g., Casarotto et al., *supra* note 3, at 81.

37 See *Fishermen in Rayong to sue PTTGC for Bt300 million*, THE NATION, (July 26, 2014), <http://www.nationmultimedia.com/news/national/aec/30239513>.

38 See *Tourism operators sue PTTGC for Koh Samet oil spill*, THAI PBS, (July 29, 2014), <http://englishnews.thaipbs.or.th/tourism-operators-sue-pttgc-koh-samet-oil-spill/>.

incidents were merely reported to the police officers for routine official records. As a matter of fact, this is largely because while some spills have a relatively small magnitude with limited impacts, the other major spills (i.e. 9 out of those 225 spills with the magnitude of equal to or greater than 20,000 liters) rarely reached the shores to cause economic impacts to the coastal communities, or gained intensive media coverage, except the Rayong incident in 2013.³⁹

Arguably, even leaving aside the reason of improper motives, without a clear legal framework specifically addressing the issue of oil spill liability, and relying, instead, on the broad regime of pollutions law in general, involving various government agencies, confusion might, consequently, be caused to the relevant agencies at the level of implementation. Given the complex nature of offshore oil spills, such confusion is likely where the agencies' duties have not been specifically and legally clarified.

Surprisingly, while there are approximately 200,000 tons of oil being routinely transported in the Thai waters on a daily basis, as well as the continuing granting of the offshore oil and gas leases by the Thai governments,⁴⁰ and, thus, contributing to a real threat of future spills, Thailand still lacks a comprehensive legal framework capable of dealing with the issues of oil spill compensation regime specifically, adequately, and effectively.

More importantly, despite a number of economic-loss claimants filing the lawsuits against the PTTGC following the 2013 incident, the traditional legal regimes—under the Thai Civil and Commercial Code (CCC) B.E. 2466 (1923) and the relevant provision of the Enhancement and Conservation of National Environmental Quality Act (ECNEQ) 1992, as well as the relevant

³⁹ See NATIONXFILE, *เกาะเสม็ดน้ำมันรั่ว (Oil Spill at Samet Island)*, YOUTUBE (Feb. 27, 2014), <https://m.youtube.com/watch?v=54jcHDV8jg4> (Thai.)

courts' opinions—have not yet adequately provided sufficient guidance for the compensation regime in the context of oil spill liability.

One of the potential problems is the lack of clarity of the relevant provisions of Thai laws in recognizing the type of economic loss suffered by the majority of the spill victims in the Rayong case. Although the oil spill victims suffering economic-loss may have a private cause of action under section 420 of the Thai CCC 1923 with regards to the liability for wrongful acts, this relevant provision, applicable to the wrongful acts in general, makes no explicit reference to the so-called “pure economic loss” under the common-law traditions.⁴¹

As Prof. Palmer observes:

*“Spills are excellent engines of pure economic loss. They cause relatively little damage to private property or human life. Instead, they devastate something un-owned—natural resources, wildlife, the shores, the environment—and that devastation causes severe disruption to the surrounding co-dependent economy. The resulting loss to individuals and businesses is a massive economic ricochet.”*⁴²

As such, in the context of oil spill damages caused to private individuals and businesses, there is usually only a relatively small percentage of the plaintiffs that suffered economic loss accompanying physical injury to their private properties⁴³—such as the case where crude oil might have directly touched fishermen’s vassals or fishing equipment or seafood farms or hotel premises.

41 It should be noted at the outset, although, that, for the purpose of this study, since the terms and the concept of “pure economic loss” does not exist under Thai laws (unlike most common-law traditions, such terms has not explicitly existed under the Thai legal regimes and even legal educations), most parts of the study will therefore refer to the types of loss suffered by the claimants, especially in the Rayong oil-spill case generally as “economic loss”. The issue of this type of loss will be discussed in detail in Chapter 4.

42 Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 109 (2011) (italics added) (discussing oil spills).

43 *Id.* at 109, 116 n.49 (after \$ 1.5 billion in funds were disbursed to claimants in Louisiana, 99% of the claims filed were for economic damage while only 1% was for property damage).

This smaller group of economic loss claimants likely to face less legal barriers as their economic losses were accompanied by certain forms of physical damages to the property. Averagely, this smaller group might account for only a very small percentage of the total number of economic-loss claims, whereas most economic loss claims are in the nature of the loss of earnings.⁴⁴

To make matter worse for the oil-spill claimants, the language of section 96 of the ECNEQ 1992, another directly relevant provision of Thai laws governing the oil-spill litigations, does not seem to recognize this type of loss when the language of this provision explicitly links the damage to the private property.⁴⁵ Accordingly, the lack of “adequate” clarity of the relevant laws can facilitate the defendants to challenge the recognition of such type of damages, making the litigation unproductively contentious and painfully lengthy for the claimants, especially when compared to the other jurisdiction where this type of loss is unambiguously recognized by the laws specifically governing the oil-spill cases.

Most importantly, the traditional litigation processes can be painfully time consuming for the victims of the oil-spill incidents. In Thailand, the average length of time from filing a complaint

44 This includes the context of economic loss claims following the Rayong Spill incident.

45 This issue will be discussed in detail in Chapter 4. For the purpose of illustration, the most relevant provision of the ECNEQ 1992 in the context of oil-spill liability is Section 96, as illustrated by the Rayong Oil Spill litigation, stating in full as follows:

“ Section 96 If leakage or contamination caused by or originated from any point source of pollution is the cause of death, bodily harm or health injury of any person or has caused damage in any manner to the property of any private person or of the State, the owner or possessor of such point source shall be liable to pay compensation or damages therefor, regardless of whether such leakage or contamination is the result of a willful or negligent act of the owner or possessor thereof, except in case it can be proved that such pollution leakage or contamination is the result of

(1) Force majeure or war.

(2) An act done in compliance with the order of the Government or State authorities.

(3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the leakage or contamination.

The compensation or damages to which the owner or possessor of the point source of pollution shall be liable according to the foregoing first paragraph shall mean to include all the expenses actually incurred by the government service for the clean-up of pollution arisen from such incident of leakage or contamination.”

to reaching the court of first instance's judgment is 12 to 18 months.⁴⁶ As such, it is not uncommon that it can take more than 10 years before the case can be finally decided by the Supreme Court of Thailand, and the ultimately awarded compensation can be paid to the spill victims. To illustrate, in one of the most relevant case law in the sphere of pollution-related litigations, involving the inland water or the small canal polluted by a lead factory, it takes 14 years, before the Supreme Court decision awarding the compensations was delivered to the affected 8 plaintiffs in 2016.⁴⁷

When litigation is in response to a major oil-spill disaster as a system of mass claims resolution, its psychological effects on the victims and the community can be more severe, often significantly worsening the plights of these plaintiffs. Social scientist Dr. Steven Picou asserts that in the communities affected by the oil-spill catastrophe, "the legal system itself can become a secondary disaster, exacerbating and prolonging psychological stress and perceived community damage."⁴⁸

To sum up, the above examples only partially illustrate the problems of deficiency or inadequacy of the current legal regime of Thai laws, that is, in a large part, ill-equipped to provide appropriate remedy for the victims of offshore oil spill incidents. The existing legal regime was not specifically designed to deal with the specific context of oil-spill liability for economic-loss compensation arising from offshore oil and gas incidents, and, hence, potentially obstructing rather than facilitating the rapid and fair compensations to the suffered victims.

46 Thawat Damsa-ard & Surapong Damrongtrakoolsak, Thailand - Dispute Resolution Guide 2016, TILLEKE & GIBBINS (Jan. 17, 2016), <http://www.conventuslaw.com/report/thailand-dispute-resolution-guide-2016/#sthash.tzTLjnZF.dpuf>. [hereinafter Dispute Resolution Guide 2016]

47 The Supreme Court decision was read by the Court of Instance to the plaintiff in July 2016, see Case No. 15219/2558 [2015] Supreme Court (Thai.).

48 See J. Steven Picou et al., *Disaster, Litigation, and the Corrosive Community*, 82 SOC. FORCES 1493, 1515 (2004).

Given especially the inherent complexity and uniqueness of the issues associated with compensation regime for the oil-spill victims—such as the nature of the mass claims itself, scientific uncertainty, and the socioeconomic conditions of the victims who are deeply integrated with the marine resources, making it highly inelastic for the them to switch to a reasonable substitute source of earnings—Thailand needs a new framework to facilitate an efficient and fair compensation regime specifically suitable for the oil-spill context.

This notion, to some extent, comports with what stated in the Thai Supreme Court’s guidance addressed to the judges at the lower courts. In this guidance, the Supreme Court explicitly encouraged the use of Alternative Dispute Resolutions (ADR), such as the settlement of disputes outside the court presided over by relevant experts, as a main method for resolving the pollution-related cases given the complexity, uniqueness, and interdisciplinary nature of the cases, hopefully to render the outcome in a more reasonable timeframe and efficient manner.⁴⁹

In the wake of the Rayong Spill 2013, the Thai government also similarly encouraged the oil-spill victims to negotiate directly with the PTTGC rather than filing lawsuits against the company in the court. In the same direction, the PTTGC’s executive in expressing the promise or commitment to full compensation that would be paid quickly to victims of the oil-spill disaster, similarly suggested the oil-spill victims that lawsuits against the company would entail a time-consuming procedure before the victims could receive a full compensation.

Given this apparent consensus on the desirability of the out-of-court rapid compensation regime, where the victims themselves had also strongly expressed their need for expeditious compensations, to simply push the victims towards a new kind of unprecedented out-of-court

49 *Id.*

regime without establishing an appropriate legal framework to protect the victims' interest would be irresponsibly unfair. Put in other words, the remedy for these already socioeconomically injured victims should not be left largely in the hands of the would-be defendant, relying on the company's level of integrity or CSR, as well as the ad-hoc supervision by some urgently assigned officials. This problem is crucial especially when the issue of public trust, and, consequently, the victims' right to fair compensation, were put in peril in the context of the out-of-court compensation program following the Rayong Spill in 2013.

As such, to secure a reasonable degree of efficiency and fairness in the compensation program, there is clearly a pressing need for Thailand to develop an appropriate legal framework to provide, at least, a uniform guidance for the creation of a compensation regime handling the economic-loss claims as faced by the oil-spill victims following the 2013 disaster in Rayong.

Geographically, Thailand has a very long coastline where the local communities' livelihood largely depend on fishery and tourism as well as other forms of related coastal businesses. At the same, a very long coastline can potentially be exposed to marine pollutions created by the offshore oil and gas operations, including the carriages of oil and gas by sea as Thailand is the net importer of oil. Similarly, the upstream oil and gas activities also have a potential to create risk of oil spill incidents incurring extensive economic impacts (i.e. the so-called fat-tail risk).

Typically, the significance of the oil spill problems has usually been rooted in its inherent nature of creating catastrophic consequence or fat-tailed risk, rather than in its frequency. For Thailand, however, even in terms of its frequency, the oil-spill incidents can even pose an imminent threat. Recently, spills are no longer a rare event in Thai waters, even after the Rayong Spill in 2013. Therefore, it can be underrated to regard them as perfectly random events.

To illustrate, on October 27, 2015, an oil spill (the source of which is still unidentifiable) washed up on Hua Hin beach in Prachuap Khiri Khan Province, covering a 10 km of the shoreline from Hua Hin to Khao Takiab, where swimming was prohibited at Hua Hin and the beach was closed for the taskforce to clean up the remaining oil on the beach.⁵⁰ Reportedly, this oil spill in Hua Hin district and nearby areas has affected a larger area than the spill that hit Rayong's Koh Samet in 2013, causing incalculable damage to marine ecology.⁵¹ More recently, in Chumphon Province locating in the south, the provincial authorities had to employ heavy machines to bury the crude oil stains appearing on the beach in order to clean up nearly 100 kilometers of an affected beach in Chumphon's Lang Suan district on December 1, 2015.⁵² .

For these reasons, rather than waiting for another massive oil spill tragedy to strike Thai waters, Thailand need to develop a comprehensive legal framework to adequately address the oil-spill compensation problem.

To sum up, the Rayong Oil Spill incident in 2013 provides a useful example of the catastrophic consequences of a large oil spill in Thailand that can provide some lessons for industry and government. Many local residents and businesses throughout the coastal communities in Rayong have suffered economic loss mostly due to the damage to the natural resources. Nevertheless, under the existing legal regime, there is no effective comprehensive legal framework directly and adequately regulating the compensation regimes handling the economic-loss claims following an oil-spill incident in Thailand. Equally, there is no appropriate practical guidance for

50 See Sasiwan Mookhasen, *Lawsuit Threatened Over Hua Hin Oil Spill*, KHAOSOD (Oct. 28, 2015), <http://www.khaosodenglish.com/life/2015/10/28/1446025228/>.

51 See Pratch Rujivanarom, *Recent oil spill 10 times larger than one in 2013*, THE NATION (Nov. 6, 2015), <http://www.nationmultimedia.com/national/>.

52 See *Oil spill in Chumphon buried*, THE NATION (Dec. 2, 2015), <http://www.nationmultimedia.com/news/national/aec/30274140>.

designing a claims resolution facility,⁵³ handling compensation payments for such type of claims as an alternative to litigation. As a consequence, struggling to find a proper way to respond to this unprecedented disaster, the out-of-court compensation regime in the aftermath of the Rayong Spill was developed on the fly, potentially leaving the compensations available for the suffering claimants unclear and, perhaps, even unfair.

Regrettably, the case of the Rayong Spill 2013, unavoidably, had to be a test case for the out-of-court compensation regime without appropriate legal framework to secure the reasonable degree of efficiency and fairness of the regime, due to the unprecedented nature of such catastrophe. In response to the future oil spill incidents, however, Thailand need to establish an appropriate legal framework to adequately regulate and provide an appropriate guidance for the out-of-court compensation regimes for economic-loss claims following an oil spill incident, in order to preserve a uniform balance between the goals of efficiency and fairness

1.3 A REVIEW OF THE US APPROACH: WHERE LESSONS CAN BE LEARNED

On this matter, the United States is prominent for having established its own comprehensive legal framework for implementing a statutory duty to create an out-of-court claims procedure, specifically for the oil-spill catastrophe. In this regards, it should be useful for Thailand to, at least, learn some lessons—either in terms of potentials or limits—offered by the US experience. This reform strategy utilizing foreign experience was also part of the long-term missions, recommended in a research project conducted by the Office of the Thai Supreme Court, proposing that, as part

⁵³ For an explanation of the “claims facilities” concept, see Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362 (2005)

of improving pollution-related laws for Thailand, the judicial exchange program with foreign countries should be set up.⁵⁴ Indeed, however, the wholesale adoption of foreign approach would not be desirable, and, thus, in building the new framework for Thailand, specific context of Thailand should primarily be taken into account.⁵⁵

As we can see both from the U.S. and the Thai experiences, the oil spill catastrophe can have particularly pronounced impact on socioeconomically disadvantaged populations of the coastal communities,⁵⁶ such as the local fishermen whose ways of life have been heavily depended on the condition of the marine environment, in particular. Consequently, long delays between economic harm and compensation as well as the manner in which the compensation processes are carried out can further injure these already-burdened victims.⁵⁷ In a sense, the problem of

54 In light of the two-day Regional Meeting in Bangkok, the Office of the Supreme Court of Thailand had set up a group of specialists with expertise in substantive law and procedural law, including professors of law and judges to conduct a research project to increase the capacity of judges and Courts of Justice in dealing with the environmental law cases. The research purpose is to analyze the specific nature of the environmental and pollution related laws problems, focusing on the difficulties, obstacles and constraints of the current legal regime. Finally, the research recommend some short-term and long- term plans for Thailand in order to enhance the efficiency of the regime in protecting and remedying the injured parties. *See* Winai Ruangsri, J, Supreme Court, Address at The Roundtable for ASEAN Chief Justices and Senior Judiciary on Environmental Law and Enforcement: Judicial Reforms to Respond to Environmental Challenges: Institutionalizing Environmental Expertise through Specialization and Environmental Courts (Dec. 5, 2011) (transcript available at <http://www.ajne.org/sites/default/files/event/2051/session-materials/25-session-5.green-benches-in-thailand-winai-ruangsri.pdf>)

55 Although the concept of “legal transplant” might be relevant with regards to the study of foreign law, for the benefit of resource efficiency, this study does not intend to enter this highly theoretical discussion. For a brief explanation, however, this concept was prominently introduced in the 1970s by the Scottish-American legal scholar W.A.J. Alan Watson to indicate the moving of a rule or a system of law from one country to another. As suggested by Watson, transplanted is the most fertile source of legal development—laws are commonly inspired by foreign policies and experiences. Regardless of the academic discourses and criticisms on whether legal transplants are sustainable as a notion in the legal theory, they are common practice in many real-world legal reform projects taking place these days. Nevertheless, the degree to which new laws are inspired by foreign examples can vary and local context should not be disregarded. A frequent and often justified criticism is that imported laws are not suited for a certain local context. For the leading work on the topic, *see* generally ALAN WATSON, *LEGAL TRANSPLANTS : AN APPROACH TO COMPARATIVE LAW* (1974)

56 *See generally* Hari M. Osofsky et al., *Environmental Justice and the BP Deepwater Horizon Oil Spill*, 20 N.Y.U. ENVTL. L.J. 99, 578 (2012).

57 In the context of BP, *see* Osofsky et al., *supra* note 56, at 149-50. (“To the extent that plaintiffs who are low-income or persons of color win monetary settlements or at trial, this compensation may alleviate some harms incurred by the BP Deepwater Horizon Oil Spill. On the other hand, long delays and eventual losses may strain an already-burdened population.”).

potentially unfair treatments faced by the oil-spill claimants also reflects some human right elements underlying in the problems of the oil-spill compensation regimes.

In the United States, oil spills are not new to the American people, and the capacity for environmental and economic destruction was recorded largely in the case of Exxon Valdez oil spill—the oil-spill disaster occurred on March 24, 1989, when the Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska. The litigation in the wake of the 1989 Exxon-Valdez oil spill stretched on for two decades, evidencing that even the U.S. system of litigation also had a poor track record with regard to swift compensation for the victims.

To avoid the anguishing delays and prolonged legal battles faced in the wake of the 1989 Exxon-Valdez litigation, Congress subsequently enacted the Oil Pollution Act of 1990 (OPA) in the belief that: (1) lawsuits under OPA are appropriate only where attempts to reach settlements with the responsible party are unsuccessful and (2) oil-spill litigation is so costly and cumbersome that it should be avoided.⁵⁸

Profoundly, in response to the problems of the traditional legal regime experienced in the 1989 Exxon Valdez, the shift of paradigm was brought about by the enactment of the OPA 1990. Specifically, with regards to the out-of-court regime handling the payments of the compensation for economic loss suffered by private individuals and businesses—like the case of the Rayong fishermen and other costal businesses claimants—Congress provided for interim-damage

58 135 CONG. REC. H7962 (statement of Rep. Hammerschmidt); 135 CONG. REC. H7965 (statement of Rep. Lent); *In re Oil Spill*, 808 F. Supp. 2d at 959 (“The intent is to encourage settlement and reduce the need for litigation.”); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310-311 (E.D. Va. 1993) (“The purpose of the claim presentation procedure is to promote settlement and avoid litigation. Congress believed that lawsuits against parties are appropriate only ‘where attempts to reach a settlement with the responsible party . . . were unsuccessful.’” (quoting H.R. REP. NO. 242, at 66 (1989))). See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 399 (2014)

payments to timely recover the loss suffered by the oil-spill victims.⁵⁹ These short-term OPA payments are intended to be expedited in nature:

“The responsible party shall establish a procedure for the payment or settlement of a claim for interim, short-term damages. Payment ... representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected”⁶⁰

With regards to the system handling the oil-spill claims in light this statutory framework, when the Deepwater Horizon spill occurred in 2010, BP was designated a “responsible party” by the Coast Guard under the OPA.⁶¹ Subsequently, the Gulf Coast Claims Facility (GCCF) was established by BP to administer claims by individual claimants and businesses for damages caused by the 2010 catastrophe.

In addition, among other significant changes, the 1990 Act also expressly creates or recognize the liability to compensate for pure economic loss, where the heads of damages covered under section 2702 (E) explicitly include “loss of profits or impairment of earning capacity” and where the claimant need not be the owner of the damaged property or resources.⁶²

To sum up, the OPA 1990 recognizes the pressing need for an out-of-court rapid compensation regime, as well as the need to explicitly recognize the pure economic loss in the

59 § 2705. See also Julie E. Steiner, *Interim Payments and Economic Damages to Compensate Private-Party Victims of Hazardous Releases*, 98 MARQ. L. REV. 1313, 1324 (2015)

60 § 2705(a).

61 This is statutory requirement of Section 2705 of the OPA which requires that a designated “responsible party” must establish an *interim* claims process. That duty rests with BP once it has been designated as “responsible party.” See George W. Conk, *Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 176 (2012)

62 See OPA § 2702(b)(2)(E). See, e.g., *In re Settoon Towing, No. 07-1263, 2009 WL 4730971, at *3 (E.D. La. Dec. 4, 2009)* (allowing a claim for economic losses resulting from inability to access a drilling platform during an oil spill clean-up and noting that such claim would have been barred under federal maritime law.)

context of oil spill disaster. Overall, it departed from “the paradigm based on negligence and the traditional economic loss rule, and moved to a rigorous regime of liability without fault, channeled responsibility, narrowed defenses, liability caps, broader loss categories, and private actions to recover pure economic loss.”⁶³

Nevertheless, both the OPA framework and the GCCF as being the most comprehensive model of claims facility in light of such framework, are not without flaws and can be controversial. The existing literature typically frames this dynamic as a conflict, for instance, between party autonomy, efficiency, and the victims’ need for rapid compensation on the one hand, and the issue of transparency and fairness on the other hand.⁶⁴

To illustrate, Mullenix, for instance, heavily criticize the GCCF regime, stating that “the precedent has now been set for corporate malefactors who are caught up in the maelstrom of massive liability to discharge their legal responsibilities on their own terms and favorable to their own interests.”⁶⁵ Similarly, Ewencyk criticized that GCCF was an institution whose fairness rested entirely on its administrator’s good will.⁶⁶ More recently and innovatively, Samuel Issacharoff and D. Theodore Rave, basing mainly on the “peace premium” concept and the ability to deliver finality, arguing that the claimants receive a greater compensation, while defendants get

⁶³ See Palmer, *supra* note 42, at 109.

⁶⁴ See, e.g., Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Revolving Mass Tort Claims - A Fund Too Far*, 71 LA. L. REV. 819, 916 (2011); Arthur J. Ewencyk, *For a Fistful of Dollars: Quick Compensation and Procedural Rights in the Aftermath of the 2010 Deepwater Horizon Oil Spill*, 44 J. MAR. L. & COM. 267, 290-269 (2013); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 922-23 (2010); Deborah E. Greenspan & Matthew A. Neuburger, *Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claims Context*, 17 ROGER WILLIAMS U. L. REV. 97, 129-36 (2012).

⁶⁵ See Mullenix, *supra* note 64, at 916.

⁶⁶ See Ewencyk, *supra* note 64, at 289.

greater closure under the public litigation system, ultimately suggesting that the OPA's approach should be abandoned.⁶⁷

On the contrary, Steiner proposed that the OPA framework should be expanded also to the victims of other types of hazardous releases, suggesting that the GCCF, at least in theory, was an expedited, procedurally more accessible, and lower cost damage recovery alternative to litigation, allowing the claimants to obtain prompt payment and avoid filing or litigation fees.⁶⁸ In addition, Steiner, citing Samuel Issacharoff and D. Theodore Rave, advocated that bringing a claim in the GCCF was a no-risk alternative to litigation since claimants could obtain interim relief and still file a lawsuit for claims that were not covered by the GCCF such as punitive damages.⁶⁹ Indeed, while criticizing the OPA regime, Issacharoff and Rave admitted that GCCF was most successful in realizing the OPA objective of finding a quick payment structure designed to limit the dislocations experienced after the Exxon Valdez spill.⁷⁰

As the real world examples of various law reform missions have showed, the devil is often in the detail of the optimal design of a given framework, and hence the ultimate design is of utmost importance.⁷¹ This notion is similar to the classic legal doctrine of "substance over form", in a sense that the OPA's approach of the out-of-court compensation regime should not be rejected at

67 Issacharoff & D. Rave, *supra* note 58, at 247 ("Abandoning OPA's streamlined, non-adversarial, private dispute resolution scheme for the costlier public class action litigation system had the ability to leave both sides better off.").

68 See Steiner, *supra* note 59, at 1341 ("There is a gap in tort recovery for many hazardous release victims. Hazardous spill victims receive different damage compensation based solely upon the type of hazardous substance released, with oil spill victims benefitting from a number of statutory damage recovery mechanisms that victims of other type of hazardous substance releases do not receive. Specifically, those injured by oil spills receive interim payments and recover for their economic loss.").

69 See *id.*

70 See Issacharoff & Rave, *supra* note 58, at 401 ("To its great credit, the GCCF achieved one of OPA's primary statutory objectives by quickly restoring billions of dollars into the crippled Gulf economy.").

71 See Michael Faure & Franziska Weber, *Potential and Limits of Out-Of-Court Rapid Claims Settlement – A Law and Economics Analysis*, 28 J. ENVTL. L. 125, 149 (2015).

the outset, basing merely on its superficial or apparent format of being a “private” or out-of-court approach of claims resolution. Therefore, developing an efficient and fair regime to address future oil-spill disaster is, rather, a matter of design, where certain factors might need to be introduced to appropriately improve substantive and procedural fairness.

Certainly, at least, the US experience with regards to the BP’s OPA obligations for the 2010 spill, as well as the rich body of scholarly writings on the matter, should be useful for assisting Thailand’s meaningful step in identifying the desirable degree of fairness and taking care of the stakeholders’ incentives, while still ensuring speedy compensation.

The use of the US experience in this sense is especially helpful, when the problems associated with the Rayong-spill compensation regime has been debated nationwide, even in the parliamentary session, resulting in parliamentary consensus that Thailand should enact the Act of Parliament to govern the oil-spill cases, specifically.⁷² While the need for specific legal treatments for the oil-spill problems is stimulated by the negative compensation experience painfully faced by a number of oil-spill victims, the existing Thai literature on the proposals directing at the root of the Rayong-spill compensation problems is regrettably scarce.⁷³

In this regards, it would be useful for Thailand to examine the U.S. experience, in light of the OPA comprehensive framework, especially in the context of the Gulf Oil Spill, where the lessons can be learned. Indeed, while there are some benefits especially in terms of efficiency

72 In the aftermath of Rayong Spill in 2013, the Thai Parliament had discussed the compensation problems as an urgent motion in the parliamentary question time, and in 2014 the Parliament recognized the need for Thailand to develop a new comprehensive legal regime to specifically deal with the issue of oil spill liability more appropriately.

73 As a collection of anecdotal evidence or empirical data about the pain experienced by the spill victims in Rayong has indicated, the real root of the victims’ sufferings is primarily the lack of appropriate legal framework to secure a reasonable degree of fairness and efficiency of the compensation regime, rather than, as a matter of priority, on how much each ship’s owner should be subject to the insurance liability, for instance.

offered by the US OPA framework, it would be undesirable to simply import the U.S. approach directly and turn a blind eye to the specific needs or relevant circumstances of the Thailand.

Even in the US context itself, by overemphasizing efficiency and expediency in resolving mass claims, Congress might have impaired, either intentionally or unintentionally, the balance between the dual goals of efficiency and fairness as reflected in some aspects of the BP's compensation scheme, namely, the GCCF.

Nevertheless, while the approach of out-of-court regime for rapid compensation is not without flaws, and some degree of traditional procedural fairness need to be compromised, the limited capacity of the existing legal regime of Thailand still suggests the need for this type of regime, at least, to facilitate the compensation to be quickly paid to the suffering victims of the oil-spill incidents. While there can still be a number of imperfections associated with the inherent nature of the out-of-court regimes, the devil truly is in the details, and if the stakeholders and policy makers or even the judiciary agreed to resort to it, the tradeoffs must be made between the conflicting objectives, although, to fit to the context of Thailand.

1.4 OBJECTIVE OF THE STUDY

Taking into account primarily the specific nature of the problems present in the Thai context, together with some useful lessons learned from the US experience, the objective of this study is to provide some indispensable foundations for potential legislative reforms. On this premise, this study aim to ultimately propose some important recommendations for building a new legal framework for Thailand that would remedy most, if not all, of the major problems as faced by the oil-spill claimants in light of the out-of-court compensation program carried out in 2013.

To provide an even more complete picture, this study also aims to offer some considerations or practical guidance for designing future claims facilities in light of the new legal framework.

1.5 RESEARCH QUESTION AND HYPOTHESIS

The research question sought to be answered is: How should Thailand develop the new legal framework that can appropriately govern the out-of-court compensation regime handling economic-loss claims following an oil spill incident?

In answering this key question, this research will begin with investigating the nature of the problems existing in the Thai context, especially in terms of the real-world problems manifested by the Rayong oil-spill compensation experience, as being a factor stimulating the need for the new legal framework, as evidenced partly by the parliamentary consensus. Then, the study will look into the U.S. experience, to examine how the OPA framework for the out-of-court oil spill compensation regime and the comprehensive model of the claims facility under such framework, namely the GCCF, operated in the wake of the Deepwater Horizon Incident 2010. This study will subsequently discuss and evaluate the potential and limits offered by this OPA approach as an alternative to litigation system in the US context, where lessons can be learned.

Having learned the lessons from US experience and its comprehensive approach on how the out-of-court rapid compensation regime might be regulated and operated, including its potentials and weaknesses, the study will then devote the effort to investigate and evaluate the apparent deficiencies of the existing relevant Thai laws. Basing primarily on the problems exhibited and found under the Thai context, either from the legal deficiencies structurally, or from the manifested problems detected under the Rayong Spill experience specifically, supplemented by the lessons

learned from the US experience, this study will provide the recommendations as the answer to the research question.

The tentative answer to this research question is as follows: Thailand should develop the new legal framework by taking into account the problems existing in the Thai context. As such, the outright adoption of the US's OPA framework might not be advisable, since the nature of the relevant legal and factual circumstances of Thailand might suggest the need to guarantee an even greater degree of transparency and fairness for the out-of-court compensation regime. Therefore, while certain features of the US framework can provide a good model for rectifying some existing inadequacies under the current Thai laws, the new legal framework for Thailand should also introduce additional elements, given specific real-world problems detected from Thai experience.

On this premise, among other things, a neutral supervisory body with certain review power should be introduced under the new legal framework to improve fairness and transparency of the regime. Overall, the design of the new legal framework should take into account the marginal cost of having additional degree of transparency, in terms of the traded-off efficiency or the need for rapid compensation, which can be vary at different phases of time (i.e. whether time is of essence). Ultimately, at the end of the spectrum, the oil-spill victims, if they wish, should maintain the right to formal procedural fairness provided by traditional system of litigation.

1.6 METHODOLOGY

The methodologies used in this research are primarily documentary research and qualitative method, subordinated by empirical data.

The documentary research is based on information from primary sources, previous empirical studies and other secondary sources. The main sources of database used for the purpose

of documentary research are the University of Washington Marian G. Gallagher Law Library, the Suzzalo and Alen Library, Chulalongkorn University Library in Thailand, Westlaw, Lexis-Nexis, and other database made available by the relevant organizations and institutions, such as, the judiciaries, the relevant government agencies, the responsible parties for oil spills, and the relevant NGOs worked for the plaintiffs, for instance.

It is clear that any legal research, especially when it is devoted to an important domain and involved various stakeholders such as oil spill incidents, should not merely remain “law in the books” but should also pay attention to “law in action”. Specifically, while abundant literature exists on the US experience, including the rich body of scholarly writings, official reports, previous empirical studies, the availability of the Thai literature on the issue of oil-spill compensation for economic loss, both in general and in the specific context of the Rayong Spill 2013, is, by contrast, relatively limited. As such, the in-depth interviews were mainly conducted in Thailand, to obtain further information from the relevant stakeholders, depending on accessibility, including the different groups of the oil-spill victims in different business sectors and locations in Rayong, in particular. The process of the interviews was in accordance with and subject to the review and approval from the UWIRB.

1.7 SCOPE AND STRUCTURE

The case of oil spills inherently involves multi-layer regulatory schemes and highly complex interrelated litigations, where a whole variety of laws can come into play. Especially in the US context, because “BP did something that no other company has done in the American legal history”, according to the Department of Justice, the BP settlement is “the largest settlement with

a single entity in U.S. history”.⁷⁴ Lawyers passionate about complex litigations will find so many fascinating sets of issues, arising out of the case of BP. Thus, it is necessary to clarify the scope of the study at the outset.

Since the objective of this study is to propose a new legal framework for the out-of-court compensation regime, handling economic-loss claims following an oil spill incident, the study will essentially focus on the laws and the regimes that are significantly relevant to this objective, addressing the problems revealed under the Thai context. Accordingly, in the US context, the OPA provisions specifically addressing or governing the oil-spill claims facilities regime, as well as, the GCCF as an only comprehensive model of the oil-spill claims facility in the US, will be examined.

Unlike the U.S. system, no Thai laws specifically governs the oil-spill compensation regime, handling the economic-loss claims, even though such out-of-court compensation regime was carried out in the wake of the Rayong Spill 2013 as a matter of fact. To examine, and, effectively, reveal, the apparent inadequacies of the existing regimes of Thai laws, the other closely relevant aspects of Thai laws will, instead, be examined. The relevant provisions of Thai laws to be examined will include section 420 of the Thai CCC 1923 and the section 96 of the ECNEQ 1992, in light of the recoverability of the type of losses claimed by the fishermen and other impacted businesses, in particular.

Subsequently, the system for handling economic loss claims carried out by the responsible parties as an alternative to the litigations, both in the case of Rayong Spill in Thailand and the Deepwater Horizon Spill (or the Gulf Oil Spill) in the U.S., will also be examined and analyzed, especially in terms of fairness and efficiency of the regimes in order to provide some useful lessons

for the relevant policy makers in Thailand. With regards to limitation, while the dissertation is intended for submission by May, 2017, discussions are limited to the law up to February, 2017.

The structure of the study will be divided into five chapters as follows:

Chapter 1 provides an overview of the study. It introduces the background of the oil-spill compensation scheme in light of the Rayong Oil Spill 2013 experience, as well as briefly identifies the inadequacies of the existing regime of Thai laws, and provides an introductory review of the relevant approach under the US experience. Ultimately, this chapter serves as a background information, providing the organization of the study, leading to further analysis surrounding the objectives of this study in the subsequent chapters.

Chapter 2 looks into the US experience to describe the OPA framework and examine how the GCCF, as a comprehensive model of the claims facility, operated in the wake of the Deepwater Horizon Incident 2010. The discussion includes, among other things, the creation of the GCCF, the compensation criteria and the design of the payments structure, as well as other significant features of the GCCF. Ultimately, this chapter provides some critiques and evaluations on the operation and performance of the GCCF, including, among others, the issue of release requirement and transparency of the regime. The discussion and analysis in this chapter is intended to focus specifically on the GCCF experience, in order to provide, a , more or less, complete picture of how such a facility can be structured and carried out by a responsible party. Rationally, it would not be possible to evaluate every aspect of the US regimes and, accordingly, only certain important features of the OPA provisions and the GCCF model will be relevant to the proposed recommendations for Thailand in Chapter 4. The information organized and provided under this chapter should, nevertheless, benefit the interested parties in terms of future utilization, either for academic or practical applications.

Chapter 3 looks at a broader perspective in terms of the potentials and limits of the overall OPA regime as an alternative system of mass claims resolutions, in order to examine whether this type of private or out-of-court regime can, at least, be theoretically defended. Having a nature of private or out-of-court regime substantively, this OPA regime has frequently been criticized on the grounds of transparency and procedural fairness as largely pointed out in Chapter 2 in the light of GCCF model specifically, and, as Chapter 2 concluded, these problems should be adequately addressed in the designs of the future claims facility and, more broadly, the new legal framework.

Instead of structuring the chapter in terms of a typical advantage-versus-disadvantage narrative—which is also undoubtedly useful but might be repetitive and not add much new contribution, given a rich body of existing literature focusing largely on the issue of legitimacy of the OPA regime as discussed in Chapter 2, this chapter devotes most, but not all, parts of the discussion to account ,instead, for a fresher critique on the regime to see if the regime can still be defended, at least in theory, in light of this new attack. The discussion can help to shade some light or add new insights for the system designers, especially given that the existing Thai literature on the incentive or behavioral aspects of the mass-claims dynamics is either scarce or not even exist.

More recently and innovatively, some commentators attacked the OPA regime on its ability to delivery finality to the defendant and, accordingly, its consequential failure to provide the claimants with “peace premium” (i.e. the generous compensation offers made by the defendant to buy “peace” or closure from the claimants), hence, the OPA regime should be abandoned, given substantially its inferior performance on this ground. Technically, by borrowing certain aspects of the “economic analysis of law” approach, especially with regards to the stakeholders’ incentives

analysis,⁷⁵ a deeper purpose of this chapter is to analyze whether the approach of the OPA regime can be defended, at least in theory, in response to this recent critique basing on the “peace-premium” hypothesis—which, itself, is also relied on the incentives and behavioral analysis.⁷⁶ Nevertheless, since a broader purpose of this chapter is to analysis the potentials and limits of this private claims resolution approach under the OPA framework, other performance criteria will also be reasonably discussed, including cost efficiency, and to some extent, the issue of transparency—which will, however, not be discussed at length, given that Chapter 2 has examined this aspect reasonably extensively in light of the GCCF operation. In addition, since the limitation is that the GCCF is the only comprehensive model of private claims facility in light of the OPA framework so far, in order to evaluate the potentials of the OPA framework, at least, as an “institution” of private mass claims settlement regime, supplementary evidences from other private mass claims experiences might also be utilized, only where appropriately relevant, in the discussion.

By balancing the strengths and weaknesses, this chapter finally offers some concluding remarks on the overall performance evaluation of this out-of-court regime of mass claims

⁷⁵ See, e.g., Louis Kaplow & Steven Shavell, *Economic Analysis of Law*. Harvard Law School, John M. Olin Center for Law, Economics and Business, Discussion Paper No. 251, February 1999, available at <https://ssrn.com/abstract=150860> or <http://dx.doi.org/10.2139/ssrn.150860>. (“Economic analysis of law seeks to answer two basic questions about legal rules. Namely, what are the effects of legal rules on the behavior of relevant actors? And are these effects of legal rules socially desirable? In answering these positive and normative questions, the approach employed in economic analysis of law is that used in economic analysis generally: the behavior of individuals and firms is described assuming that they are forward looking and rational, and the framework of welfare economics is adopted to assess social desirability.”)

⁷⁶ Although, a number of classic articles or grand theorists have discussed or touched upon the use of this type of analytical approach, both in terms of potentials and limits. Given the scope and the research question of this study, as well as the notion of resource efficiency however, while can be relevant, it is not within an intended scope and purpose of this study to enter the philosophical debate on the economic analysis of law approach and/or the use of incentive and behavioral analysis. At least, given the reasons explained above—that the use of incentive analysis approach here, partly, as a parallel rebuttal to the work that relied on this approach itself—the use of this approach should be reasonably justifiable in the context of this specific discussion. And, in fact, in evaluating the potential or capacity of a given regime, especially on issue of mass claims resolution as an alternative to litigation, like the case of the OPA framework, most scholars have also looked deeply into its potential impact of the regime on stakeholders incentives, despite certain imperfection of the approach.

resolution approach under the US experience, where the lessons can be learned. Ultimately, the chapter provide a final observation that, since the OPA framework has not prescribed a precise structure of the claim facility, therefore, the “devil” is not in the nature of the regime but rather in the design or details of a given claims facility.

Chapter 4 proposes some key recommendations as a foundation for building a new comprehensive framework for Thailand that should strike an appropriate balance between efficiency and transparency, albeit, suitable for the Thai context. To this end, this Chapter begins with examining the legal environment in Thailand in order to illustrate why the current regime of Thai laws might not be adequate in providing an effective legal framework for compensating the oil-spill victims suffering economic loss. After having explained such an inadequacy and, hence, establishing the need for a new legal framework in light of the problems evidenced by the Rayong spill experience in particular, as well as the lessons learned from the US experience, this chapter, subsequently, proposes some crucial recommendations as a foundation for developing a new legal framework which should strike a better balance between efficiency and legitimacy. Next, to provide an even more complete picture of this mission at an implementation level, this chapter also offers some useful considerations for designing future claims facilities in light of this new legal framework. It should be noted that, although certain parts of the discussion might touch upon the human rights elements of the oil-spill compensation problems, this study is not intended to engage in a theoretical debate on human rights. Lastly, the chapter provides some concluding remarks on the proposed recommendations, particularly in terms of the interrelationship between this new approach as an alternative venue and the traditional litigation system.

Chapter 5 ultimately provides the conclusion on the findings of the study, as well as recommendations for future research that should be necessary and useful for Thailand in achieving the optimal design for an even more complete framework governing the issue of oil-spill liability.

1.8 SIGNIFICANCE AND CONTRIBUTION

Oil spills have occurred virtually everywhere around the world, posing the challenges not only to environmental and tort laws but also the traditional system of litigation in the affected nations. As such, the oil spills frequently afford critical point from which to observe the evaluation of liability rules and a shift of attitude toward the new paradigm of an innovative compensation regime as an alternative to conventional wisdom of the litigation venue. Accordingly, the study of oil spill incidents usually lead to the “most creative moment”⁷⁷ in the legal history and development of the impacted nations.

At an academic level, this study will provide a series of reflections inspired by a devastating consequence of the oil spill incidents, and the problems faced by the traditional system of public litigation in delivering an effective and fair compensation to the oil-spill victims. This study will also help to set the context for the academic discussion of various approaches to the oil-spill compensation regime by providing the overview, the analysis, as well as, the assessment of another comprehensive approach under the OPA framework, in particular. On this premise, this study can allow an invaluable exposure to another possible comprehensive approach, for the Thai

⁷⁷ This terms is derived from William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: "The Whats,"* 2000 U. ILL. L. REV. 1-33 (2000).

scholars, involving in a law reform project on this matter, providing the legal advice to the Thai government in the course of devising a new legal framework for Thailand.

At a policy level, the significant contribution of this study is, therefore, to provide policy considerations and recommendations as an indispensable and influential foundation for building a new comprehensive legal framework for Thailand. The contribution in this respect is particularly of utmost importance, given the limited availability of the studies on the comprehensive approach to regulating the oil-spill claims facility in the existing literature in Thailand, despite the fact that a law reform process, activated by the victims' sufferings in the Rayong Spill case, is in progress.

At a practical level, in order to provide an even more complete picture of the proposed framework, this study will also offer some design considerations as a practical guidance for the possible structural designs of the future out-of-court claims facilities, which should be observed by the industry, whether or not the proposed legal framework will be put into effect. Observance of this efficient and fair practice under this guidance should, at least in principle, improve fairness in compensation for the oil-spill victims, and also mutually benefit the responsible party, since the improved legitimacy or public trust can increase the participation rate and, thus, the prospect of achieving closure in due time. In this scenario, this can prevent the parties from incurring other related costs of prolonged litigations.

Lastly, in terms of wider implications, not only can the findings of this study help to shape the future out-of-court compensation schemes in the context of oil spill incidents specifically, the findings of this study can also, to some extent, lead to a reevaluation of compensation regimes for economic loss, arising from other types of industrial pollutions or hazardous releases in general.

CHAPTER 2 A COMPREHENSIVE APPROACH TO THE OIL-SPILL COMPENSATION:

THE US EXPERIENCE

2.1 INTRODUCTION

*“Numerous unforeseen consequences should lead to recognition of a new paradigm and the call for innovative systems, as the “unprecedented disasters” need the “unconventional responses.”*⁷⁸

KENNETH FEINBERG, 2011.

In recent years, the United States has increasingly sought to resolve the nation’s greatest tragedies without utilizing conventional aggregate litigations. In the aftermath of the terrorist attacks, for instance, Congress created the September 11th Victim Compensation Fund for the express purpose of removing cases from the traditional litigation system—effectively insulating the airlines from the costs of defense, and streamlining the costs of public funds dissemination through the creation of a non-Article III claims tribunal.⁷⁹ Likewise, private defendants have eschewed formal aggregate litigations, as exemplified most prominently by the BP Gulf Coast Claims Facility (GCCF) created in the wake of Deepwater Horizon Disaster under the statutory framework provided by the Oil Spill Pollution Act (OPA), 1990.⁸⁰ The 2010 Gulf Oil Spill presented an

78 Kenneth Feinberg, *Unconventional Responses to Unprecedented Disasters*, Address at the New Hampshire Institute of Politics & Political Library (Apr. 26, 2011) (This message is derived from Kenneth Feinberg’s speech just after the BP Oil Spill in the Gulf, about how policy makers respond to these types of unprecedented disasters.)

79 Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2006). For similar programs, see Smallpox Emergency Personnel Protection Act of 2003, 42 U.S.C. §§239-239h (2006) (Smallpox Compensation Program); Radiation Exposure Compensation Act, id. § 2210 (Radiation Exposure Compensation Program); Public Safety Officers' Benefits Act of 1976, id. §§3796-3796c-2 (Supp. 2008) (Public Safety Officers' Benefits Program); Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-3 (2006). See Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution without Class Actions*, 63 EMORY L.J. 1253, 1255 (2013).

80 Although BP ultimately reached a class action settlement approved in 2012, it resolved more than two-thirds of its claims – i.e. more than \$ 7.8 billion - through a private claims resolution facility, as statutorily required by the Oil Pollution Act of 1990. See 33 U.S.C. § 2705(a) (2012).

opportunity to observe a mass interim claims payment process and draw environmental justice lessons from that experience.

This Chapter describes the relevant legal framework as a new paradigm for comprehensive approach to oil-spill compensation regime, introduced by the OPA 1990, together with the creation and the operation of the GCCF in light of US experience, in the wake of the Deepwater Horizon Oil Spill disaster in 2010. The scope of the discussion and analysis in this chapter will focus specifically on the GCCF experience, in order to provide, as far as possible, a reasonably complete picture as an example of how such an out-of-court regime of claim facilities can be carried out by a responsible party. On this premise, although not every aspect of the regime will ultimately be relevant to the proposed recommendations for Thailand in Chapter 4, the information organized and provided in this chapter should, more or less, benefit the interested parties in terms of future utilization, either for academic or practical applications.

2.2 THE CREATION OF GCCF

2.2.1 EVENT GIVING RISE TO THE CREATION OF THE GCCF

In the wake of the explosion of the *Deepwater Horizon* offshore drilling rig, the United States faced the unprecedented challenge where an oil discharge continued for 87 days, resulting in the largest ever oil spill in the history of the U.S. waters (which was nearly 20 times more than the *Exxon Valdez*).⁸¹

81 The magnitude of the 1989 Exxon Valdez was 11.3 Million Gallons while the 2010 Deepwater Horizon was 206.2 Million Gallons. See Jonathan L. Ramseur, *Congressional Research Service: Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments* (Apr. 17, 2015), <https://fas.org/sgp/crs/misc/R42942.pdf>.

On April 20, 2010, in the Gulf of Mexico, a gas explosion engulfed the Deepwater Horizon oil drilling rig, which was being operated by Transocean Offshore Deepwater Drilling Inc. for British Petroleum Exploration & Production Inc. (BP). It was not until September 19, 2010, that the federal government's point man, retired United States Coast Guard (USCG) Admiral Thad Allen, declared that the well was “effectively dead”.⁸² By then, it was estimated that a total of 4.9 million barrels of oil had leaked into the Gulf of Mexico,⁸³ making the disaster the largest oil spill in history.⁸⁴

The 2010 oil spill disaster injured the economy of the Gulf Coast massively. Seafood, tourism and energy—the key sectors of the gulf’s economy—suffered severely as a result of the almost five billion barrels of crude oil released into the waters.⁸⁵ The injury was immediate. A ban on Gulf fishing affected not only commercial fisherman but also individuals depending upon the Gulf resources for both subsistence use and economic livelihood.⁸⁶ Gulf tourism dropped.⁸⁷ Many businesses lost earnings, and subsequently laid workers off, or even shut their doors entirely.⁸⁸

82 See Harry R. Weber, *Blown-Out BP Well Finally Killed at Bottom of Gulf*, BOSTON.COM (Sept. 19, 2010), http://www.boston.com/news/nation/articles/2010/09/19/blown_out_bp_well_finally_killed_at_bottom_of_gulf.

83 However, BP disputed this reported figure. See Harry R. Weber, *BP Expert Disputes Spill Amount; Billions in Fines at Stake*, HOUS. CHRON. (June 27, 2013), <http://www.houstonchronicle.com/business/energy/article/BP-expert-disputes-spill-amount-billions-in-4629668.php>.

84 See Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES (Aug. 2, 2010), <http://www.nytimes.com/2010/08/03/us/03spill.html>. See Jim Poison, *BP Oil Still Ashore One Year After End of Gulf Spill*, BLOOMBERG (July 15, 2011, 3:50 PM), <http://www.bloomberg.com/news/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html>.

⁸⁵ Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS NEWSHOUR (Aug. 2, 2010, 10:07 PM), <http://www.pbs.org/new.shour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html>.

⁸⁶ Palmer, *supra* note 42, at 109 (After \$ 1.5 billion in funds were disbursed to claimants in Louisiana, 99% of the claims filed were for economic damage while only 1% was for property damage); see also Steiner, *supra* note 59, at 1318

⁸⁷ Maureen Mackey, *BP Oil Spill: Gulf Tourism Takes a Huge Hit*, Fiscal Times (Jun. 24, 2010), <http://www.thefiscaltimes.com/Articles/2010/06/24/BP-Oil-Spill-Gulf-Tourism-Takes-a-Huge-Hit>, archived at <http://perma.cc/K667-2UR9>. See also Steiner, *supra* note 59, at 1318.

⁸⁸ Andrew B. Davis, Note, *Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent*, 45 Colum. J.L. & Soc. Probs. 1, 5 (2011).

The public anxiety associated with the oil contamination had ripple effects that potentially led to a decline in seafood consumption and a travel aversion to the Gulf region, affecting numerous individuals and businesses that persisted even after the moratorium ended.⁸⁹ Those are just a few examples of the economic loss experienced by the 2010 BP Gulf oil spill victims.

2.2.2 “OPA 1990” AS A FRAMEWORK FOR PRIVATE CLAIMS FACILITIES

The residents of the Gulf Coast, who had already suffered greatly as a result of Hurricane Katrina, which hit the area in 2005, needed quick financial assistance in the wake of this new disaster. Yet, traditional adjudication had a poor track record with regard to swift compensation.

Indeed, litigation in the wake of the 1989 Exxon-Valdez oil spill stretched on for two decades. From 1989 to 2009, the Exxon-Valdez litigation made its way from the Federal District Court for the District of Alaska, to the Ninth Circuit, and ultimately to the U.S. Supreme Court, which ruled that the jury-awarded punitive damages were excessive and should not exceed compensatory damages.⁹⁰ After a pro-plaintiff ruling by the Ninth Circuit in June 2009, Exxon abandoned its appeals, and a Satisfaction of Judgment was entered in December 2009—two decades after the oil spill.⁹¹

To avoid the anguishing delays and prolonged legal battles in the wake of the 1989 Exxon-Valdez litigation, Congress subsequently enacted the OPA1990 in response to, among other things, the eleven-million-gallon oil spill from the tanker Exxon Valdez off the coast of Alaska, the

⁸⁹ *Id.* at 2. *See also* Steiner, *supra* note 59, at 1315-18.

⁹⁰ Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008). *See* Ewencyk, *supra* note 64, at 268.

⁹¹ Baker v. Exxon Mobil Corp, Nos. 04-35182 & 04-35183, D.C. No. 89-CV-00095-HRH (Dec. 15, 2009): *see also* Exxon Valdez Oil Spill Litigation Update, FAEGRE BAKER DANIELS (May 11, 2011), <http://www.faegrebd.com/showarticle.aspx?Show=2881>.

inadequate government and industry response in containing the spill, as well as various legal barriers to victim recovery.⁹²

In effect, the OPA imposed affirmative duties on responsible parties to be responsible for costs associated with removal of the oil and specified damages caused by the unlawful discharge.⁹³ In essence, the responsible parties must compensate for impairment of natural resources, damage to real and personal property, the incapacitation of subsistence resource users, lost tax revenues derived from damaged resources in their various forms, lost profits derived from said resources, and public services which suffer as a result of the discharge.⁹⁴ Crucially, the conference report on the OPA explicitly states that “the claimant need not be the owner of the damaged property or resources to recover for lost profits or income.”⁹⁵

Congress provided for interim damage payments to timely recover the loss suffered by the oil release victims.⁹⁶ These short-term OPA payments are intended to be expedited in nature:

“The responsible party shall establish a procedure for the payment or settlement of a claim for interim, short-term damages. Payment ... representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected”⁹⁷

If the claimant is paid only for interim, short-term damages, he retains the right to recover further damages in the future.⁹⁸ Payment of “final damages ... shall not foreclose a claimant's right

92 S. Rep. No. 101-94, at 2 (1989).

93 33 U.S.C. § 2702(b).

94 *Id.*

95 H.R. Rep. No. 101-653, at 4 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 781.

96 33 U.S.C. § 2705. *See also* Steiner, *supra* note 59, at 1324.

97 *Id.* § 2705(a).

98 *Id.* § 2715(b). *See* McDonell, *The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes*, 64 STAN. L. REV. 765, 769 (2012) (“The Plaintiffs’ Steering

to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.”⁹⁹

Following the oil spill incidents, responsible parties are required to begin advertising detailed claimant information within fifteen days of the incident, and must maintain these advertisements for at least thirty days.¹⁰⁰ Most importantly, advertisements are to specify the availability of “interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled,” and that acceptance of these payments will not preclude the claimant from engaging in subsequent legal action to recover “damages not reflected in the paid or settled partial claim.”¹⁰¹

Before a victim can bring an OPA claim in court, he must first present the claim to the responsible party in accordance with the advertised procedures.¹⁰² Only if the responsible party denies all liability for a claim, or does not settle the claim within ninety days after the claim was presented, may the claimant then commence an action in the court against the responsible party.¹⁰³

To be more precise, one important aspect of OPA is that it requires victims of an oil spill to present their claims to the responsible party and wait ninety days before they can take further

Committee, however, advanced the argument that this provision applies not just to interim payments but to final payments, in effect forbidding any settlement that contains a release of future claims.)

99 33 U.S.C. § 2715(b)(2).

100 *Id.* § 2714(b)(1).

101 *Id.* § 2714(b)(2).

102 *Id.* § 2713(a). *See* McDonell, *supra* note 98, at 769.

103 *Id.* § 2713(c). If a claimant presents a claim before the responsible party advertises procedures, however, he must wait until ninety days after the responsible party began advertising procedures. *See* McDonell, *supra* note 98, at 769.

action—either by bringing an action under the OPA in federal district court or by filing a claim with the Coast Guard's Oil Spill Liability Trust Fund (OSLTF).¹⁰⁴

In addition, the OPA resolves many of the jurisdictional issues inherent after an unlawful discharge of oil. Actions arising under the OPA are to be heard in the U.S. district court for the district in which the discharge or injury occurs, or the district in which the defendant resides, is found, or has its primary place of business.¹⁰⁵ State trial courts may hear removal and damage claims.¹⁰⁶ These jurisdictional rules are subject to a three year statute of limitations on actions for damages and removal costs—a time period that commences when “ the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care.”¹⁰⁷

Although the statutory text provides next to no guidance on what the responsible party's claims process should look like, the intent of this scheme is clear—to promote settlement and discourage litigation.¹⁰⁸ On balance, OPA created both the statutory framework that governs the formation of the Oil Spill Claims Facility as well as the primary causes of action on which plaintiffs in the Deepwater Horizon litigation rely.

104 Therefore, if BP fails to settle a claim within ninety days of presentment, victims decide to bring an action against the responsible party in the court or to present the claim directly to the OSLTF (*See* 33 U.S.C. § 2713). If a claimant accepts payment from the OSLTF, the government is subrogated to their right and recover the amount from the responsible party. (*See id.* § 2715.)

105 *Id.* § 2717.

106 *Id.*

107 *Id.*

108 *See* *In re Oil Spill*, 808 F. Supp. 2d at 959 (“The intent is to encourage settlement and reduce the need for litigation.”); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993) (“The purpose of the claim presentation procedure is to promote settlement and avoid litigation. Congress believed that lawsuits against parties are appropriate only ‘where attempts to reach a settlement with the responsible party . . . were unsuccessful.’” (quoting H.R. REP. NO. 242, at 66(1989))). *See* Issacharoff & Rave, *supra* note 58, at 399.

2.2.3 BP AS A RESPONSIBLE PARTY UNDER THE OPA FRAMEWORK

In contrast to the events of September 11, 2001, the Deepwater Horizon disaster did not involve a case of ambiguous responsibility. Shortly after the oil rig explosion incident on April 20, 2010, the Coast Guard designated BP as a “responsible party” under the OPA.¹⁰⁹ This designation as a “responsible party” triggered a duty on the part of BP to pay for all costs related to the oil spill,¹¹⁰ and, in effect, the company was charged with establishing a claims process.

2.2.4 THE INITIAL BP-OPERATED CLAIMS FACILITY PRIOR TO THE CREATION OF THE GCCF

Pursuant to this designation, BP subsequently set up numerous claims offices throughout the Gulf Coast states and hired hundreds of claims processors. BP selected ESIS, Inc. (“ESIS”¹¹¹), a global risk management services firm, to act as the administrator of the facility.¹¹² Within the first month after the explosion, 35 field offices were set up by “Worley”¹¹³ in the Gulf States, paying more than \$399 million to more than 30,000 claimants during the period from May 3, 2010 through August 22, 2010.¹¹⁴ Yet, at that time, little was known or publicized about the hiring and

109 See Protocol for Emergency Advance Payments, Gulf Coast Claims Facility (Aug. 23, 2010), *available at* https://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf [hereinafter Protocol for Emergency Advance Payments]

110 *Id.* at 1 (The Coast Guard “directed BP to maintain a single claims facility for all Responsible Parties to avoid confusion among potential claimants.”).

111 ESIS, Inc. (“ESIS”), is a global risk management services firm, to act as the administrator of the facility. See BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE, app. ex. L (Gulf Coast Claims Facility Protocol for Emergency Advance Payments) (June 5, 2012) *available at* <https://www.justice.gov/iso/opa/resources/697201241917226179477.pdf>.

112 *Id.* at 12.

113 After BP selected ESIS to act as the administrator of the facility, ESIS, in turn, engaged the services of claims adjusters from Worley Catastrophe Response (“Worley”). See *id.*

114 During its initial operations, the BP-operated facility accepted and processed claims only from claimants involved in the fishing industry, such as fishermen, dock workers and seafood processing businesses. As time went on, claims were also accepted from claimants in other industries, such as condominium owners, hotels and restaurants, though those claims ultimately were never processed by the BP-operated facility. See *id.* See also Ira Teinowitz, How to Claim Money from BP's \$ 20 Billion Fund, WALLET POP (June 18, 2010),

training of these claims processors and the OPA is relatively imprecise about how a responsible party must satisfy its duties under the OPA framework.¹¹⁵ Thus, against the backdrop of this arguably imprecise and unclarified statutory mandate and the limited availability of the precise information, various commentators have suggested that this initial BP-operated claim facility, operating between May and August 23, 2010, was relatively un-systematized, and largely unregulated.¹¹⁶ As such, the initial BP efforts on operating the claims facility attracted numerous complaints by frustrated applicants.¹¹⁷

2.2.5 THE BP TRUST FUND AND THE FORMATION OF GCCF

In response to the crisis, President Obama called BP into the White House and the President and his staff negotiated the creation of a \$ 20 billion fund.¹¹⁸ On June 16, 2010, President Obama announced that BP had agreed to waive OPA's \$ 75 million cap and place \$ 20 billion in an escrow

<http://www.walletpop.com/2010/06/18/how-to-claim-money-from-bps-20-billion-fund/> (describing BP's prior processing of claims by utilizing its contractor, ESIS, and that BP made the determination whether to pay claims, and indicating that under the new facility, award decisions would be made available to hear appeals from award determinations); BP Creates Special Team to Speed Up Claim Payments, ABC NEWS (Aug. 3, 2010), <http://www.abcnews.go.com/Business/wireStory?id=11313798>. See Mullenix, *supra* note 64, at 83.

¹¹⁵ See Protocol for Emergency Advance Payments, *supra* note 109 ("Under OPA, Responsible Parties must establish a claims process to receive certain claims by eligible claimants. USCG . . . directed BP to maintain a single claims facility . . ."). See Mullenix, *supra* note 64, at 834.

¹¹⁶ However, there some commentators disagreed on this point. See, e.g., Strassel, Kimberley A. Strassel, *Mr. Fairness: The Pay Czar, BP Claims Administrator, and 9/11 Victims Fund Manager Talks About How He Makes Decisions That Alter Lives*, WALL ST. J., Aug. 7, 2010, available at <http://online.wsj.com/article/SB10001424052748703309704575413404274531476.html> (comparing Feinberg to King Solomon). See Mullenix, *supra* note 64, at 834.

¹¹⁷ See Wendy Kaufman, *Feinberg Vows Quick Response on Gulf Oil Spill Claims*, NPR (Aug. 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=129293800> (concerning Louisiana residents criticizing to BP payouts); Campbell Robertson, As Claims for Oil Spill Losses Shift to Administrator, Queries Follow, N.Y. TIMES, Aug. 24, 2010, at A14, available at http://www.nytimes.com/2010/08/24/us/24claims.html?_r=1&ref=us ("Dealing with BP . . . has been a nightmare."). See Mullenix, *supra* note 64, at 834.

¹¹⁸ Press Release, The White House, FACT SHEET: Claims and Escrow (June 16, 2010), available at <http://www.whitehouse.gov/the-press-office/factsheet-claims-and-escrow>.

account for payment of oil spill claims, and this amount would not represent a cap on BP's liability,¹¹⁹ should that amount prove insufficient.¹²⁰

Under the formal trust agreement, executed in August 2010, BP agreed to create the \$ 20 billion fund by providing \$ 5 billion to the Trust by the end of 2010 and \$ 1.25 billion per quarter to the Trust between 2011 and 2013.¹²¹ To this end, BP agreed to cease paying dividends to its shareholders¹²² and to immediately place \$ 3 billion into an irrevocable trust. The rest of the money was, however, paid on a quarterly basis over 3.5 years, out of BP's ongoing revenue.¹²³

Since the GCCF's commencement, the trust has been funded largely by BP's future earnings.¹²⁴ BP did not sell assets to generate the \$ 20 billion pledged to the GCCF, but instead securitized future earnings.¹²⁵ The trust agreement provides that "the Grantor hereby agrees to grant, convey, and/or assign to the Trust first priority perfected security interests in production payments pertaining to the Grantor's U.S. oil and natural gas production."¹²⁶ Implicitly, as a result, BP holds a significant advantage in negotiating the terms of continued drilling in the Gulf.¹²⁷

119 Remarks Following a Meeting with BP Leadership, 2010 Daily COMP. PRES. DOC. 503 (June 16, 2010). Members of Congress, moreover, had already introduced legislation to increase BP's liability. See, e.g., Blake Ellis, Proposed Spill Penalty: A Year of Profits, CNNMONEY (May 13, 2010), http://money.cnn.com/2010/05/13/news/companies/oil_spill_bill/index.htm (discussing bill introduced by Senators Vitter and Sessions that would have increased the cap on BP's liability to \$ 20 billion). See McDonell, *supra* note 98, at 770.

120 See Issacharoff & Rave, *supra* note 58, at 398.

121 Deepwater Horizon Oil Spill Trust Agreement 2 (2010), available at <http://motherjones.com/files/2010-8-9TrustAgreement.pdf>. See McDonell, *supra* note 98, at 262.

122 Pressure from the Obama Administration led BP to announce a dividend freeze for the remainder of 2010, resulting in shareholder losses of an estimated \$ 2.6 billion per quarter. See Julie Schmit & Adam Shell, BP stock rises on oil spill compensation fund plan, USA TODAY, June 16, 2010, http://www.usatoday.com/money/industries/energy/2010-06-16-bp-dividend_N.htm.

123 See Deepwater Horizon Oil Spill Trust Agreement, *supra* note 121, at 4.

124 See Trust Agreement between BP Exploration & Production, Inc., John S. Martin, Jr., Kent D. Syverud, & Citigroup Trust-Delaware (Aug. 9, 2010), available at <http://motherjones.com/files/2010-8-9TrustAgreement.pdf>.

125 See Deepwater Horizon Oil Spill Trust Agreement, *supra* note 121, at 4.

126 *Id.*

127 Arguably, given its financial status, BP could have funded even the multi-billion dollar GCCF trust in a number of ways. Nevertheless, BP opt to offer royalties from production on its Thunder Horse, Atlantis, Mad Dog, Great White, Mars, Ursa, and Na Kika oil and gas assets, all located in the Gulf of Mexico, as collateral to the GCCF. See

Under this arrangement, a sustained moratorium on deep-water oil and gas production in the Gulf of Mexico would have meant a substantial delay in issuance of GCCF payments, if not a complete undermining of the trust. BP, in effect, linked the legal rights of OPA claimants with the company's continued prosperity as a result of the very drilling that caused the BP Deepwater Horizon Oil Spill.

Next, the trust agreement provides that BP cannot recover any portion of the \$ 20 billion until a substantial number of outstanding claims are resolved.¹²⁸ At the expiration of the trust, however, all unused GCCF funds are to be returned to BP.¹²⁹ In addition, the formal trust agreement named two individual trustees—Kent Syverud, Dean of Washington University's School of Law in St. Louis, and former federal judge John S. Martin, Jr.,¹³⁰—where each individual trustee was to be compensated at \$ 100,000 per year.¹³¹

The entity created to disburse the \$ 20 billion BP fund was named the Gulf Coast Claims Facility (GCCF).¹³² To this end, the GCCF subsequently replaced BP-internally operated facility

Ian Walker, *BP Pledges Assets as Gulf Spill Collateral*, WALL ST. J., Oct. 1, 2010, <http://online.wsj.com/article/SB10001424052748703859204575525482920628758.html>. See Monica Langley, *BP Near Deal on Fund*, WALL ST. J., Aug. 10, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748704388504575418602719011146.html> (discussions between Obama Administration and BP to use future revenues from BP's Gulf of Mexico operations to guarantee its \$ 20 billion cleanup and compensation fund; speculation that the deal could produce backlash in Congress). See Mullenix, *supra* note 64, at 835 (criticizing this arrangement for making the federal government, in effect, future partners with BP in assuring continued offshore oil drilling in the Gulf. As such, when the federal government sought a moratorium on offshore oil drilling in the Gulf, the government's side deal with BP regarding funding of the escrow account placed the government in conflict with the interests of future claimants in seeking compensation, because continued funding of those compensation obligations are contingent on BP's ability to continue deep-sea offshore and other drilling in the Gulf.)

128 See Ewencyk, *supra* note 64, at 272.

129 Deepwater Horizon Oil Spill Trust Agreement, *supra* note 121, at 9.

See also Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 262 (2011)

130 Deepwater Horizon Oil Spill Trust Agreement, *supra* note 121, at 1. The corporate trustee was Citigroup Trust-Delaware, N.A. See Stier, *supra* note 129, at 262.

131 Deepwater Horizon Oil Spill Trust Agreement, *supra* note 121, at Schedule B-2-1. See Stier, *supra* note 129, at 262.

132 See Stier, *supra* note 129, at 262.

to fulfill BP's legal obligations under OPA. In essence, after BP created the GCCF and shut down its internal claims processing facility in June 2010, the GCCF became the "official way for individuals and businesses to file claims for costs and damages."¹³³ The GCCF is therefore the mandatory first step for victims of the oil spill where the victims must go to the GCCF before they can take their OPA claims to the federal court or the Coast Guard's Fund.¹³⁴

Arguably, although the OPA mandates that victims present their claims to the responsible party and wait ninety days before filing suit, the responsible party is not explicitly required to offer any guarantees that its settlement offers are fair.¹³⁵ Rather, underlying this presentment requirement is the Congress's beliefs that: (1) lawsuits under OPA are appropriate only where attempts to reach settlements with the responsible party are unsuccessful and (2) oil-spill litigation is so costly and cumbersome that it should be avoided.¹³⁶ Conceivably, this legislative history makes clear that OPA did not require that the GCCF be anything more than a settlement agency for BP and functioned fundamentally like a traditional settlement agency.¹³⁷

After meeting with BP executives, however, the President stated in a press conference that the fund would be "administered by an impartial, independent third party," and that claims would be "administered as quickly, as fairly, and as transparently as possible."¹³⁸ Notably, President

133 See Protocol for Interim and Final Claims, Gulf Coast Claims Facility (Feb. 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4 (on file with the Harvard Law School Library).

134 If BP fails to settle a claim within ninety days of presentment, victims can elect to initiate an action in court or to present the claim directly to the OSLTF (See 33 U.S.C. § 2713) If a claimant accepts payment from the OSLTF, the government is subrogated to their right. The government is then left to recover from the responsible party. (Id. § 2715.)

135 See generally the text of the relevant OPA provisions.

136 H.R. REP. NO. 242, at 66 (1989)

137 See Ewencyk, *supra* note 64, at 273. See *BP-Feinberg Agreement* at 14, available at <http://media.al.com/live/other/feinberg%20exhibit%20Jan%2018%202011.pdf> (The Claims Protocols provided that the GCCF's role was to fulfill BP's obligation under OPA to establish a claims process).

138 See Press Release, The White House, Statement by the President After Meeting with BP Executive (June 16, 2010) <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>

Obama used his first nationwide Oval Office address to discuss the BP oil spill disaster and also to announce the BP fund.¹³⁹

Despite the extensive media coverage of BP's agreement with President Obama to create a \$20 billion escrow account to settle the oil spill claims, the precise legal basis for this agreement is relatively unclear.¹⁴⁰ There is no Executive Order or any official governmental order formally authorizing the creation of Gulf Coast Claims Facility. Unlike the September 11th Victim Compensation Fund, there is no direct congressional statutory enactment authorizing the creation of the GCCF specifically.¹⁴¹

Even though neither BP nor the federal government has indicated with certainty that the GCCF was intended to satisfy BP's compensation obligations under the OPA. Similarly, the GCCF's descriptions of itself suggest that the facility was established to address those obligations, at least in part. For example, the GCCF's Phase I Protocol for "Emergency Advance Payments" stated that the U.S. Coast Guard "directed BP to maintain a single claims facility for all Responsible Parties to avoid confusion among potential claimants."¹⁴² Hence, the GCCF, as well as the protocols under which it operated, were structured to be compliant with OPA obligations.

139 See President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>). See Stier, *supra* note 129, at 261.

140 See Neil King Jr., *Feinberg Ramps Up \$ 20 Billion Compensation Fund*, WALL ST. J., June 22, 2010, at A6, available at <http://online.wsj.com/article/SB10001424052748704256304575321072301455004.html> (explaining that the fund was created as a "voluntary compact" but without any act of Congress, executive order, or other legal anchor). See Mullenix, *supra* note 64, at 836.

141 Mullenix, *supra* note 64, at 837-840. See also Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42.

142 See Osofsky et al., *supra* note 56, at 131.

¹⁴³ In addition, the GCCF adopted certain OPA approach in order to regulate fund policies, including whether or not a claim has been presented. ¹⁴⁴

On balance, the Obama administration and BP created the GCCF to take over the claims process from the initial BP-operated claims facility. In effect, unresolved claims that had been submitted to the BP initial claims process were transferred to the GCCF, and the claimants were, nonetheless, required to file new forms. The Claims Protocols, which spelled out the rules under which the GCCF operated, provided that the GCCF's role was to fulfill BP's obligation under OPA to establish a claims process. ¹⁴⁵

2.2.6 APPOINTMENT OF THE CLAIMS ADMINISTRATOR

Profoundly, President Obama stressed that the fund would “not be controlled by BP.”¹⁴⁶ Subsequently, the White House and BP chose Kenneth Feinberg as claim administrator. ¹⁴⁷ Ultimately, the trust agreement named Mr. Kenneth Feinberg as GCCF Claims Administrator. ¹⁴⁸

Mr. Feinberg is perhaps the most well-known claims administrator in the United States. In 1984, Mr. Feinberg served as a mediator in the \$ 180 million Agent Orange class settlement that provided compensation to veterans claiming health injuries stemming from the Agent Orange defoliants sprayed during the Vietnam conflict. ¹⁴⁹ More famously, Mr. Feinberg served as the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *BP-Feinberg Agreement, supra* note 137, at 26.

¹⁴⁶ *Id.*

¹⁴⁷ *See* Press Release, The White House, Statement by the President After Meeting with BP Executive (June 16, 2010) <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives> (“We’ve mutually agreed that Ken Feinberg will run the independent claims process we’re putting in place.”); *see generally* Terry Carter, *The Master of Disasters: Is It Just Him, or Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, 97 A.B.A. J. 32 (2011) (discussing Mr. Feinberg’s career in mass tort claims resolution). *See* Stier, *supra* note 129, at 261.

¹⁴⁸ *Deepwater Horizon Oil Spill Trust Agreement, supra* note 121, at 9. *See* Stier, *supra* note 129, at 262.

¹⁴⁹ *See generally* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS PASSIM* (1987).

claim administrator for the 9/11 Victim Compensation Fund created by Congress after the terrorist attacks on the World Trade Center in New York in 2001.¹⁵⁰

In 2007, Mr. Feinberg administered the fund assembled to compensate victims of the university shooting at Virginia Tech.¹⁵¹ In addition, he also served as Special Master in asbestos personal injury, wrongful death, Dalkon shield and DES (pregnancy mediation) cases.¹⁵² More recently, President Obama appointed Mr. Feinberg to oversee executive salaries for entities receiving funds from the Trouble Asset Relief Program following the 2008 financial crisis.¹⁵³

In administering the GCCF, Feinberg Rozen, LLP (Feinberg's firm) agreed to comply with BP's Code of Conduct.¹⁵⁴ The GCCF protocols provide that "Feinberg and the GCCF are acting for and on behalf of BP Exploration & Production Inc. in fulfilling BP's statutory obligations as a "responsible party under OPA."¹⁵⁵ Furthermore, the contract appointing Feinberg as administrator of the GCCF—a private agreement between BP and Feinberg Rozen—provided that BP could terminate the arrangement if it determined that Feinberg Rozen had "breached its fiduciary

150 See generally KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005). See Mullenix, *supra* note 64, at 820.

151 See Kenneth R. Feinberg, *Compensating the Victims of Catastrophe: The Virginia Tech Victims Assistance Program*, 93 VA. L. REV. in Brief 181 (2007); Laura Parker, A Conversation with BP's Pay Czar, Kenneth Feinberg, AOL NEWS, Jan. 10, 2011, <http://www.aolnews.com/2011/01/10/a-conversation-with-bps-pay-czar-kenneth-feinberg/>. See Stier, *supra* note 129, at 262.

152 See BDO CONSULTING, *supra* note 111, at 13 (" In the commercial sector, Mr. Feinberg designed, implemented and administered ADR Settlement Programs involving various national insurance companies and Gulf hurricane claimants who suffered losses due to Hurricane Katrina and other Gulf hurricanes. Mr. Feinberg has also served as Distribution Agent for AIG Fair Fund claimants and has been the Fund Administrator for a variety of claimant funds totaling more than \$1 billion. In his capacity as an arbitrator, Mr. Feinberg helped determine the fair market value of the original Zapruder film of the Kennedy assassination and legal fees in Holocaust slave labor litigation. In 2009, Mr. Feinberg was appointed by the Obama administration to be Special Master for TARP Executive Compensation.")

153 See Parker, *supra* note 151. See also Stier, *supra* note 129, at 262.

154 See Ewencyk, *supra* note 64, at 274. See also BP's Code of Conduct provides BP employees and contractors with BP's internal rules. See BP, CODE OF CONDUCT, available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/C/Code_of_Conduct_2011.pdf.

155 *BP-Feinberg Agreement*, *supra* note 137, at 14, available at <http://media.al.com/live/other/feinberg%20exhibit%20Jan%2018%202011.pdf>.

obligations to expend funds, and administer and resolve claims in accordance with the Claims Protocols.”¹⁵⁶

Despite being a contractor hired and paid by BP to discharge the company’s obligations under OPA, Feinberg declared publicly that he endeavored to administer the GCCF with principle of generosity toward oil spill claimants.¹⁵⁷ Nothing in OPA required such an approach. Arguably, Feinberg enjoyed wide discretion in administering the fund, sheltered by the risk of political backlash against BP, as President Obama announced the appointment himself in a speech from the White House.¹⁵⁸ However, this discretion was also constrained by the fact that, ultimately, the GCCF was a settlement agency created and funded by BP.¹⁵⁹

2.3 THE GCCF COMPENSATION STRUCTURE

2.3.1 THE DERIVATION AND AUTHORIZATION OF THE GCCF ELIGIBILITY FRAMEWORK

Private mass settlements—which, in general, are not subjected to the type of adversarial procedures that define the United States litigation system—have historically operated as unilateral

¹⁵⁶ *Id.*

¹⁵⁷ *See* Ewencyk, *supra* note 64, at 276.

¹⁵⁸ *Id.* *See also* Press Release, The White House, Statement by the President After Meeting with BP Executive (June 16, 2010) <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>

¹⁵⁹ *See* Ewencyk, *supra* note 64, at 270.

offers of compensation made by the corporate defendant to the victims.¹⁶⁰ This places cooperate defendants in the role of both the settlement drafter and the systems designer.¹⁶¹

Corporations have the opportunity at the outset to carefully design the eligibility criteria and scope of the fund. As the settlement's author, the defendant must decide the eligibility requirements for participation.¹⁶² This is largely a complicated task, especially for the case of oil spill incident where the harms as well as the zones of harm are inherently indirect and complex. Yet, this can equally allow a tactical opportunity for the corporate defendant—if the line is carefully drawn, the settlement should attract the participation of the highest-value claims. This may leave a subset of claims with weaker merits or low-value claims, disincentivizing plaintiffs' lawyers from taking up these claims.¹⁶³ On balance, in the course of drawing these lines, the defendant may well decide to create certain “presumptions of harm” for individuals to meet as a compensation eligibility criteria.

In creating the GCCF, BP decided not to exercise this power, but, instead, allowed the special master, Kenneth Feinberg, to be in charge of building such framework. Although the GCCF is the result of an agreement between BP and the federal government, it is not truly a “governmental” claims fund: it is not funded by the government and, equally, the government did

160 See Nancy H. Rogers et al., *Designing Systems and Processes for Managing Disputes* (2013). See Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 361 (2014). In addition, although many unilateral mass settlement offers have included super-compensation to plaintiffs relative to the expected outcome in public aggregation as a mechanism for enhancing participation (such as Hyundai and NFL's Super bowl tickets settlements). Some scholars have, however, concluded that mass settlement offers made unilaterally by the defendant will favor the defendant, offering less compensation to plaintiffs than would be available in litigation. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 376 (2005); Mullenix, *supra* note 64, at 825; Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 161-68 (2011).

161 See Dodge, *supra* note 160, at 361.

162 *Id.*

163 *Id.*

not establish any of the specific criteria for evaluating claims. Again, unlike the September 11th Victim Compensation Fund, eligibility criteria under the GCCF regime had not been directly subject to broad authorization by federal statute, nor has it received authorization by way of an Executive Order.¹⁶⁴ As a result, eligibility is only remotely derived from the relevant provisions of the OPA, which has not prescribed specifically which parties are eligible for compensation or how eligibility criteria should look like.¹⁶⁵ Given this legislative vacuum, the GCCF administrator could assume, to himself and his staff, the power and authority to determine eligibility for compensation.

In creating the compensation structure, Feinberg consulted with prominent scholars and professionals in a wide ranges of skills in making a variety of difficult decisions.¹⁶⁶ These decisions include, for example, how closely a claimant’s alleged harm—especially for claimants seeking lost profits or income—must be tied to the oil spill in order for the claimant to be eligible,

164 According to Mullenix, the September 11th Victim Compensation Fund ("September 11th VCF" or "VCF") adjudicated individual claims based on general guidelines embodied in regulations issued by the United States Department of Justice. Similarly, in the course of reauthorizing the VCF in late 2010 for the purpose of providing compensation to rescue and recovery workers for ongoing and latent injuries, the new eligibility criteria was added by the Congress and the provisions that were no longer relevant were subsequently eliminated. *See* James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, § 101, 124 Stat. 3623, 3624-27 (to be codified as amended at 42 U.S.C. 300mm). *See* Mullenix, *supra* note 64, at 846.

165 *See* 33 U.S.C. § 2705(a) (2006) (The Act provides merely provide that responsible parties must "establish a procedure for the payment or settlement of claims for interim, short-term damages.") *See* Mullenix, *supra* note 64, at 847.

166 According to the report commissioned by Department of Justice, immediately upon Mr. Feinberg’s selection as Claims Administrator, Feinberg Rozen began the process of assembling a large team of experienced professionals, including claims processing firms, accounting firms, investigators, catastrophe response companies, economists, academics and other professionals, to assist it in the development and implementation of claims processing protocols and methodologies. One of these experts was Analysis Research Planning Corporation (“ARPC”), a firm of economists retained in July 2010 to assist the GCCF in the development of economic models for the treatment of losses and to assist in the design, drafting and implementation of the methodologies for determining past and future losses of income sustained by eligible claimants. In addition, the GCCF also engaged other experts to assist with a variety of different issues including, for examples, Professor John C.P. Goldberg, who provided an expert opinion regarding the scope of liability under OPA and Dr. John W. Tunnell, who provided an expert opinion of when the Gulf of Mexico would return to pre-Spill harvest status for shrimp, crabs, oysters and finfish; and others, as needed, to address issues relating to specific claims. When Feinberg Rozen first undertook the process of assembling the various entities that would be engaged to assist the GCCF, its goal was to have a centralized, web-based claims receipt. *See* BDO CONSULTING, *supra* note 111, at 14-28.

as well as how to value future risk for the case in which the settlement was a final settlement of all claims.¹⁶⁷ In addition, to this end, Mr. Feinberg had also participated in 37 Town Meeting throughout the Gulf Coast region to answer the questions from the audience between June 18, 2010 and January 19, 2011.¹⁶⁸

2.3.2 THE GCCF STRUCTURE: THE TWO-DISTINCT PHASES

After the GCCF was created, a mass mailing was sent to all claimants who had filed claims during the time of the BP-operated facility to inform them of the GCCF's creation, and the GCCF website was also created which went live on August 23, 2010, the date the GCCF began its initial phase, known as Phase I.¹⁶⁹

During Phase I, or the Emergency Advance Payment (EAP) claims process, eligible claimants would receive compensation for five categories of loss; including, the loss of earnings or profits, removal and clean-up costs, real or personal property damage, loss of subsistence use of natural resources and physical injury or death caused by the Spill by submitting a lesser level of documentation than would have been required in later stages of the GCCF.¹⁷⁰ The GCCF administered claims in this phase according to the emergency claims protocol for Phase 1 which set forth, among other things, the claim submission process, the types of claims it would compensate during this phase and the general types of documentation it would require from claimants, and began accepting EAP claims on August 23, 2010.¹⁷¹

167 KENNETH R. FEINBERG, WHO GETS WHAT 163-179 (2012) (“Like the 9/11 fund, the GCCF is unlikely to be replicated. It is a one-off.”).

168 See BDO CONSULTING, *supra* note 111, at 29.

169 *Id.*

170 *Id.* at 29-31.

171 *Id.*

Under the protocol, the EAP program provided for a payment to individuals and businesses claims for documented losses sustained during the first six months following the Spill, where the EAP applications could be submitted on a monthly basis, starting from August 23, 2010 to November 23, 2010.¹⁷²

In light of the OPA framework, the GCCF explicitly stated in its protocol for Phase I as follows: “A *claim for an Emergency Advance Payment is an interim claim under OPA. To the extent that the claimant incurs additional compensable damages that are not reflected in the Emergency Advance Payment, receipt of an Emergency Advance Payment shall not preclude a claimant from seeking additional damages not reflected in the Emergency Advance Payment.*”¹⁷³

Accordingly, the GCCF priority in Phase I is to make payment to eligible claimants as quickly as possible,¹⁷⁴ and the claimants who received a EAP payment was not required to execute a release or covenant not to sue BP or any other responsible parties.¹⁷⁵ While the loss calculation of the EAP payment was not deducted by any amounts received from BP-operated facility, the EAP payment was to be deducted from any future final payments received from the GCCF in Phase II.¹⁷⁶ In addition, Feinberg acknowledged in his public statements made in

¹⁷² *Id.*

¹⁷³ See Protocol for Emergency Advance Payments, *supra* note 109.

¹⁷⁴ This priority was reflected in the Phase I protocol which stated, in pertinent part, as follows:

“2. Each Emergency Advance Payment application will be evaluated preliminarily within 24 hours of receipt of the completed [claim] form and supporting documentation to determine whether an Emergency Advance Payment is appropriate based on the information submitted by the Claimant. Complex business claims submitted for an Emergency Advance Payment will be evaluated within 7 days of receipt of the completed [claim] form and supporting documentation to determine whether an Emergency Advance Payment is appropriate based on the information submitted by the Claimant.

3. Upon determination that the Claimant is eligible for an Emergency Advance Payment, a payment will be authorized within 24 hours.” See BDO CONSULTING, *supra* note 111, at 30.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* In fact, the GCCF also accepted Final Payment Claims during Phase I, but did not process these claims until Phase II. Final Payment claim forms were included in packages sent to all persons and businesses that filed claims

September 2010 that the process of determining eligibility during Phase I was more complex and time-consuming than initially contemplated and that the GCCF had not been able to process claims in the timeframe set forth in the Phase I protocol.¹⁷⁷

(1) PHASE I: THE EMERGENCY ADVANCE PAYMENT

With regards to the eligibility of a claimant, according to the report subsequently produced by the BDO Consulting, the GCCF placed the claimants in one of the different business categories, identified claimant's role of business (as the owner or employee) and categorized the location of claimant's loss as being either inside or outside the "zone of impact" from the spill.¹⁷⁸ If a claimant had been found eligible through this process, the calculated loss would have been presumed to have been caused by the spill.¹⁷⁹

with the BP-operated facility and were available online. See Protocol for Emergency Advance Payments, *supra* note 109.

177 Part of the letter from the U. S. Department of Justice, Office of the Associate Attorney General addressed to Mr. Feinberg, states as follows:

"As we have previously discussed, the United States believes that the success of your Gulf Coast Claims Facility depends on its ability to achieve a number of goals: It must provide an independent, fair, efficient process for those most affected by the Deepwater Horizon Oil Spill; it must meet or exceed the requirements of the Oil Pollution Act; it must provide a seamless transition from the existing BP claims process; and it should not in any way retreat from commitments that BP has made.

In taking over the BP claims process, you pledged that individual claims would be resolved within 48 hours, and business claims would be resolved within seven days. We have reviewed recent statistics regarding the GCCF's performance, and it appears that - even aside from the claims that the GCCF has identified as needing additional documentation - tens of thousands of claims have been pending, awaiting GCCF review, longer than the time periods you proposed.

Your recent public statements have acknowledged that the process is more complicated and time-intensive than you had anticipated. I would reiterate to you, however, that the efficiency of the GCCF's review and payment process is not just a matter of fulfilling your own performance goals. The Deepwater Horizon Oil Spill has disrupted the lives of thousands upon thousands of individuals, often cutting off the income on which they depend. Many of these individuals and businesses simply do not have the resources to get by while they await processing by the GCCF.

As the present pace is unacceptable, the GCCF needs to devote whatever additional resources - or make whatever administrative changes - are necessary in order to speed up this process. I would appreciate your keeping me advised of your progress in this matter." See Letter from the U. S. DEP'T OF JUST., to Kenneth R. Feinberg (Sep.17, 2010) available at http://media.nola.com/2010_gulf_oil_spill/other/perrelli-to-feinberg-letter.pdf.

178 See BDO CONSULTING, *supra* note 111, at 30-32.

179 *Id.*

In terms of calculation of loss for an eligible “individual” claimant, for instance, the GCCF utilized a calculator tool to calculate claimant’s losses—where the claimant’s “projected 2010 earning” was determined by choosing the highest of the claimant’s earning for 2008, 2009 or annualized 2010 prior to the spill.¹⁸⁰ Then the projected 2010 earnings had to be multiplied by a “seasonality percentage”¹⁸¹ to get an amount from which the claimant’s actual earnings for the claim period were subtracted.¹⁸²

It should be noted, however, that this precise information about calculation methodology was revealed later on in the June 2012 Report produced by the BDO Consulting at the request of the U.S. Department of Justice (the “DOJ”), and not provided by the GCCF’s protocol itself.¹⁸³

Phase I operation of the GCCF has led to widespread criticism by oil spill claimants and scholars. A common complaint was that claimants could not get any information about their claims until the GCCF made a final decision. The GCCF did not provide a formula for calculating the

180 *Id.*

181 See BDO CONSULTING, *supra* note 111, at 30. (“A seasonality percentage was assigned to each month based upon an estimation of the proportion of annual earnings that the claimant would receive in that month. Because the economy of the Gulf was heavily dependent upon the fishing and tourism industries, the highest seasonality percentages were applied in June, July and August. During Phase I, a seasonality percentage was used in the calculation of all business and individual claims. With regard to individual claims calculations during Phase II, a seasonality percentage was applied only when the employee was an hourly employee; the seasonality percentage was not applied to salaried employees because it was presumed that their monthly earnings did not vary from month to month. Starting in September 2010 and through the rest of Phase I, the GCCF applied the seasonality percentages for Gulf Shores, Alabama to all loss calculations except those for claims in the commercial and charter fishing industries, which had an individualized seasonality percentage.”)

182 See *id.* at 30-32 (“For an eligible “business” claimant, several different calculators were utilized, based upon the claimant’s industry. The selected calculator tool, in turn, determined the claimant’s projected 2010 revenue based upon on of a series of formulas and rules. The projected 2010 revenue was multiplied by the applicable seasonality percentage for the month(s) covered by the claim, resulting in an amount from which the claimant’s actual 2010 revenue would be subtracted. The resulting amount was multiplied by a Loss of Income percentage (“LOI”), which adjusted the loss revenue amount for expenses avoided or discontinued as a result of the reduction in revenue. The product of this calculation was the amount of the business claimants’ EAP payment.”)

183 For example, the GCCF’s protocol for Phase I merely stated the general rule on “causation” as follows: “The GCCF will only pay for harm or damage that is proximately caused by the Spill. The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine. Determinations of non-OPA claims will be guided by applicable law. The GCCF will take into account, among other things, geographic proximity, nature of industry, and dependence upon injured natural resources.” See Protocol for Emergency Advance Payments, *supra* note 109.

amount claimants received or the reason for denial of claims.¹⁸⁴ Many claimants complained of slow, inconsistent payments.¹⁸⁵ Following several letters from state and federal government representatives about slow payments, including a September 17, 2010 letter from the Justice Department,¹⁸⁶ the GCCF began issuing emergency payments faster and became more generous.

Allegedly, some criticized that the GCCF even speeded up the process by processing claims from businesses without regard to their proximity to the shore.¹⁸⁷ In terms of inconsistency, for instance, there are several reports of individuals and businesses being paid in full, while their neighbors or coworkers with “identical” claims received a fraction of what they requested, or nothing at all.¹⁸⁸ Former Alabama Governor Bob Riley called the process a “roller coaster ride.”¹⁸⁹ In addition, no less controversial perhaps, the controversy also related to the fact that the GCCF Phase I protocols did *not* include a process by which a claimant could appeal the GCCF decision or have its claim re-reviewed by the GCCF.¹⁹⁰

184 *Id.*

185 See Letter from the U. S. DEP’T OF JUST., *supra* note 177.

186 *Id.*

187 Dionne Searcey, *Bumpy Start to BP Fund Puzzles Gulf*, Wall St. J., Oct. 20, 2010, available at <http://online.wsj.com/article/SB10001424052748703673604575549970587948384.html>.

188 See e.g., BDO CONSULTING, *supra* note 111, at Exhibit B (The report notes that although “the GCCF appeared to have consistently applied its protocols and methodologies in processing claims,” there were, nevertheless, errors that negatively affected approximately 7,300 claimants, resulted in cases of overpayment, and caused erroneous denials of payment to 2,600 claimants.) See *id.* at Exhibit B at 9 (The evaluators also investigated “concerns raised by claimants, public officials and other stakeholders,” including “whether communications with claimants were effective; whether the GCCF gave appropriate consideration to documentation submitted by claimants; and why there seemed to be inconsistent outcomes among claimants that [appeared to be] similarly situated.”) See Joan Flocks & James Davies, *The Deepwater Horizon Disaster Compensation Process as Corrective Justice: Views from the Ground up*, 84 MISS. L.J. 1, 42 (2014); See Osofsky et al., *supra* note 56; See Mullenix, *supra* note 64, at 819.

189 Dan Murtaugh, *Bob Riley Criticizes Oil Spill Claims Process After Meeting with Ken Feinberg*, MOBILE PRESS-REGISTER, Nov. 4, 2010, available at http://blog.al.com/live/2010/11/riley_criticizes_claims_proces.html; Joanne Doroshow, *BP, Feinberg and Some Shameful Legal Ethics*, Huffington Post, Feb. 4, 2011, available at http://www.huffingtonpost.com/joanne-doroshow/bp-feinberg-and-some-sham_b_818092.html.

190 See Protocol for Emergency Advance Payments, *supra* note 109; See Mullenix, *supra* note 64, at 870 (criticizing that claimants have limited opportunities to appeal decisions of the fund administrator. On this premise, Feinberg is, therefore, “the original and ultimate arbiter of both substantive and procedural due process in administering the GCCF”).

Statistically, as Phase I progressed, the GCCF received a very large volume of claims—over 475,000 claims were filed from August 23, 2010 through November 2010.¹⁹¹ Ultimately, under the Phase I program, the GCCF paid approximately the total of \$ 2.5 billion to 169,000 Phase I claimants.¹⁹² The GCCF indicated that it denied approximately 60% of the claimants who filed claims during Phase I, mainly due to the reason that the claimants failed to submit the required financial documentation.¹⁹³

(2) PHASE II: INTERIM AND FINAL PAYMENTS OPTIONS

Phase II of the GCCF began on November 22, 2010 where the GCCF transitioned from emergency payment claims to provide “3 options” of claims pursuant to its Protocol for Interim and Final Claims.¹⁹⁴ Claim forms were made available on December 18, 2010¹⁹⁵, and Phase II claims were allowed to be submitted until August 23, 2013.¹⁹⁶

During Phase II or the “Interim Payment/Final Payment” claims process, the GCCF received three types of claims: Interim Payment Claim, Full Review Final Payment Claim and Quick Payment Final Claim,¹⁹⁷

While the Interim Payments were based on documented past losses only, Full Review Final Payments (or “Final Payment”), on the other hand, were based on documented past losses plus estimated future damage due to the Oil Spill.¹⁹⁸ As such the Full Review Final Payment would

191 See DONOVAN LAW GROUP, <https://donovanlawgroup.wordpress.com/category/deepwater-horizon/> (last visited Dec. 24, 2016)

192 *Id.*

193 *Id.*

194 See BDO CONSULTING, *supra* note 111, at 35.

195 *Id.*

196 However, this Phase was subsequently replaced by a Transition Process (i.e. Phase II) which lasted until June 4, 2012, and paid out approximately \$ 405 million for nearly 16,000 claims. See BDO CONSULTING, *supra* note 111, at 11.

197 See BDO CONSULTING, *supra* note 111, at 34-55.

198 *Id.*

resolve the claimant's entire claim against BP and all other potentially liable parties for past and future damages.¹⁹⁹ Therefore, to receive a Final Payment, a claimant will be required to sign a release precluding the claimant from seeking further compensation from the GCCF, the Coast Guard, or in court from either BP or any other defendant companies allegedly responsible for the Oil Spill.²⁰⁰ By contrast, under the Interim Payment Option, no release will be required,²⁰¹ and, with additional documented loss, the claimant could come back to the GCCF and was, however, permitted to file only one Interim Payment per quarter.²⁰²

Under the Protocol for Interim and Final Claims, the GCCF must decide within 90 days whether to make an interim or final payment to a claimant.²⁰³ A claimant may elect to reject an interim or final payment determination and either present the claim to the Coast Guard's National Pollution Funds Center or commence an action in court.²⁰⁴ The same recourse is available if a claim is denied or not ruled on within 90 days.²⁰⁵ During Phase II, as a general matter, the GCCF subject Interim Payment and Final Payment claims to more stringent documentation requirements than those applied to the Phase I Emergency Advance Payment claims.²⁰⁶

A. THE INCLUSION OF QUICK PAYMENT OPTION

Faced with resolving the claims of more than a half-million entities, many of which were small monetary claims or had been partially compensated with the EAP in Phase I, the GCCF also established the "quick pay" option in mid-December to speed up the claims process. This option is available to any claimant who has received either an Emergency Advance Payment in Phase I

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

or an Interim Payment from the GCCF (who were not subject to release requirement in receiving those payments).²⁰⁷

Under this Quick Payment option, the GCCF offered a one-time final payment of \$ 5,000 for individuals and \$ 25,000 for businesses without requiring any further evidential documentation.²⁰⁸ Similar to the Full Review Final Payment option, this Quick Payment option had, nevertheless, to be accompanied by a full release, precluding the claimant from seeking further compensation from the GCCF, the Coast Guard's fund, or in court from either BP or any other defendant companies allegedly responsible for the Oil Spill.²⁰⁹

The process for review of the claims for Quick Payment option was necessarily more straightforward than that utilized for determining Interim Payments and Full Review Final Payments—the GCCF only needed to determine the claimant type (individual or business), whether the claimant had received a prior EAP or Interim Payment, and whether claimant previously signed a release.²¹⁰ The option was viewed as a way to compensate claimants such as service industry workers, who had indirect losses from the disaster, but who would not “be able to show more losses going forward” from that point.²¹¹ It was not intended to satisfy those with larger claims—such as business owners or fishermen who experienced substantial losses because of their

207 *Id.*

208 *Id.*

209 *Id.* See also, David Hammer, *Most BP Oil Spill Claimants Opt for One-Time 'Quick Payment'*, THE TIMES-PICAYUNE (Jan. 26, 2011, 9:40 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html

210 See BDO CONSULTING, *supra* note 111, at 36.

211 See David Hammer, *Most BP Oil Spill Claimants Opt for One-Time 'Quick Payment'*, THE TIMES-PICAYUNE (Jan. 26, 2011, 9:40 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html

dependence on the coastline. Approximately 135,000 claimants elected this alternative and were paid approximately \$1.4 billion.²¹²

To sum up, during Phase II, there were three types of claims paid out to claimants: Interim Payment Claim, Full Review Final Payment Claim, and Quick Payment Final Claim. In Feinberg's belief, most claimants who took partial payments or EAPs would return to the GCCF for a final payment (either "full review with estimated future loss" or "quick payment option") after assessing their options. This menu of options resonated Feinberg's belief that the GCCF offered victims a better deal than they would get by relying on the conventional mass tort litigation.²¹³

B. CRITICISM REGARDING THE DELAY OF INTERIM PAYMENT

Despite Feinberg's optimistic belief, the delay in the process of granting interim payment has generated controversy and criticism extensively. The first set of interim payments was made in the late February 2011.²¹⁴ Some critics, including Mississippi Attorney General Jim Hood, have argued that delaying interim payments for several months effectively created financial hardship on claimants, steering them toward final payment, which requires them to waive their legal rights.²¹⁵ As such, the choice made by these claimants could have been under economic duress.

More tangibly, at the October Congressional hearing, Rep. Landry claimed that the GCCF conveniently "lost" paperwork in order to delay payments.²¹⁶ Similarly, the Plaintiff Steering

212 This policy created tension in some communities. See Thomas Vasquez, *A Template for Designing Mass Tort Settlement Structures*, LAW360 (June 17, 2013), <http://www.law360.com/articles/449316/a-template-for-designing-mass-tort-settlement-structures>.

213 See Ewencyk, *supra* note 64, at 278.

214 See BDO CONSULTING, *supra* note 111, at 34-55.

215 *BP Claims Process Violates Law*, FOX10TV.COM (Feb. 2, 2011), http://www.fox10tv.com/dpp/news/gulf_oil_spill/ag%3A-bp-claims-process-violates-law.

216 Although Feinberg denied this allegation. See *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources*, 101ST CONG. (Oct. 27, 2011), <http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=265099>. See also Lucy Martucci, *Using Principles*

Committee (PSC)²¹⁷ also claimed that this was a strategy to pressure cash-strapped business owners and individuals into accepting a Quick Payment Final Claim.²¹⁸ Even for those who can afford to wait, the interim claims process caused problems because claims must be filed quarterly (i.e. once per quarter) and the GCCF has 90 days for the claims to be resolved. As a result, claimants' cash flow could be delayed by up to six months from the time they incur damages.²¹⁹

C. THE FINAL RULES ON METHODOLOGY

At the January meeting of the Senate Ad Hoc Subcommittee on Disaster Recovery concerning insufficient compensation to oil spill victims, Feinberg promised to release additional information on the GCCF's methodology for considering and awarding claims.²²⁰

In developing that methodology, the GCCF worked collaboratively with the ARPC in modifying the methodologies for determining past and future losses of income sustained by eligible claimants.²²¹ Notably, Dr. Vasquez, the team leader, revealed that in developing economic models for determining compensable losses in mass tort cases, he endeavored to design a model

and Policies of Maritime Arbitration to Guide Responsible Parties in Oil Spill Claims Resolution, 14 CARDOZO J. CONFLICT RESOL. 251, 273 (2012).

217 See McDonnell, *supra* note 98, at 766-767 (explaining that Subsequently, the Plaintiffs' Steering Committee (PSC), and the attorneys general of Gulf States affected by the oil spill, also urged the court to nullify or modify releases, monitor communications between the GCCF and potential claimants, and even take over the private compensation process itself.)

218 See, e.g., Laurel Brubaker Calkins, Jef Feely & Edward Petterson, *BP Reaches Estimated \$ 7.8 Billion Deal with Gulf Spill Victims*, BLOOMBERG (Mar. 3, 2012), <http://www.bloomberg.com/news/print/2012-03-03/bp-reaches-settlement-agreement> (attorneys argued that the GCCF used coercive tactics to force claimants to accept inadequate payments for their claims and give up their right to sue); David Ferrara, In Gulf Shores: 2 Claims, 2 Stories, Huntsville Times, Aug. 23, 2011 ("What they're trying to do is wear you down, so you give up"); see also Gulf Coast Claims Facility - Summary of Options For Submission of Final and Interim Payment Claims, available at http://www.gulfcoastclaimsfacility.com/summary_options.pdf (This option requires no loss documentation, compensates individuals at \$ 5,000 and businesses at \$ 25,000, and requires claimants to sign a full release of liability, thereafter foreclosing their appeal and litigation options.) See Martucci, *supra* note 216, at 273.

219 Dan Murtaugh, *Justice Department Official Asks Claims Czar to Reconsider Denials to Coastal Businesses*, PRESS-REGISTER, Feb. 4, 2011, available at http://blog.al.com/live/2011/02/justice_dept_official_asks_cla.html.

220 See 12 Env'tl Lit. & Toxic Torts Com. Nwsltr. 13 (2015)

221 Analysis Research Planning Corporation ("ARPC"), a firm of economists retained in July 2010 to assist the GCCF in the development of economic models for the treatment of losses and to assist in the design, drafting and implementation of the methodologies for determining past and future losses of income sustained by eligible claimants. This consulting firm headquartered in Washington, DC. The team consisted of three individual assigned to GCCF. The team leader was Thomas Vasquez. See BDO CONSULTING, *supra* note 111, at 18-24.

that would efficiently distribute money to deserving claimants and limit the number of claimants opting out of the settlement.²²²

On February 2, 2011, the GCCF subsequently released a draft of its proposed methodology for a two-week public review period where the GCCF received a total of 1,440 comments from individual claimants, businesses, experts, public officials, public interest groups, as well as BP.²²³ Ultimately, the GCCF published the Final Rules on February 18, 2011.²²⁴ The Final Rules set forth the GCCF's methodology for determining claimant eligibility and calculating losses, as well as documentation requirements.

At first, subsequent to its initial decision to adopt the proximate cause standard of causation, the GCCF sought an expert opinion from Professor John C.P. Goldberg of Harvard Law School, to be used as a benchmark,²²⁵ regarding the scope of liability that BP or any other party

²²² *Id.* at 36.

²²³ The public comments are available on the GCCF's Web site, <http://gulfcoastclaimsfacility.com/methodology>.

²²⁴ See BDO CONSULTING, *supra* note 111, at 39.

²²⁵ Professor Goldberg's basic thesis is that OPA employs "proximate cause-like limitations" on recovery for pure economic losses. Specifically, OPA grants recovery under section 2702(b)(2)(E) to claimants who have "a right physically to obtain or use property or resources that are damaged or lost because of an oil spill" (i.e. the "use-right" requirement). See John C.P. Goldberg, *OPA and Economic Loss: A Reply to Professor Robertson*, 30 MISS. C. L. REV. 203, 204 (2011) (on file with the Harvard Law School Library). Some commentators initially thought that Professor Goldberg's analysis would be the template used to determine payouts from the GCCF, see David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1353 (2011), but the facility's protocol for paying claims appears to be broader than Professor Goldberg suggests the law requires, as can be seen in the Protocol for Interim and Final Claims, Gulf Coast Claims Facility (Feb. 8, 2011). See also David W. Robertson, *The Oil Pollution Act's Provisions on Damages for Economic Loss*, 30 MISS. C. L. REV. 157, 174 n.58 (2011) (criticizing Professor Goldberg for proposing an "overly narrow view of the legislative history"). For an interesting discussion on Prof. Goldberg thesis, see Brendan Selby, *In re: Oil Spill by the Oil Rig Deepwater Horizon on the Gulf of Mexico, on April 20, 2010, Order, Aug. 26, 2011*, 36 Harv. Envtl. L. Rev. 533, 551 (2012) ("After Professor Goldberg released his report, University of Texas Professor David W. Robertson published a highly critical response in the Mississippi College Law Review, which drew a subsequent response and reply from both professors. Professor Robertson describes the "dual-layer" statutory argument as "highly dubious" and "fabulously false." He proceeds to attack the use-right requirement from many angles. His basic theme is that Professor Goldberg has advanced an overly limited construction of OPA's causation requirements in order to craft an argument with "exclusionary power." It should be noted that Professor Robertson's argument reflects his work as a consultant for the Plaintiffs' Steering Committee in the MDL litigation.")

would face as a result of the Spill.²²⁶ Feinberg, however, viewed Professor Goldberg’s approach to be more demanding and, therefore, less favorable to claimants than the approach to causation actually adopted by the GCCF.²²⁷ As such, the GCCF stated in the Final Rules as follows:

*“Neither physical proximity to the Oil Spill nor a particular type of work or business engaged in by the claimant is a prerequisite to eligibility for payment of a claim. But adequate documentation of damage attributable to the Oil Spill is required. Physical proximity to the Oil Spill, and the nature of the business or work engaged in by the claimant, are important factors when it comes to the proof needed to document a claim that the damage was caused by the Oil Spill....The ability of the claimant to link the alleged damage to the Oil Spill – as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill – is required.”*²²⁸

More specifically, to assess whether a claimant was eligible to receive a payment offer from the GCCF, the GCCF first placed the claimant into one of four groups as illustrated by Table 3 below:

Table 3. The eligibility criteria according to the different type of group.²²⁹

Groups	Description of the Group	Eligibility Criteria
Group 1	This group consisted mainly of individuals and businesses that were heavily dependent on Gulf resources and tourism and were located in zip	Any demonstrated loss sustained by a claimant in Group 1 was presumed to have resulted from the Spill and, therefore, the GCCF would deem the claimant eligible even if the claimant had not submitted any other evidence linking the claimant’s loss to the Spill.

²²⁶ See BDO CONSULTING, *supra* note 111, at 39.

²²⁷ *Id.*

²²⁸ See Gulf Coast Claims Facility, Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology (Feb. 18, 2011), <https://eng2viet.files.wordpress.com/2011/02/gccf-final-rules.pdf> [hereinafter GCCF Final Rules].

²²⁹ The information contained in this table is derived from BDO CONSULTING, *supra* note 111, at 38-43.

	codes that bordered the Gulf shore, as well as claimants that had already received prior payments from the GCCF and/or Real Estate Fund.	
Group 2	This group consisted of individuals and businesses that were located in the Gulf Alliance counties, but were not in zip codes that bordered the Gulf shore, as well as businesses that, while located in zip codes that bordered the Gulf shore, were not heavily reliant on Gulf resources and tourism.	For Group 2, the GCCF analyzed the documentation presented by a claimant to ascertain whether any loss sustained by the claimant was due to the Spill. When ascertaining the eligibility of a Group 2 “business claimant”, the GCCF first subjected the claimant’s financial history to the “Financial Test” ²³⁰ in which, in essence, the GCCF determined whether the business’s decline in its 2010 post-Spill revenue as compared to the same period in 2008 and 2009 was greater than any decline in revenue it might have experienced in the four months leading up to the Spill as compared to the same period in 2008 and 2009.

230 The financial test is to establish whether there was damage due to the Oil Spill.

- First, 2010 is divided into two parts – pre-Oil Spill and post-Oil Spill. The pre-Oil Spill period is January through April. The post-Oil Spill period is May through December of that year.
- Second, the January through April financial performance in 2010 is compared to the average financial performance in the January through April period from prior years (for example January through April for 2008/2009) – pre-Oil Spill Financial Performance
- Third, the May through December end of year financial performance in 2010 is compared to the average financial performance in May through December from prior years (for example May through December for 2008/2009) – post-Oil Spill Financial Performance.

To qualify for compensation, the financial performance test must show:

#1: A decline in revenue from the average revenue earned May through December in 2008/2009. In effect, the business must show there is a decline in post-Oil Spill financial performance relative to earlier years.

#2: The percent decline in 2010 post-Oil Spill revenue from #1 above must exceed the percent decline in 2010 pre-Oil Spill revenue. See Gulf Coast Claims Facility, Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology 15 (Feb. 18, 2011). See BDO CONSULTING, *supra* note 111, at 38-43.

		<p>If a Group 2 “business claimant” failed to pass the Financial Test, the GCCF still considered it eligible if it had submitted a Specific Causation Document (SCD), such as a cancelled or modified contract or cancelled order for goods or services sold, which demonstrated that a loss sustained by the business was more likely than not the result of the Spill.</p> <p>For Group 2 “individual claimants”, an individual claimant was deemed eligible if the claimant were claiming losses as a result of working at a business that had been deemed eligible or if the individual had submitted an SCD, such as a termination letter or an affidavit, which demonstrated the individual’s loss was more likely than not due to the Spill. The GCCF required that, with some exception, an SCD, in order to be sufficient, had to be prepared <i>contemporaneously</i> with the event it was reporting. 231</p>
Group 3	<p>This group consisted of claimants who either were not located on the Gulf shore or Gulf Alliance counties, or were businesses or the employees of businesses that were not heavily reliant on Gulf resources and tourism.</p>	<p>To be eligible, a Group 3 business claimant had to pass both the Financial Test and provide an SCD that demonstrated that the business had sustained a loss that was more likely than not caused by the Spill.</p> <p>As with Group 2, a Group 3 individual claimant would be deemed eligible if the claimant were claiming losses as a result of working at a business that had been deemed eligible or had provided a contemporaneously dated SCD, such as a termination letter or an affidavit, demonstrating that the individual’s loss was more likely than not due to the Spill.</p>

231 For example, to be sufficient, a letter from an employer explaining that the employer had terminated the claimant or reduced the working hours of the claimant because of a downturn in business caused by the Spill had to bear a date near the time of the termination or reduction of hours. The GCCF deemed as insufficient letters or sworn affidavits that were not prepared at or near the time of the termination or reduction in hours. *See* BDO CONSULTING, *supra* note 111, at 42.

Group 4	This Group included, for example, government entities, which could be eligible to make claims against funds being maintained by BP; oil rig support businesses, which might be eligible to make claims to the oil moratorium fund created by BP; Spill clean-up workers; freshwater seafood processors and distributors; recreational fishermen; GCCF workers; and recreational divers.	Claimants in Group 4 were deemed ineligible for compensation at various times by the GCCF.
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In addition, beginning on March 31, 2011, the GCCF implemented the coattails eligibility policy.²³² Pursuant to that policy, a claimant in Group 2 or Group 3 was deemed automatically eligible through the application of the GCCF—provided that the GCCF previously deemed the claimant’s employer eligible or if the claimant’s employer had been paid during Phase I or had previously been deemed eligible in Phase II.²³³ This policy change made it easier for individual claimants to prove eligibility.

In sum, once a claimant was deemed to be eligible for potential compensation, the GCCF calculated the amount of claimant’s compensable loss. For Interim Payment claims, the analysis was limited to a calculation of the amount of past losses sustained by the claimant from May 1,

232 See BDO CONSULTING, *supra* note 111, at 73.
233 *Id.* See also GCCF Final Rules, *supra* note 228, at 4-5.

2010 (or the date of any prior Interim Payment) through the date of the claim.²³⁴ For Final Payment claims, the analysis included both a calculation of past losses as well as a Future Recovery Factor, based upon a multiple of the claimant's documented 2010 loss amount.²³⁵ To put it another way, the GCCF calculated the Final Payment amount to be offered to a claimant by first calculating the Interim Payment and multiplied that amount by the applicable Future Recovery Factor.

D. FUTURE LOSS CALCULATION: FUTURE LOSS RECOVERY FACTOR (THE MULTIPLIERS)

With regards to the future loss calculation, the GCCF developed the model in which a claimant's future losses would be calculated by multiplying the claimant's actual documented loss—incurring during the period immediately following the Oil Spill on April 20, 2010, through December 31, 2010—by a Future Loss Recovery Factor.²³⁶ The anticipated future losses following the Oil Spill under this model was based on the anticipation of the gradual economic recovery.²³⁷ A Feinberg-commissioned report conducted by the ARPC indicated that, based on experience with other unanticipated and catastrophic events, the Gulf's economic recovery was expected to continue in 2011, with full recovery reasonably expected in 2012.²³⁸ On this basis, the GCCF viewed that recovery spreading over this time period would, therefore, result in a Final Payment Offer of two times the actual documented losses in 2010.²³⁹ In other words, according to

234 With regard to Interim Payment for business claims, the first step in the calculation of losses for Interim Payment was similar to that for individuals: The reviewer determined the claimant's Comparison Year income by selecting the highest of the claimant's 2008, 2009 and annualized pre-Spill 2010 revenue³² for the same months of the year as those included in the claim and subtracting from that amount the claimant's actual revenue during the claim period. This amount was then multiplied by a Loss of Income (LOI) percentage to arrive at the amount of lost profits, if any, sustained by the claimant during the claim period. The GCCF then subtracted any prior payments received by the claimants at any stage of the process, to arrive at the amount to be paid to the claimant. *See* BDO CONSULTING, *supra* note 111, at 42.

235 To calculate the Final Payment offer, the documented 2010 loss amount was multiplied by two. In the case of claims by oyster harvesters and processors (from the inception of the GCCF) and claims by shrimp and crab harvesters and processors (under review on or received after November 30, 2011), the Final Payment offer was calculated by multiplying the documented 2010 loss by four. *See* BDO CONSULTING, *supra* note 111, at 41.

236 *See* BDO CONSULTING, *supra* note 111, at 38.

237 *See* GCCF Final Rules, *supra* note 228, at 4-5.

238 *Id.* at 5. *See also* BDO CONSULTING, *supra* note 111, at 38.

239 *See* GCCF Final Rules, *supra* note 228, at 5. *See also* BDO CONSULTING, *supra* note 111, at 38.

the final guidelines, most individuals and businesses would receive a total payment of twice their 2010 losses as a final settlement.²⁴⁰

Despite its criticism for being speculative,²⁴¹ the research continued to serve as the main basis for Feinberg's predictions and, consequently, for the GCCF's methodology for future loss calculation. Put it another way, basing on this research, BP could then credibly take the position that fishermen would not suffer significant future losses.

Not surprisingly, the methodology was disappointing to several Gulf Coast residents who were hoping to receive up to three times their losses in 2010.²⁴² Many claimants fear the GCCF's studies could negatively impact how claims were determined.²⁴³ After reviewing all received comments the GCCF insisted on continuing to believe that a Future Recovery Factor of 1.0 (two times the actual documented losses) in 2010 is “fair and reasonable.”²⁴⁴ Subsequently, the GCCF also responded to criticism—both about its future loss calculation, and, in effect, its release form requirement for final payment incorporated such amount of estimated future payment—by merely

240 See GCCF Final Rules, *supra* note 228, at 5.

241 See Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419, 423 (2012); see also Comments with Respect to the Gulf Claims Facility's Draft Proposal Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology 3 (Feb. 16, 2011) (“There is simply no factual basis to assume, as the GCCF proposes, that, Gulf-wide, claimants will experience losses in 2011 equaling 70% of their 2010 losses and losses in 2012 equaling 30% of 2010 losses, so that final payments should be twice the amount of actual substantiated loss.”)

242 Dan Murtaugh, *Oil Spill Claims Payments Would Double What Was Lost in 2010 for Most, Document Says*, MOBILE PRESS-REGISTER, Feb. 2, 2011, available at http://blog.al.com/live/2011/02/Gulf_coast_claims_facility_ann.html.

243 Dan Murtaugh, *Bob Riley Criticizes Oil Spill Claims Process After Meeting with Ken Feinberg*, PRESS-REGISTER, Nov. 4, 2010, available at http://blog.al.com/live/2010/11/riley_criticizes_claims_proces.html; Joanne Doroshow, *BP, Feinberg and Some Shameful Legal Ethics*, HUFFINGTON POST, Feb. 4, 2011, available at http://www.huffingtonpost.com/joanne-doroshow/bp-feinberg-and-some-sham_b_818092.html

244 See GCCF Final Rules, *supra* note 228, at 5.

urging that “claimants who disagree with this conclusion are urged to opt for an Interim Payment for past damage.”²⁴⁵

Nevertheless, a special exception was made for oyster harvesters, who received a final payment equal to *four* times their 2010 losses, since experts expect a longer recovery period for oyster beds.²⁴⁶ In addition, the GCCF promised to reassess data on the recovery of the Gulf every four months, so the calculation of future losses was subject to change over time.²⁴⁷

On balance, Feinberg's biggest challenge in administering this second phase of the GCCF was to convince some significant number of the affected individual and business claimants to accept the offers made by the GCCF in Phase II. Significantly, the methodology utilized for analyzing claims for Interim and Final Payments was more complex than that utilized for Quick Payment claims as well as the Emergency Advance Payment in Phase I. It should also be noted that, given the complexity of some business claims, the GCCF accountant models were varied slightly among industries, allowing the GCCF accountants to exercise some discretion when calculating the loss sustained by eligible business claimants.²⁴⁸

245 *Id.* See also Louis Cooper, *Feinberg Addresses Spill Claims Concerns*, PENSACOLA NEWS J., Feb. 8, 2011, available at www.pnj.com/article/20110208/NEWS01/102080318/Feinberg-addresses-spill-claims-concerns.

246 See GCCF Final Rules, *supra* note 228, at 4-5.

247 For instance, based upon research conducted by ARPC, in October 2011, the GCCF modified its methodology as relates to calculating losses sustained by eligible oyster leaseholders. As a result of this modification, in addition to being compensated for lost earnings or profits, eligible oyster leaseholders would receive a special allowance—to compensate [them] for the risk of as yet undetected and possibly ongoing damage to oyster-producing areas in the Gulf and the possibility of significant delay before affected oyster beds are repaired. This special allowance was calculated by multiplying the claimant's net income in a comparison year by a Future Risk Multiple, which, depending upon the location of the claimant's oyster bed, could be 1, 2, 3.5 or 7. See BDO CONSULTING, *supra* note 111, at 38.

248 *Id.* at 43.

E. APPEAL PROCESS IN PHASE II: A POSITIVE CHANGE

In terms of certain positive changes, the GCCF in Phase II eliminated some problematic issues arisen under the Phase I by, for instance, introducing the requirement that all denials must include an explanation of why the claim was denied.²⁴⁹ Most importantly, claim reconsideration was made possible through different methods, allowing a claimant to challenge the result by: (i) requesting that the GCCF re-review the claim²⁵⁰ and (ii) in limited circumstances, filing an appeal with the GCCF Appeal Board.²⁵¹

In addition, it should be reminded that had claimant decided not to accept the Final Payment Offer, then the claimant could have filed a claim for additional Interim Payments from the GCCF—again, on the condition that only one interim payment claim could be filed per quarter.²⁵²

249 See GCCF Final Rules, *supra* note 228, at 8 (“In an effort to promote greater transparency and consistency in the GCCF claims process, the GCCF is initiating a series of measures designed to provide claimants with greater access to information about their individual claims, including the status of the claim and the reasons for determinations made by the GCCF (claim acceptances or denials; calculation of compensation and the reasons related thereto, etc.)” For Sample Payment Letters and Evaluation Calculations, see *id.* at Attachment E.

250 See BDO CONSULTING, *supra* note 111, at 46-47. (“claimant could seek to have the GCCF re-review a claim on which a Determination Letter, Zero Loss Determination Letter, Denial Letter or Deficiency Letter had been issued within thirty days of the date of the letter. Prior to July 2011, a claimant could request the re-review (1) in writing; (2) by calling BrownGreer’s Claimant Communication Center; (3) in person at one of the GCCF’s site offices; or (4) by submitting additional documentation. Beginning in July 2011, the GCCF required a claimant seeking a re-review of a claim on which a Determination Letter or Zero Loss Determination letter had been issued to complete a form on which the claimant was to provide the reason for the request. Claimants were only permitted one re-review per claim.”) See also GCCF Final Rules, *supra* note 228, at 24, Exhibit B)

251 See GCCF Final Rules, *supra* note 228, at 30. (“A claimant may appeal a Final Payment Offer if your total monetary award (including any Emergency, Interim or Final Payments made by BP or the GCCF) is in excess of \$250,000. The appeal will be reviewed by a panel of three neutrals who will make an independent determination of the claim’s value. BP will have the right to appeal to the panel of three neutrals if your total monetary award (including any Emergency, Interim or Final Payments made by BP or the GCCF) is \$500,000 or more.”) See BDO CONSULTING, *supra* note 111, at 44-46 (“Mr. Feinberg, in his discretion, could grant either a claimant or BP the right to appeal if the appealing party asserted that (a) a Final Claim determination —presented an issue of first impression under OPA or (b) a Final Claim determination was inconsistent with prior legal precedent under OPA; and that the claim involved was representative of a larger category of claims to be considered by the GCCF.”)

252 See GCCF Final Rules, *supra* note 228, at 2, 31.

2.3.3 THE GCCF AND THE AVAILABILITY OF COMPENSATION FOR LOSS OF SUBSISTENCE USE

Although, the damages for loss of subsistence use of natural resources might not, strictly speaking, be within the scope of the study in a sense that it has been left out from the Rayong compensation story. This type of loss, is, technically, another type of, perhaps, indirect economic loss, which could be claimed by certain fishermen relying on a portion of their catch for personal or household consumption. For the interest of some oil-spill victims that might also be qualified for compensation for this type of loss, it should also be noted that under the GCCF regime, the loss of subsistence use of natural resources claims were also offered and compensated. The loss of subsistence use was defined under the GCCF regime as being the loss for “damages to a claimant's ability to rely, without purchase, on natural resources for food, shelter, or other minimum necessities of life”.²⁵³ Accordingly, “a claimant who depends upon his or her ability to harvest fish that he or she depends upon for food may have a claim for the cost of replacing fish the claimant was unable to harvest because of the closure of fishing waters.”²⁵⁴

However, since there are no records of this subsistence, the Administrator accepts the individual's affidavit regarding claimant's subsistence practices.²⁵⁵ Nevertheless, it was proposed that claims based on “Loss of Subsistence Use of Natural Resources” may be harder to obtain.²⁵⁶ At the same time, this category of loss might expose the facility to the risk of frivolous claims

253 See Claims for Loss of Subsistence Use of Natural Resources, Gulf Coast Claims Facility, <http://web.archive.org/web/20101018000528/http://www.gulfcoastclaimsfacility.com/> (accessed by searching for www.gulfcoastclaimsfacility.com in the Internet Archive index).

254 *Id.*

255 See David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68. WASH. & LEE L. REV. 1341, 1372 (2011).

256 See Osofsky et al., *supra* note 56, at 133. (suggesting that the GCCF website reveals that “thousands of identical claims for Loss of Subsistence Use of Natural Resources have been submitted to the GCCF with no documentation other than standard form letters signed by local officials stating that the claimant has experienced hardship in a “fill in the blank” specified monthly amount as a result of the increase in seafood production costs after the Spill. According to the GCCF, “these claims are not sufficient for payment.”) See also Claims for Loss of Subsistence Use of Natural Resources, *supra* note 253.

where the individual does not do subsistence fishing, and decided to submit a claim only after learning about the fact that some of his neighbors had succeeded in obtaining money from the GCCF by making subsistence allegations. On the other hand, since the individuals in coastal communities that are likely to need these types of subsistence claims tend to primarily be comprised of socioeconomically disadvantaged groups, such as people of color, low-income people, and Indian Tribes, it is suggested that this type of claims may have some human rights elements, in light of environmental justice principle.²⁵⁷ In any case, regardless of the implementation, the fact that there is the availability of compensation for this type of loss under the GCCF regime does highlight, at least, one benefit of the OPA framework in terms of explicitly recognizing this type of loss to be on the list of its damages provision.

2.4 THE THREE MAIN PROBLEMS OF THE GCCF OPERATION

The GCCF was among the largest claims processing facilities in the U.S. history and the most significant response to date by a Responsible Party under OPA. As presented in the preceding discussion, the GCCF evolved over time and faced many challenges. Among them, the following three main problems of the regime should be identified: the problem of inconsistencies; the problem of the release requirements; and the problem of the independence of the GCCF administration.

²⁵⁷ See Osofsky et al., *supra* note 56, at 133 (“Since the communities likely to need these types of subsistence claims may be primarily comprised of people of color, low-income people, and Indian Tribes, increased scrutiny related to these claims may make it harder for these groups to access much-needed subsistence income.”).

2.4.1 THE PROBLEM OF INCONSISTENCIES

Consistency refers to an “agreement or harmony with what has already been done, agreed on, or expressed,” equitably, across time and, in the case of oil spill disaster, across claims.²⁵⁸ Some scholars point out that the conventional tort system can produce apparent inconsistent results for “similarly situated” cases, whereas claims resolution facilities, on the other hand, have the ability to employ a variety of mechanisms creatively to ensure that similar claims are paid similarly.²⁵⁹

Nevertheless, under the GCCF administration of the oil spill mass claims, a variety of compensation inconsistencies was pointed out—between claimants in identical employment arrangements within the same industry (e.g., two boat captains), between claimants in difference industries (e.g., realtors vs. restaurant owners), and even between claimants in different regions (e.g., oystermen in Apalachicola vs. shrimpers in Alabama).²⁶⁰ Arguably, numerous complaints about the lack of standards and inconsistency in claim processing were caused by the ad-hoc or on-the-fly nature of the GCCF administration.²⁶¹

Critics have associated Feinberg with his pattern of on-the-fly rule modification, influenced not only by claimant pressure, but even also by the BP request, rather than resolving the issue through deliberative rulemaking.²⁶²

258 See WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 389 (2d ed. 1983).

259 See, e.g., McGovern, *supra* note 54, at 1379-80.

260 See Flocks & Davies, *supra* note 187, at 29.

261 See Mullenix, *supra* note 64, at 847 (“Feinberg has become aware of the problem of inconsistent awards”); see also Mike Tolson, *A Storm Brews in Alabama over BP’s Promise*, HOUS. CHRON. (Dec. 13, 2010), <http://www.chron.com/disp/story.mpl/business/7336204.html> (complaints over pace and extent of compensation payments; inconsistent awards).

262 For criticism of Feinberg’s “on-the-fly” approach of rules modifications, See Mullenix, *supra* note 64, at 843-844 (“Feinberg’s on-the-fly rule modifications in administering the GCCF have been made in response to objections and requests not only from claimants, but from BP itself”). See also Ian Urbina, *BP Settlements Likely to*

One example can be seen at the time when the GCCF initially employed the collateral source rule to deduct and offset prior payments by BP or other sources from the final settlement amounts.²⁶³ The collateral source rule is a doctrine most commonly used in tort law—under this rule, when a person successfully prevails on a tort claim in the court, any other compensation from other sources should *not* be deducted to diminish the claimant's award.²⁶⁴ The modification of jury awards by collateral source funds has long been a staple of tort reform advocates, especially corporate defendants. As such, settlements funds in light of corporate legal liabilities, including the World Trade Center Fund (in relation to the Airline industry), usually embrace this dimension of tort reform.²⁶⁵

The application of the collateral source rule in the context of the GCCF can be even more controversial than the WTC Fund experience, due to the allegation that the requirement for collateral sources to be deducted from awards was demanded by BP.²⁶⁶ During Feinberg's administration, the GCCF announced that claimants' awards would be reduced by any monies that they earned from participating in the Gulf cleanup.²⁶⁷ Not surprisingly, this policy was protested by hundreds of fishermen and boat owners hired by BP to assist in the oil spill cleanup. They

Shield Top Defendants, N.Y. TIMES, Aug. 20, 2010, at A1 (“BP influence on scope of waiver and release, requiring GCCF fund claimants to waive right to sue not only BP, but all other major defendants involved with the spill”).

²⁶³ See Mullenix, *supra* note 64, at 859 (“As the Fund and now the GCCF demonstrate, in order to receive a quick resolution of the claims, participants must agree to reduce their awards by collateral source funds. Fund resolution of mass tort claims, then, embodies an end run around the collateral source rule that applies in judicially adjudicated tort litigation.”)

²⁶⁴ For the discussion on the rule, see, e.g., RICHARD A. EPSTEIN, TORT 436 (1999).

²⁶⁵ See Mullenix, *supra* note 64, at 859 (“The Air Transportation Safety and System Stabilization Act, which authorized creation of the September 11th Victim Compensation Fund, provided for the reduction of awards by collateral source benefits such as insurance, pension funds, and other government payments. Not surprisingly, Feinberg drew on his experience with the Fund to guide his decisions about the applicability of the collateral source rule in administering the GCCF.”)

²⁶⁶ Urbina, Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010 (BP's successful lobbying of Feinberg to include collateral source deductions). See Mullenix, *supra* note 64, at 861.

²⁶⁷ Neil King Jr., *Feinberg Criticized for Spill-Compensation Terms*, WALL ST. J. (Aug. 24, 2010) (Feinberg indicating that it was not unusual under state law to deduct such earnings from final damage settlements). See Mullenix, *supra* note 64, at 861-862.

viewed such policy to be unfair by deducting cleanup earnings from their awards. This is because, in effect, such approach would have made them a free labor for BP in the cleanup efforts.²⁶⁸

In response to these criticisms, and similar to the pattern he pursued in the course of supervising the WTC Fund, Feinberg modified his position on the collateral source issue. With regard to the award paid for the cleanup efforts, Feinberg subsequently announced that any monies earned by locals participating in the Gulf cleanup would not be deducted from GCCF awards.²⁶⁹

Similarly, after facing stronger pressure and the outcry over inadequate compensation from the seafood sectors, Feinberg subsequently told Congress that the GCCF would “find a way to be more generous.”²⁷⁰ As a result, in the following month, shrimpers’ and crabbers’ compensation doubled to four times each claimant’s 2010 documented losses.²⁷¹

While many modifications could be seen as a victory and a fair result for some claimants, the pressure to offer generous payments or more lenient determination of the claims according to the change in external pressure, together with the lack of restraints on the process consequently led to inconsistency within the process and, perhaps, even payment of fraudulent claims. Representative Jo Bonner (R-Ala.) remarked that the claims process was marked with great inconsistency, and Feinberg was accused of “increasing claimant appeasement by further

268 See Mullenix, *supra* note 64, at 862 (“These claimants protested that the oil spill prevented them from engaging in their usual employment, and it was unfair to deduct cleanup earnings from their fund awards, because this would be tantamount to working for BP for free in the cleanup efforts”).

269 See ASSOCIATED PRESS, *BP Fund Czar: No Deduction for Spill Cleanup Wages*, HOUS. CHRON. (Sept. 20, 2010), <http://www.chron.com/disp/story.mpl/business/7210041.html> (Feinberg announced that he would waive requirement that wages earned by spill cleanup workers be subtracted from their claims of lost revenue).

270 Martucci, *supra* note 216, at 270-271. See also Deborah Barfield Berry, *Feinberg Promises More Aid For Shrimpers Affected by Gulf Oil Spill*, THE MONTGOMERY ADVERTISER, Oct. 28, 2011.

271 Martucci, *supra* note 216, at 270-271. See also David Hammer, *Ken Feinberg Expands Oil Spill Claims Payments for Shrimpers, Crabbers*, THE TIMES-PICAYUNE (Nov. 30, 2011, 9:20 AM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/11/ken_feinberg_expands_oil_spill.html.

extending eligibility, including increasingly remote proximity claims.”²⁷² This on-the-fly approach of administration might have negatively affected the fund available for those more meritorious or deserving claimants.

With regards to the problem of inconsistency, the key question of the concern has been why there seemed to be inconsistent outcomes among claimants that appeared to be “similarly situated”.

In addressing this concern, the GCCF admitted that it expected that certain inconsistencies unavoidably created by methodology modifications.²⁷³ In the last paragraph of the Final Rules, the GCCF stated explicitly that it would continue to monitor and revised these rules.²⁷⁴ Indeed, some of the changes were included in two published modifications—dated August 16, 2011 and November 30, 2011.²⁷⁵ In addition to these published changes, the GCCF made many other adjustments to the methodology used to analyze claims and determine compensable losses.²⁷⁶

²⁷² Martucci, *supra* note 216, at 27.

²⁷³ See BDO CONSULTING, *supra* note 111, 48-49.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 48. (“In its published August 16, 2011 modification to the Final Rules, the GCCF created a requirement that, beginning in the second quarter of 2011, business claimants demonstrate a 5% growth in revenue in 2011 when compared to 2010; created a requirement that, beginning in the third quarter of 2011, individual claimants demonstrate a 5% increase in 2011 earnings over their earnings in 2010; modified the Financial Test used to determine the eligibility of business claimants to allow for additional flexibility in determining the eligibility of claimants with limited financial history; created a methodology to compensate Oyster Leaseholders for projected future losses as a result of potential for prolonged damage to their oyster beds; and made adjustments regarding the calculation of Final Payments for claimants who did not have a documented loss in 2010. In its published November 30, 2011 modification to the Final Rules, the GCCF changed from two to four the Future Recovery Factor to be applied when calculating Final Payment offers for commercial shrimp and crab harvesters and processors; made adjustments to the eligibility of claimants in the Florida Peninsula and Texas; and changed the methodology for calculating the Comparison Year income for individual claimants.”)

²⁷⁶ *Id.* (“The GCCF made these changes for various reasons, including to integrate input from industry groups, to expand eligibility and to facilitate the faster processing of claims. Many of these changes—both those contained in the two modifications to the Final Rules and those that were not—had a direct impact on the GCCF’s determination of a claimant’s eligibility or calculation of any compensable losses.”)

It is worth noting that with some exceptions the GCCF did not apply these changes retroactively.²⁷⁷ Potentially therefore, this non-retrospective approach of subsequent modification resulted in cases in which two claimants—that may appear to have been similarly situated—could have their claims resolved in different ways merely due to the difference in the timing of the GCCF’s review of their claims.²⁷⁸ Because the GCCF did not apply retroactively the changes that would have made these claimants eligible, unless they filed a new claim with the GCCF, these claimants would never receive a payment to which they might have been entitled under the GCCF’s protocols and methodologies.²⁷⁹

Nevertheless, the GCCF stated, on several occasions, that it took this approach because claimants were able to have their claims reconsidered by the GCCF process by requesting a re-review or submitting a new claim.²⁸⁰ Hence, having established the Re-review option, the GCCF expected that certain inconsistencies created by the methodology modifications would be corrected through this process.

²⁷⁷ *Id.* at 48-49.

²⁷⁸ *Id.*

²⁷⁹ For an excellent illustration, see *id.* at 72-76 (“Beginning March 31, 2011, a claimant in Group 2 or Group 3 was deemed automatically eligible through the application of the GCCF’s under the newly introduced coattails eligibility policy provided that the GCCF previously deemed the claimant’s employer eligible. However, the GCCF reviewers did not search back previously processed claims submitted by individual employees to determine if subsequent changes to their employers’ eligibility status as businesses would affect or benefit their payment eligibility as individuals (Also, claimants were, however, entitled to resubmit previously denied claims). The consistency can occurred, for example, where an individual employee might have been determined to be ineligible for calculation of possible payment based on accurate application of GCCF protocols and methodologies. However, if the GCCF subsequently determined that the individual claimant’s employer were eligible, it would deem automatically eligible any employee of that business who thereafter filed a claim. Hence, if the first employee did not re-submit the previously denied claim, the GCCF’s determination that this claimant was ineligible would remain in effect even though the claimant’s co-workers who filed subsequently would be deemed automatically eligible. Thus, this example of accurate application of the GCCF’s protocols and methodologies – that provided for automatic eligibility for individuals who filed claims after their employers were determined to be eligible – resulted in different outcomes for claimants who may appear to have been similarly situated.”)

²⁸⁰ *Id.* at 49.

GCCF also provided a variety of reasons explaining why—despite accurate application of the GCCF’s protocols and methodologies perhaps—claimants that may appear to have been similarly situated might have received different outcomes.²⁸¹ Apart from the problem of human errors, other reasons for inconsistency includes those related to the introduction of “coattails eligibility” as well as the inclusion of Special Determination Letters and automatic eligibility during Phase II based on Phase I errors.²⁸²

On a more general basis, the GCCF explained that eligibility and loss calculations had to take into account a wide range of factors, due to the recognition by the GCCF that the Spill affected specific claimants differently. Together with the complexity of each business structure faced by the GCCF in analyzing each claimant’s expected post-spill earnings in relation to the claimant’s pre-spill earnings, as well as other background factors, the variation in the outcome among claimants was unavoidably and unsurprisingly expected.

While, at first glance, this explanation based on the claimants’ advantages might seem to be acceptable. And, equally, while “similarly situated”, arguably, is a “subjective” consideration and may not reflect differences among claimants that were not evident to observers but have certain implications to the outcomes in many cases. Ultimately, the problem of consistency is, nevertheless, a matter of degree. To judge it, a more extensive empirical research or data need to be acquired to establish the actual extent of deviation or inconsistency from the acceptable standard for mass claims in this nature. For the purpose of the system design of the private mass claims

281 *Id.* at 73-77 (suggesting that these reasons include: (1) the range of options for claimants to document pre-Spill earnings; (2) the timing of an individual’s claim as compared to business claims by his employer; (3) the evolution of the GCCF’s methodologies during its tenure; (4) the periodic implementation of processes to expedite payments; (5) the automatic eligibility in Phase II of claimants who may have been paid in error in Phase I; (6) human error by GCCF claims processors; and (7) the temporary differences in outcomes that were subsequently corrected.)

282 *Id.*

settlement, the system designer, in future, should look harder to the problem of inconsistency and try to find some reasonable preventive measures to control or reduce such consistency to achieve a legitimate level.

2.4.2 PROBLEM OF FAIRNESS AND THE RELEASE REQUIREMENTS

Reportedly, the GCCF paid a total of 230,370 claimants who filed claims with the GCCF during the “Phase II” period; of these, 195,109 were either Quick Pay or Full Review Final payments (subject to the release requirement²⁸³); and only 35,261 were Interim payments (not subject to the release requirement).²⁸⁴ Based on this data, some GCCF opponents strongly criticized Feinberg for unconscionably forcing 84.68% of the claimants to sign a “Release and Covenant Not to Sue” in which the claimant agreed not to sue BP and all other potentially liable parties.²⁸⁵ In effect, based on this line of argument, the Feinberg’s “Release and Covenant Not to Sue” arguably excluded approximately 200,000 BP oil spill victims from the MDL 2179 Economic and Property Damages Class Settlement Agreement unconscionably.²⁸⁶

According the critics, the “Release and Covenant Not to Sue” requirement forces emotionally-stressed victims of the BP oil spill to sign a release and covenant not to sue in order

283 The Section C of the GCCF Final Rules titled “GCCF Release” states as follows:

“You qualify for compensation from the GCCF. Attachment A to this Letter explains the amount, if any, that the GCCF is paying to you now for an Interim Payment as well as an offer for a Final Payment (the “Final Payment Offer”), which is the additional amount you can be paid now if you decide to accept the Final Payment Offer and sign a Release and Covenant Not to Sue (the “Release”). The Release waives and releases any claims that you have or may have in the future against BP and all other potentially responsible parties with regard to the Oil Spill, and prevents you from submitting any claim seeking payment from the NPFC or a court.” See GCCF Final Rules, *supra* note 228, at 23.

284 See THE DONOVAN LAW GROUP, *Approximately 200,000 BP Oil Spill Victims Are Being Illegally Excluded From Proposed Deepwater Horizon Class Action Settlement*, The Donovan Law Group (Sept.24, 2012), <https://donovanlawgroup.wordpress.com/category/what-is-life-worth/>

285 *Id.*

286 *Id.*

to receive a tiny payment amount for all damages, including future damages, although, in their belief, this “release” requirement is expressly prohibited by the OPA.²⁸⁷

Nevertheless, in *Kenan Transport Co. v. United States Coast Guard*, the Eleventh Circuit upheld a release agreement, rejecting the claimant’s ability to obtain full recovery under OPA 90.²⁸⁸ The court held that the plaintiff could not recover additional damages once the parties reached a settlement agreement containing a waiver provision.²⁸⁹ After examining the state law where the tort occurred, the court in *Kenan* determined that the release agreement was subject to the ordinary rules of contract law.²⁹⁰ The court reasoned that the parties’ intentions at the time of the agreement controlled and, accordingly, presumed that the plaintiff intended to contractually relinquish his rights because he failed to clearly preserve his rights within the release.²⁹¹

Although the holding in *Kenan* reveals an instance in which a court interpreted § 2705 of OPA 90 to permit claimants to waive their right to obtain actual damages, some might argue that the Deepwater Horizon oil spill characterizes different public policy considerations than *Kenan*. More precisely, plaintiff in *Kenan* suffered damages due to an auto accident where injuries were immediately detectable.²⁹² By contrast, the Deepwater Horizon oil spill is an environmental toxic tort, largest ever in the U.S. history, where the correct calculation of the damages following this nature of the catastrophe will necessarily depend on projections of the timing of the ecosystem's

287 *Id.* See also Memorandum of Authorities in Support of Statement of Interest on Behalf of the State of Mississippi at 1, In re Oil Spill, MDL No. 2179 (Feb. 1, 2011), 2011 WL 1599357 (arguing that the contracts were obtained under duress).

288 *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed App'x 902 (11th Cir. 2006).

289 *Id.* at 904.

290 *Id.*

291 *Id.*

292 *Id.* See Mary M. Owens, *Settling the Unknown: Why Congress Should Adopt Reopener Liability under OPA 90 to Compensate Victims of the Deepwater Horizon Oil Spill*, 57 Loy. L. Rev. 589, 603 (2011)

recovery as well as the associated economic losses.²⁹³ These complexities prompt the question: should the responsible parties be allowed to request the victims of the Deepwater Horizon oil spill to forgo the right to collect future actual damages from BP that are not known to exist at the time of settlement in exchange for the *artificially* estimated damages?

Most critics have argued that the use of the release requirement by the responsible party unfairly limits an oil spill victim's right to full compensation, directly conflicts with Section 2705 of OPA 90.²⁹⁴ As such, the final settlement waiver is the key undesirable difference between the GCCF operation and the OPA provisions.

Similarly, in Plaintiffs' Supplemental Memorandum Concerning BP's Failure to Comply with the Mandates of OPA, *In re Oil Spill*, MDL No. 2179 (Feb. 18, 2011),²⁹⁵ one of the grounds²⁹⁶ asserted by the Plaintiff Steering Committee (PSC) and the attorneys general for invalidating releases was also that—the release requirement was forbidden by OPA.²⁹⁷

In an order issued on August 26, 2011, the court refused to grant a request by the PSC for a declaratory judgment that certain settlement provisions releasing defendants from punitive

293 See Owens, *supra* note 292, at 602-603. See also Brian Donovan, *BP Oil Spill: Failure to Act by the Obama Administration and Congress Threatens the Oil Spill Liability Trust Fund* (Dec. 6, 2010), <http://donovanlawgroup.wordpress.com/>.

294 See generally Osofsky et al., *supra* note 56; Mullenix, *supra* note 64.

295 See McDonell, *supra* note 98, at 785 ; see also Plaintiffs' Supplemental Memorandum Concerning BP's Failure to Comply with the Mandates of OPA, *In re Oil Spill*, MDL No. 2179 (Feb. 18, 2011), 2011 WL 1599380 [hereinafter Plaintiffs' Supplemental Memorandum]

296 Another ground was that that the release requirements were inconsistent with state contract law, being contracts of adhesion or obtained under duress. See McDonell, *supra* note 98, at 785 (suggesting that, between the two grounds, namely the OPA and the State Law, the only plausible basis for requesting invalidation of releases is state contract law. "But whether the putative class can bring the issue before the court will depend on whether any class representatives have standing to bring a claim and whether their interests conflict with the interests of other class members".)

297 See Plaintiffs' Supplemental Memorandum, *supra* note 295, at 2 ("The Releases represent a clear violation of the fundamental principles of OPA.") See McDonell, *supra* note 98, at 785.

damages were contrary to the OPA.²⁹⁸ Rather, to this end, the court reasoned that:

(a) “While OPA does not specifically address the use of waivers and releases by Responsible Parties, the statute also does not clearly prohibit it;” and

(b) “In fact, as the Court has recognized in this Order, one of the goals of OPA was to allow for speedy and efficient recovery by victims of an oil spill.”²⁹⁹

Although the court’s opinion on the issue of release requirement with regards to the OPA provisions has been delivered, it is still worth examining the nature of the release requirement in the context of the GCCF more specifically.

Relatively, the GCCF release is even more far-reaching and extensive than the release used in the World Trade Centre Fund.³⁰⁰ The GCCF release extends to any and all claims arising out of the Deepwater Horizon explosion, spill, and consequent contamination.³⁰¹ The release requires claimants to waive their rights to sue BP and “anyone who is or could be responsible or liable in any way for the incident or any damages related thereto,”³⁰² even though the long-term losses resulting from the spill are now unknown, and may not be known for several years.

Moreover, the release requires the claimant to promise that his or her “affiliates”—which include, among other things, spouse, heirs, agents, and insurers— will not sue on their behalf.³⁰³

298 *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179, 2011 WL 3805746, at 18-19 (E.D. La. Aug. 26, 2011).

299 For a complementary analysis, *see McDonell, supra* note 98, at 786.

300 *See Mullenix, supra* note 64, at 886.

301 *See* GCCF Sample Release and Covenant Not to Sue, GULF COAST CLAIMS FACILITY, [http://www.gulfcoastclaimsfacility.com/sample release.pdf](http://www.gulfcoastclaimsfacility.com/sample%20release.pdf) (last visited Dec. 25, 2016); *See also* Mullenix, *supra* note 64, at 888.

302 *See* GCCF Sample Release and Covenant Not to Sue, *supra* note 301.

303 *Id.* (“Under the release, “affiliates” is defined broadly to include claimant’s “spouse, heirs, beneficiaries, agents, estates, executors, administrators, personal representatives, subsidiaries, parents, affiliates, partners, limited partners, members, joint venturers, shareholders, predecessors, successors, assigns, insurers, and attorneys.”)

In effect, after signing the release, if a claimant is involved in litigation alleging anything other than bodily injury or securities law violations, the claimant must dismiss the litigation or withdraw from the class action.

Another controversial issue relating to the GCCF waiver requirement can be directed at the deadline imposed by the GCCF with regards to the submission of the claims for Emergency Advance Payment (EAP) under Phase I. The GCCF EAP appear to be the GCCF's version of the “interim, short-term damages” required by OPA Section 2705.³⁰⁴ Nevertheless, no deadlines in the same nature as that imposed by the GCCF seem to be mentioned in or contemplated by Section 2705. Rather, this section seems to exclude the use of release requirement “for damages not reflected in the paid or settled partial claim.”³⁰⁵ Despite the language of OPA Section 2705, the GCCF imposed a November 23, 2010 deadline for claimants to submit claims for Emergency Advance Payments. After this deadline, these payments were no longer available, and the GCCF shifted to providing Final Payments.³⁰⁶

In this specific scenario, some individual claimants without the benefit of legal counsel might unknowingly have foregone their rights to future litigation in exchange for a payment received before the full scope of damages proximately caused by the oil spill is known. Such a payment—without any account for the continuing risk of possible future loss—would have been unfairly short, leading to the possible conflict with the OPA.

304 See OPA § 2705 (“Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.”)

305 *Id.*

306 See Osofsky et al., *supra* note 56, at 134-135.

Nevertheless, the subsequent step or the change made by the GCCF to include an Interim Payment option in Phase II was, perhaps, a tolerable response to this concern. Even so, the initial approach of the GCCF to the Emergency Payments deadline, however, does not appear to have adequately protected the claims options for vulnerable populations.³⁰⁷ While the GCCF subsequently took certain steps to address these concerns, the initial design defect should warn the designers of the claims facilities in future to be more careful from the beginning of the task.

On balance, in terms of economic incentive and behavioral science, defendants involved in mass tort litigation generally desire “global peace” or the complete resolution of all current and potential future claims that might be asserted against them.³⁰⁸ Arguably, therefore, if OPA prohibited the use of releases, responsible parties would, consequently, have a lesser incentive to offer claimants anything more than interim damages. In such situation, the chance of oil spill victims to recover future loss damages would only be left within the realm of the lengthy mass tort litigation and conventional process of discovery.

From this perspective, for a practical reason, the waiver of substantive liability questions can be utilized to generate a substantial joint benefit sufficient to create a zone of agreement as a matter of private autonomy without litigation or discovery—provided, among other things, that

307 *Id.* at 137. (“The deadline for Emergency Advance Payment claim submissions was not widely reported in the national press. Unless the GCCF engaged in extensive local advertising, the deadline may have gone largely unnoticed among many residents of the Gulf Coast, which contains numerous communities of color where environmental justice concerns are of acute importance. Some of these residents may have become aware of the deadline and its significance only after November 23, 2010. At that point, they would no longer be able to submit an Emergency Advance Payment Claim; instead, they would have faced the choice of either accepting a Final Payment and releasing BP of future liability or forgoing non-litigious reimbursement altogether. In addition, at the very least, clearer advertisement would have helped ensure that it did not have a differential effect on those who are less educated, face language barriers, or have fewer resources to support representation.”)

308 *See, e.g.,* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). *See also* *Mullenix*, *supra* note 64, at 889.

the problems of negotiation and information asymmetries can be appropriately rectified or controlled.

Admittedly, the estimation and valuation of future claims and waiver issues have complicated the resolution of many complex mass torts in general. Equally, the concept of informed, intelligent waivers of rights is well established in many areas of law.³⁰⁹ As such, victims of mass disasters ought not to—under deadline pressure and without adequate counsel, information, or neutral advice—be tacitly forced into electing a fund award and forego any future rights to litigation.

2.4.3 PROBLEM OF TRANSPARENCY AND NEUTRALITY OF THE ADMINISTRATION

In the aftermath of the WTC Fund, commentators have widely debated whether the election of remedies requirement constituted a “benign paternalism” on the part of Congress or rather embodied a “stealthy tort reform” initiative designed to protect corporate defendants from thousands of tort claims.³¹⁰ Indeed, the GCCF election-of-remedies provision and its implementation raised even more compelling concerns, albeit more horizontally, about the problems of asymmetries, which, were in turn, allegedly worsen by the lack of independence and transparency in the GCCF administration.

309 See generally Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2003) (discussing waiver and informed consent in various legal contexts); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994) (discussing the history of doctrines of informed consent in contract and tort law, with a focus on medical informed consent). See Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833, 839 (2012).

310 Mullenix, *supra* note 309, at 886. See also Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L.REV. 627, 672 (2003) (“Waiver of tort claims was an essential part of the statutory purpose of protecting the airlines from massive tort liability. . . . [T]he necessity of shielding the airlines from tort liability in excess of their insurance coverage was deemed more important than preserving victims' right to sue.”).

Unlike WTC claimants, GCCF claimants initially did not have counsel readily available to provide assistance in making an informed decision.³¹¹ Instead, the GCCF administrator, Ken Feinberg, served as the primary source of advice about the election of remedies—even though Feinberg’s familiar approach in the past was to urge potential claimants firmly to seek relief from the WTC Fund.³¹²

Because of the lack of transparency in the claim determination process, it was difficult to evaluate, without a subsequent federal audit, how the GCCF evaluated claims and why it denied them at that time.³¹³ The GCCF was accused of intentionally failing to process interim claims in due time with the hidden intent to steering the claimants to opt for a Quick Payment and sign a release.³¹⁴ To make matter worse, public reports³¹⁴ have suggested that BP had a hand in drafting and reviewing the nature and scope of the GCCF release, thus contradicting assertions that BP has played no role in the GCCF's administration.³¹⁵

The GCCF administrator’s conflicting status, coupled with his extreme efforts at urging claimants to elect relief from the GCCF Fund instead of litigation, ultimately prompted a judicial

311 See *Mullenix*, supra note 310, at 839. It should be noted, however, that, from its inception, the GCCF attempted to arrange for a process by which claimants would be able to receive free legal assistance. Initially, it attempted to do this by approaching law firms in the Gulf region to provide this legal assistance on a pro bono basis. Because most law firms in the region had some sort of conflict of interest, this approach was not feasible. (See BDO CONSULTING, supra note 111, at 28) On December 15, 2010, with the support of several state Attorneys General, the GCCF entered into an agreement with the Mississippi Center for Justice, a nonprofit, public interest law firm, to oversee a consortium of legal services providers in the Gulf region that provided legal assistance to all claimants who sought it, regardless of income level. (See *id.*) The extent to which how well the GCCF claimants were generally aware of the availability of such legal advice or how effective of the advice call still be subject to questions.

312 See *Mullenix*, supra note 309, at 838. See also Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 27 (2006) (criticizing the role of Feinberg as special master when he tried to induce claimants to elect to take award from the Fund).

313 McDonell, supra note 98, at 778. See also Memorandum of Authorities in Support of Statement of Interest on Behalf of the State of Mississippi at 3, In re Oil Spill, MDL No. 2179 (Feb. 1, 2011), 2011 WL 1599357 [hereinafter Mississippi Memorandum].

314 McDonell, supra note 98, at 778. See also Mississippi Memorandum, supra note 313, at 5-7.

315 See *Mullenix*, supra note 309, at 888.

disapproval and restraining injunction.³¹⁶ One of the major points at the dispute was the relationship of Feinberg and the GCCF to BP—the PSC pointed out that BP paid Feinberg’s salary and that Feinberg was acting like BP’s defense attorney in an effort to secure final settlements on BP’s behalf, before concluding that Feinberg was not independent.³¹⁷

Impartiality and transparency were, thus, the main problems from the outset of GCCF. Early in the process, Feinberg refused to disclose how much BP was compensating his law firm for administrating the Fund.³¹⁸ This caused distrust in the public, despite the promise by President Obama that the Fund would be independent and not controlled by BP.³¹⁹ This also raised an obvious conflict of interest, although Feinberg repeatedly assert that he functioned as an impartial administrator.³²⁰ Even a New York University Professor who provided a letter as a legal opinion supporting that Feinberg was independent from BP and not in violation of professional responsibility standards was also paid by BP (at a rate of \$ 950.00 per hour).³²¹

316 *Id.* at 839.

317 *See* McDonnell, *supra* note 98, at 775-776. It should be noted also that in response to such accusation, BP argued that Feinberg was an independent contractor, because he was solely responsible for administering the GCCF, because BP in no way controlled his decisions, and because his salary was publicly disclosed. (*See id.*) Several of the *non*-PSC plaintiffs' lawyers even advanced the argument that Feinberg was an officer appointed by President Obama, that the GCCF was an executive agency, and that the political question doctrine shielded Feinberg's discretionary judgments from judicial review. (*See id.*)

318 *See* Moira Herbst, *Pressure on Kenneth Feinberg to Disclose BP Pay Deal*, REUTERS LEGAL (Nov. 23, 2010), <http://in.reuters.com/article/2010/11/22/idINIndia-53083520101122>. *See* Steir, *supra* note 69, at 257. *See also* Mullenix, *supra* note 64, at 833. (There was also no available public information as to how claims administrators were trained.)

319 President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>) (“This fund will not be controlled by BP. In order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.”) *See* Mullenix, *supra* note 64, at 873.

320 Mullenix, *supra* note 64, at 873.

321 *See* Mullenix, *supra* note 64, at 874. *See also* Letter from Stephen Gillers, Prof. of Law, New York Univ., to Kenneth Feinberg, Administrator, Gulf Coast Claims Facility (Dec. 28, 2010), available at http://www.gulfcoastclaimsfacility.com/Gillers_Feinberg_Doc_2010.pdf.

On February 2, 2011, Judge Barbier, presiding over the consolidated multidistrict litigation in the Eastern District of Louisiana, granted in part the PSC's motion to supervise communications, finding that although Feinberg and the GCCF were independent of BP with regard to the evaluation and payment of claims, they were, nonetheless, not fully independent of BP.³²² The default presumption is that a third party hired to fulfill a responsible party obligation under the OPA is an agent of the responsible party, and BP had not disclosed enough information about the nature of Feinberg's obligations to BP to overcome the presumption.³²³

The court subsequently ordered that BP, Feinberg, and the GCCF refrain—from referring to the GCCF or Feinberg as neutral or completely independent, from giving legal advice to unrepresented claimants or advising claimants not to hire a lawyer, and from directly contacting any claimant they know to be represented by counsel.³²⁴

Moreover, in any communications with claimants, BP, Feinberg, and the GCCF must state that an individual has the right to consult an attorney before accepting a settlement, that claimants may file a claim in the MDL in lieu of accepting a final payment from the GCCF, and that pro

322 See McDonell, *supra* note 98, at 777. See also Ewencyk, *supra* note 64, at 278-80. ("In his opinion, Judge Barbier mentioned one particularly example of BP's interference in the GCCF process. In a news story published on January 31, 2011, the Associated Press reported that the GCCF made a \$ 10 million payment to a company at the request of BP, without reviewing the claim's merits. According to Feinberg's statements to the Associated Press on the matter, BP reached a settlement with a private party and ordered Feinberg to issue the payment. Feinberg noted that the GCCF never reviewed the claim and merely "honored the request of the parties to fund the claim." A BP spokesperson called it "a unique situation in which an existing BP partner and BP submitted a view on a specific claim" to the GCCF. Whatever the exact process, the news story highlighted BP's ability to influence the GCCF claims process.")

323 Order and Reasons In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), ECF No. 1098 (citation omitted), available at <http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/222011OrderonRecDoc912.pdf>. (The judge found that the BP argument "misses the larger point" that BP created the GCCF to meet its legal obligations and after reviewing the facts and submissions by the parties, the Court finds that BP "has created a hybrid entity, rather than one that is fully independent of BP.") See *id.* at 12-13.

324 *Id.* at 8. (In his discussion of the motion, Judge Barbier noted that "...because the Court finds that the hybrid role of Mr. Feinberg and the GCCF has led to confusion and misunderstanding by claimants, especially those who are unrepresented by their own counsel, the Court finds that certain precautions should be taken to protect the interests of claimants...")

bono attorneys retained by the GCCF to assist claimants are compensated by BP.³²⁵ While the court required that such disclosures appear on releases, it did not, however, nullify the releases or substantively modify their terms.³²⁶

This ruling has dramatically changed how the claims process operated in the Gulf. For one thing, the Court effectively ordered Mr. Feinberg to stop saying his claims process is superior to litigation and removed the idea that the claims center are not agents of BP. In April 2012, the Department of Justice's finding of the GCCF awards revealed that, in fact, the average claimant received \$8,800 less than what the independent reviewers determined to be due.³²⁷

Essentially, the lack of accuracy or merits-based determinations in disaggregative mass settlements may, to some extent, weaken the goal of compensation as well as deterrence, provided that the cost of wrong doing has not been appropriately internalized by the corporate defendants. A private, unilateral offer regime lacking transparency, at the same time, can undermine the goal of the private settlement as a means to resolve claims quickly and cheaply. As some plaintiff lawyers has correctly put it, "emergency is not the only touchstone of justice".³²⁸ Undeniably however, certain degree of efficiency is necessarily desirable. Thus, a deeper question is, rather, how to strike the right balance between the two conflicting values, namely, efficiency and procedural justice.

325 *Id.*

326 *Id.*

327 See Press Release, Dep't of Justice, *Audit of Gulf Coast Claims Facility Results in \$ 64 Million in Additional Payments* (Apr. 19, 2012), <http://www.justice.gov/opa/pr/2012/April/12-asg-500.html> (describing fund as "a significant advance in disaster response"). See Dodge, *supra* note 78, at 1301.

328 See Brian J Donovan, *A Victims Compensation Fund, Administered by Kenneth R. Feinberg, is a Cancer which is Metastasizing*, DAILY KOS (May 30, 2015, 5:15 AM), <http://www.dailykos.com/blog/Brian%20J%20Donovan>. See also McDonnell, *supra* note 98, at 794 ("The GCCF is expeditious and has low overhead, but lacks both transparency and a process with public legitimacy; the court is expensive and cumbersome, but is transparent and offers victims the opportunity to present claims that the private system refuses to recognize.")

2.5 THE CURRENT STATUS OF THE GCCF

On March 2, 2012, BP reached an agreement-in-principle with plaintiffs in the class action lawsuit, pending in the U.S. District Court for the Eastern District of Louisiana.³²⁹ Judge Barbier gave preliminary approval to the settlement terms for economic claims on May 2.³³⁰ Pursuant to the agreement-in-principle, BP agreed to pay damages to those who suffered economic or medical harm as a result of the Spill.³³¹ As part of that litigation, on March 8, 2012, U.S. District Court Judge Carl Barbier issued an order creating a process (known as the “Transition Process”) for transitioning from the GCCF claims process to the court-supervised claims process; setting forth the parameters by which claims currently pending with the GCCF would be handled in the Transition Process; and appointing Lafayette-based attorney Patrick Juneau as the Claims Administrator.³³²

The Transition Order also provided that the GCCF would not accept, process or pay claims submitted to it other than those claims for which the claimant had accepted a payment offer made by the GCCF and executed a release prior to February 26, 2012, at 11:59 p.m., and neither BP nor the claimant had filed an appeal. The Transition Order also terminated the GCCF appeals process for all claims except those then pending.

Ultimately, after BP and the Plaintiffs’ Steering Committee entered into the court-approved Economic and Property Damage Class Action Settlement Agreement (Settlement Agreement), the

329 See John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar.

2, 2012, <http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oilspill.html>.

330 See Preliminary Approval Order, In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. May 2, 2012), available at

[http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order\(EconomicSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(EconomicSettlement).pdf).

331 Although the agreement-in-principle did not provide a cap on the amount that BP would be required to pay to claimants, BP estimated the cost of the settlement to be \$7.8 billion.

332 See Order Creating Transition Process issued on March 8, 2012, Rec. Doc. 5995.

GCCF finally was transformed to the Court Supervised Settlement Program (Settlement Program) and began to accept claims on June 4, 2012.

2.6 CONCLUDING REMARKS

The OPA approach of the out-of-court or private mass claims facilities “was intended to prevent a downward economic cascade by bringing a quick infusion of cash” to the socioeconomically aggrieved communities.³³³ This statutory framework reflects a “congressional preference for speedy informal private dispute resolution over prolonged litigation in the public court system.”³³⁴ This can be translated from the OPA’s legislative history stating that the “system of liability and compensation” it creates “is intended to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation.”³³⁵ Admittedly, the GCCF was most successful in realizing the OPA objective of finding a quick payment structure designed to limit the dislocations experienced after the 1989 Exxon Valdez catastrophe.

With regards to its structural design, the GCCF offered claimants a menu of payment options that took place in two separate phases. In Phase I, the GCCF began paying “Emergency Advance Payments” for , among others, the loss of “earnings or profits and loss of subsistence use of natural resources” caused by the Spill, subject to a less stringent documentation

333 See Issacharoff & Rave, *supra* note 58, at 399.

334 *Id.*

335 *Id.*

requirements than would be required in Phase II”.³³⁶ During Phase II, the GCCF offered three options: (i) “interim payments” designed to compensate claimants for past documented losses, (ii) full-review final payments designed to compensate claimants for past and future losses, and (iii) a “Quick Pay” final payment that offers fixed amounts of lump sum payments to businesses and individuals with least documentation requirement.³³⁷ However, if a claimant accepts a final payment from the GCCF, the claimant is required to sign a release or a covenant not to sue.

Nevertheless, while providing victims of oil-spill disasters with quick financial relief might be an important governmental policy, it is also important not to overlook the procedural costs that these quick payouts impose on victims. In light of the GCCF operation, the main problems are central around the issue of legitimacy and fairness in particular, either in the form of the neutrality of the claims administrator or the potential unfairness in the manners in which the release requirements were utilized. Yet, in many other ways, the GCCF was a remarkable success, given especially that the GCCF interim claims processing was significantly faster than litigation in terms of its ability to intake, process, and deliver short-term payments to claimants.

Consider that, during the one and one-half years of GCCF operations, the facility paid over \$ 6.2 billion to claimants, where over 1 million claims were processed to over 220,000 individuals and businesses in a very short period of time. To illustrate what is meant by “short”, the GCCF began accepting claims on 23 August 2010, where almost 19,000 claims were submitted in the first week, and by November, BP said it had sent \$1.7 billion in checks. In its second full month

336 BDO Consulting, Independent Evaluation of the Gulf Coast Claims Facility Executive Summary 3 (2012), available at http://media.nola.com/2010_gulf_oil_spill/other/BDO%20Executive%20Summary.pdf. Phase I began almost immediately upon the start of the GCCF on August 23, 2010, and concluded on November 23, 2010.

337 *Id.*

of operation, it paid over \$ 840 million in emergency advance payments, and that is over \$ 27 million per day.³³⁸ Overall, the compensation for lost earnings or profits constituted 90.3% of the claims received, 96.8% of the amounts paid, and 99.8% of the claims paid.³³⁹

On balance, although the GCCF has been criticized typically for its lack of transparency and legitimacy, the facility was highly praised for its speed in processing the claims and getting the payment out for the oil spill victims within a short time. Reportedly, more than one million claims of 220,000 individual and business claimants were processed and more than \$6.2 billion was paid out from the fund—before it was replaced by the court supervised settlement program or the BP class settlement in June 2012.³⁴⁰

Despite this, since the statutory language of the OPA provides little guidance on what the responsible party's claims process should look like. Therefore, beyond the context of GCCF, future designs of the claims facility under this statutory framework should take into account these problems to increase legitimacy and fairness of the regime. Likewise, beyond the US context, in designing the new legal framework to govern the out-of-court regime of claims facilities for handling the oil-spill claims, similar to the OPA, the design of the new legal framework itself should also try to strike a better balance between the goals of efficiency and fairness, in order to facilitate “fast and fair” compensations to the suffering victims of the oil-spill catastrophe.

338 *Id.* at 4.

339 *See* BDO CONSULTING, *supra* note 111, at 59.

340 *Id.*

CHAPTER 3 CAN THE OPA REGIME BE, AT LEAST IN THEORY, DEFENDED?

3.1 INTRODUCTION

*“This litigation has been extraordinarily complex and expensive....This litigation has taxed the resources of both the parties and the Court. In light of the complex issues of law, engineering, science, and operative fact presented by this litigation, simply completing trial could require several years.”*³⁴¹

JUDGE BARBIER, 2012

When carefully assessing the potential and limits of private dispute resolution system under the OPA framework like the GCCF, it is useful to examine, among others, how this new-generation mechanism can affect incentive structure of the stakeholders within the system of settlement mechanism. In essence, this includes its effect on the victims’ incentives to file a claim or bring a lawsuit, and, equally, responsible parties’ incentives with regards to their settlement strategies. This process will, in turn, help to examine how those elements play out in terms of relative potential and weaknesses of private claims settlement under the OPA framework in relation to the traditional system of litigation.

In addition, it should be noted, at the outset, that any types of analytical approach basing on the assumption of rationality or incentives analysis in light of economic analysis of law approach would unavoidably be subject to a number of limits and various factors existing in the

³⁴¹ See Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement, No. 10-md-2179, (E.D. La. December 21, 2012) at 52 , 57.

real-world situations and a case-by-case basis analysis. Despite this, in evaluating the potentials and limits of a given regime which can effect a large population at a macro level in the society, this analytical tool, while is not perfect, can, nevertheless, be one among other useful tools to be utilized by the policy makers or system designers—especially when it is supplemented by other approaches, to allow an understanding of certain factual parts of the real-world situations that might be deviate from the rational assumptions.³⁴²

This chapter looks at a broader perspective in terms of the potentials and limits of the overall OPA framework as an alternative system of mass claims resolutions, in order to examine whether this type of private or out-of-court regime can, at least, be theoretically defended.

Having a nature of private or out-of-court regime substantively, this OPA regime has frequently been criticized on the grounds of transparency and procedural fairness as essentially pointed out in Chapter 2 in the light of GCCF model, specifically. And, as Chapter 2 suggested, these problems should be adequately addressed in the designs of either the future claims facilities or, at a macro level, the new legal framework. Given also a rich body of the existing literature focusing on the issue of legitimacy of the OPA regime, in order to avoid repetition and to add a

342 Although, a number of classic articles or grand theorists have discussed or touched upon the use of this type of analytical approach, both in terms of potentials and limits. Given the scope and the research question of this study, as well as the notion of resource efficiency however, while can be relevant, it is not within an intended scope and purpose of this study to enter the philosophical debate on the economic analysis of law approach and/or the use of incentive and behavioral analysis. At least, given the reasons explained bellow—that the use of incentive analysis approach here is, partly, as a parallel rebuttal to the work that relied on this approach itself—it should, therefore, be reasonably justifiable in the context of this specific discussion. And, in fact, in evaluating the potential or capacity of a given regime, especially on issue of mass claims resolution as an alternative to litigation, like the case of the OPA framework, most scholars have also looked deeply into its potential impact of the regime on stakeholders incentives, despite certain imperfection of the approach. *See generally* Kaplow & Shavell, *supra* note 75. (“Economic analysis of law seeks to answer two basic questions about legal rules. Namely, what are the effects of legal rules on the behavior of relevant actors? And are these effects of legal rules socially desirable? In answering these positive and normative questions, the approach employed in economic analysis of law is that used in economic analysis generally: the behavior of individuals and firms is described assuming that they are forward looking and rational, and the framework of welfare economics is adopted to assess social desirability.”)

fresher contribution, this chapter, consequently, devotes most, but not all, parts of the discussion to account for a more recent critique on the OPA regime to see if the regime can still be defended, at least in theory, in light of this new attack. The discussion might help to shade some light or add new insights for the system designers, given especially that the existing Thai literature on the incentive or behavioral aspects of the mass-claims dynamics is either scarce or not even exist.

More recently and innovatively, basing on the “peace premium” hypothesis, and certain features of the compensation offers in the context of BP settlements, some commentators attacked the OPA regime on its ability to deliver finality to the defendant and, accordingly, its failure to provide the claimants with “peace premium” (i.e. generous compensation offers made by the defendant to buy “peace” or closure from the claimants). Subsequently, according to them, the OPA regime should be abandoned, basing mainly on its inferior performance on this ground. Technically, by borrowing certain aspects of the “economic analysis of law” approach, especially with regards to the stakeholders’ incentives analysis, a deeper purpose of this chapter is to analyze whether the approach of the OPA regime can be defended, at least in theory, in response to this recent critique basing on the “peace-premium” hypothesis—which, itself, is also relied on the incentives and behavioral analysis. In other words, the use of incentive analysis approach in this regards is also, partly, to provide a parallel rebuttal to the work that relied on this approach itself.

None the less, since the purpose of this chapter is to analysis the potentials and limits of this private claims resolution approach under the OPA framework, other performance criteria will also be discussed, including cost efficiency, and to some extent, the issue of legitimacy and fairness—which will, however, not be discussed at length, given that Chapter 2 has examined this aspect reasonably extensively in light of the GCCF operation. In addition, since the limitation is that the GCCF is the only comprehensive model of private claims facility in the oil-spill context

so far, in order to evaluate the potentials of the OPA framework, as an “institution” of private or out-of-court mass claims resolution, supplementary evidences from other private mass claims experiences will also be utilized, only where appropriately relevant, in the discussion.

By balancing the strengths and weaknesses, this chapter finally offers some concluding remarks on the overall performance evaluation of this out-of-court regime of mass claims resolution approach under the US experience, where the lessons can be learned. Ultimately, the chapter provides a final observation that, since the OPA framework has not prescribed a precise structure of the claim facility, therefore, the “devil” is not in the regime but rather in the design of each claims facility.

Ultimately, this Chapter seeks to commence the dialogue about the probable consequences of this new generation of mass claims resolution, in light of some fundamentally relevant criteria, for evaluating the regime’s performance, in order to provide some useful observations as a foundational input for the determination of whether, on balance, the out-of-court regime of oil-spill compensation should provide a workable solution.

3.2 PERFORMANCE IN TERMS OF COST-EFFICIENCY CRITERIA

3.2.1 THE INVESTMENT-ASYMMETRY THEORY

Manifestly, one of the main drawbacks of the traditional public litigation is that the liability system and the accompanying litigation procedure as a mechanism to allocate defendants’ liabilities and victims’ compensation has proven to be very costly and time-consuming. Specifically, in the mass claims context, at least in principle, individual plaintiffs rationally *often*

lack the incentive to file a lawsuit, and where they do so, they *often* underinvest in litigation, compared to the defendant.³⁴³

This aspect of the investment-asymmetry theory touches on with the optimal-deterrence rationale, recognizing that when a defendant harms a large number of people in a similar way, the defendant, as a repeat player, often enjoys a comparative advantage in the resulting litigation given its incentives to invest in developing its case.³⁴⁴ More broadly, this analysis can, to some extent, be applied to various situations in which a defendant faces a number of similar outstanding lawsuits, resulting from defendant's wrongful action common to all the injured claimants.³⁴⁵

In the context of oil spill disaster in particular, the *Exxon Valdez* experience raised a question for future plaintiffs in environmental tort litigation: "Do you want to risk going up against a big company knowing you probably won't see a penny for a decade or more?"³⁴⁶ Such an asymmetric incentives pattern could discourage plaintiffs from going to trial where the corporate defendant knows that they could delay payment for a number of years.³⁴⁷ As a consequence, there was a direct congressional response to correct such undesirable results arisen out of the public

343 See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1859–60 (2004).

344 Randy J. Kozel, *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665, 2667 (2004),*Research for this Note was funded by the John M. Olin Center for Law, Economics, and Business at Harvard Law School. ("Motivating this behavior is the defendant's recognition that it can spread the common costs of developing its defense over all the outstanding claims it faces.")

345 See generally David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. LEGIS. 393,432 (2000).

346 See Robert E. Jenkins & Jill Watry Kastner, *Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation*, 18 UCLA J. ENVTL. L. & POL'Y 151, 207 (1999) (suggesting the motive of Exxon to keep the litigation going and not seek a resolution: "Three or four more years of appeals, and Exxon will not only have earned enough to pay the entire judgment but also will have manipulated the court system in such a way that they actually make money on this whole deal.") See generally Mark Curriden, *Exxon Finds Slow Pace of Valdez Case Profitable: Company Says Fairness, Not Money, Is the Issue*, DALLAS MORNING NEWS, Mar. 14, 1999.

347 In the context of the EXXON Valdez litigation, for instance, some commentators argue that Exxon designed its delay tactics because it realized it could earn money by investing rather than paying out the damages. See, e.g. Jenkins & Kastner, *supra* note 346, at 210-211.

litigation system in the Exxon Valdez era—especially in terms of cost and time inefficiencies, leading to a call for the use of the rapid “out-of-court” settlement approach under the OPA 1990.³⁴⁸

Such private claims facilities approach has formally become the “next-generation” mass claims resolution mechanism in dealing with the economic loss compensation in the context of oil spill liability since the enactment of the OPA 1990. It is interesting to see what the implications of the OPA innovative approach on the incentives structures of the stakeholders are likely to be, and how these elements would play out in terms of its relative potential and weaknesses as an alternative to the traditional public litigation system.

This part examines the associated costs in the out-of-court system of mass claims resolution and their impacts on stakeholders’ incentives that can give rise to the relative strengths or weaknesses of the private claims facility approach under the OPA framework like the GCCF. This part argues that, on balance, the private mass claims resolutions under the OPA regime should work to the benefits of the oil-spill victims by reducing the litigation costs, and, is, therefore, relatively cost-efficient.

It should be acknowledged, however, that just as aggregate litigation could not be fully explained in a single scholarly work—but instead has led to tens of thousands of scholarly articles and books³⁴⁹—so too the questions posed by disaggregation or private mass settlement regime are far too broad and complex for any single scholarly works to address comprehensively.

³⁴⁸ See generally Dodge, *supra* note 78.

³⁴⁹ See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914-16 (1998) (questioning whether any legal writings existed that had not published an article on class actions).

3.2.2 THE ASSUMPTION OF RISK AVERSION

There are several types of risks that individual plaintiffs would face in litigation.³⁵⁰ Given the assumption of risk aversion,³⁵¹ the incentives of victims in bringing meritorious claims against the corporate defendant in public litigation system can be distorted by the relatively high built-in costs of the traditional litigation system in particular. In principle, the rational individual³⁵² will not act if costs exceeds the benefits, especially when the harm is very trivial and the investment to enforce the law is expensive.³⁵³ More broadly, this is also closely connected to the so-called “rational apathy” problem³⁵⁴—the situation where, as in the case of large-scale oil spill catastrophe, no actions may, at least in theory, be taken by individuals with small value claims, given a divergence between the individual and social incentive to sue, even though the harm to the society is large and law enforcement desirable.³⁵⁵

350 See Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement, No. 10-md-2179, (E.D. La. December 21, 2012) at 61.

351 See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV.L.REV. 2463, 2470 (2004) (“Risk aversion is a broad concept that comprises multiple factors. The two categories of factors that determine risk behavior are risk propensity and risk perception. Risk propensity is the concept perhaps more commonly associated with risk aversion; it embraces one’s willingness to take risks. But risk behavior is also influenced by risk perceptions. Information, advice, optimism, experience in the domain, and social influences all shape perceptions of risk. If a person systematically overestimates the magnitude of risks, he will avoid risks just as an especially cautious person will.”). See also Sim B. Sitkin & Amy L. Pablo, *Reconceptualizing the Determinants of Risk Behavior*, 17 ACAD. MGMT. REV. 9, 14-24 (1992). For a basic account of the notion of risk aversion as it has developed in the economics literature concerning choice under uncertainty, see Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK. U. L. REV. 629, 636 (1997)

352 By “rational action” or “rational choice”, economists mean “that man is a rational maximizer of his ends in life.” See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (4th ed. 1992). Although the discussion on the limits of rational action theory, while relevant, is not the main focus of this study. Nevertheless, for sympathetic discussions of the limits of the rational actor assumption and an introduction to relevant literature, see DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 17-18 (1990); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

353 See WILLEM VAN BOOM & MARCO LOOS (EDS) *COLLECTIVE ENFORCEMENT OF CONSUMER LAW* 184 (Europa Law Publishing 2007)

354 For the discussion on risk aversion and rational apathy, see Faure & Weber, *supra* note 71, at 128-129, 143.

355 See *id.* at 128. For the rational apathy concept in light of the decision making process, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

Rationally, this is especially true for the cases of oil-spill disasters, where the numbers of victims (and thus plaintiffs) may be large, and the economic loss suffered by them individually might not be substantial enough. Even when the victims might initially feel that the economic damage suffered by them is substantial enough, and, presumably, the victim might want to invest in a lawsuit, there might be discouraged due to the problem of risk aversion caused by the various costs of the complex tort law litigation. The type of lawsuit, especially in the nature of marine oil-spill disaster, typically involves a high degree of complexity, both substantively and procedurally, which can further result in both the need for higher investment on the lawsuit as well as the painfully time-consuming litigations.³⁵⁶

As such, given also the uncertainty in the outcome of this highly complex nature of the mass tort litigations, without an inventive alternative vehicle to allow the access to rapid compensation for the oil-spill victims, the risk aversion theory might potentially be translated into a real-world consequence where the victims' access to remedies is denied. Accordingly, the immediate payouts will, therefore, provide benefits that may not be obtained in litigation.³⁵⁷

3.2.3 THE OPA'S PERFORMANCE IN LIGHT OF VARIOUS SYSTEMATIC COSTS: THE COST EFFICIENCY CRITERIA

Statistically, the formal public aggregation system imposes substantial transaction costs that allows only \$1 of every \$3 spent by the defendant in litigation to reach the victims.³⁵⁸

356 *See* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (“The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.”)

357 *See, e.g.*, Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement, No. 10-md-2179, (E.D. La. December 21, 2012) at 61.

358 *See* David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1727 (2005) (stating that “on average, it costs approximately one dollar in legal expenses for the legal system to transfer one dollar from a defendant to a plaintiff,” even in settlement).

Moreover, a number of barriers stand in front of compensation within the class action under the public litigation regime. Especially in the case of low-value claims, the amount at stake may be so small that once the class counsel is paid and a settlement administrator retained to provide class notice is paid, ultimately, too little remains available to be allocated to class members.³⁵⁹ Once these costs are considered, it is unsurprising that the ultimate compensation rates under class action can be relatively low given its built-in transaction costs.

With regard to the agency cost, for instance, most class settlements, such as the BP class settlement that replaced the GCCF, were operated on the premise of the participation of lawyers, both in their creation and implementation.³⁶⁰ And, indeed, those lawyers would have to be paid. The agency cost is therefore another source of potential distortion with regard to the victims' incentive.

By contrast, the introduction of the out-of-court regime under the OPA framework allows the design of the GCCF procedures to be relatively straightforward and simple enough to put victims in a position where the claimants would not need to involve a lawyer in the course of pursuing their economic loss claims.³⁶¹ Hence, unlike the BP class settlements under the public litigation system, the principal-agent situation could, presumably, be substantially reduced under the OPA's approach of private claims facilities regime, saving the costs in the interest of the oil-spill victims.

Indeed, for the purpose of illustration on the issue of cost-efficiency, substantial transaction cost saving achieved under the GCCF regime can be best exemplified by the "Quick Payment"

359 See Dodge, *supra* note 160, at 348.

360 Issacharoff & Rave, *supra* note 58, at 402.

361 See Faure & Weber, *supra* note 71, at 131.

approach.³⁶² While the documentation requirements for Final Payments were relatively stringent, the GCCF also allowed claimants to instead elect a one-time, fixed-sum “Quick Payment” of \$5,000 for individuals or \$25,000 for businesses based on a much more lenient burden of document showing.³⁶³ Arguably, in this particular dimension, leaving aside other negative aspects of this type of payment as also discussed in other parts of this study, the Quick Payment options, pragmatically, allow the victims to, taking into account the individual particular needs, access to their remedies faster and at a lower cost.

In terms of the stakeholders’ incentives, reducing the evidentiary requirements for small claims is *not* always irrational—both claimants and BP may be rationally willing to tolerate some loss of accuracy in the valuation of small claims as it can prevent the transaction costs of administering and reviewing documentation from eroding the entire amount of their joint welfare.³⁶⁴ This is particularly comprehensible when a given mass tort case involves more than one millions claims or thousands of claimants, like the case of BP. The claimants, not only the would-be defendant, might want a fast closure and move on with their life.

Nevertheless, while bypassing the merits determination can be rational for the parties in pursuance of efficiency in an expectation for an increase in mutual benefits—either in terms of cost or time—this approach, however, potentially creates a lack of precision in determining the actual damages to be paid to the each victim. Inherently, the approach of flat-rate payment structures, similar to the GCCF’s Quick Payment Option, fail to distinguish among different levels

362 Indeed, there are also other relative weaknesses with regards to the issue of Quick Payment option, in terms of accuracies and, perhaps, fairness as discussed in the previous chapter and also in other parts of this chapter, particularly in terms of accuracy of the payment (potentially resulting in both under-or-over compensation and deterrence.) Yet, for the purpose of the illustration to provide an example of the potential cos- saving aspect relevant to this Part, the other issues involving the Quick Payment should be left aside for now.

363 For the discussion on Quick Payment option, see Chapter 2.

364 For the concept of joint welfare in this context, see Issacharoff & Rave, *supra* note 58, at 403.

of harm, suffered by individual victims.³⁶⁵ Not only such a problem of inaccuracy in compensation can have an implication on the notion of fairness individually (in the case of under compensation), but it can also have a negative impact on the deterrence function as a societal goal of the legal enforcement in a collective sense.

At the extreme, however, from a deterrence point of view, some scholars argued that the wrongdoers only need to be exposed to the social costs of their activity, and it is not required that the payment due by them have to correspond precisely to each victim's individual loss.³⁶⁶ Nevertheless, not only this notion can be controversial, but to verify the extent to which the socially optimal level of compensation and deterrence can be distorted by the use of flat-rate approach is also technically difficult, if not impossible, in practice, given the difficulty of obtaining the relevant empirical data at a macro level. On balance, given the inherent nature of "flat-rate" offers, if every victim is to be paid such flat-rate equally and as final payments, as opposed to being paid as an interim or short-term payment in the first phase, such approach can result in a drastic distortion at an aggregate level.

Presumably, at a micro level, both claimants and the responsible party may, nevertheless, find it cheaper to settle their cases via the "quick pay" approach as it can generate the mutual benefits in terms of cost-savings, than to proceed the cases through class certification process and

365 For the discussion on the use of Flat-Rate approach, see Dodge, *supra* note 79, at 1278-1280 (explaining that while the private tribunals traditionally operate as litigation substitutes, so the efficiency and viability of flat-rate offers are typically correlated with commonality in harm suffered, such structures inherently fail to distinguish among levels of harm. For example, with regards to the reparations made to Japanese-Americans interned during World War II, Japanese-American citizen who was interned, and the citizen whose internment resulted in the additional loss of his home and business, would receive identical compensation payments despite clear differences in their actual harms). *See also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011) (discussing reparations in the context of *Korematsu v. United States*, 323 U.S. 214 (1944)).

366 Kaplow and Shavell contended that as long as on average the damage will be correctly assessed by the courts potential injurers will receive appropriate behavioural incentives even when the assessment of damages in a specific case is not always accurate. *See* Louis Kaplow and Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J L ECON 191 (1969).

summary judgment, taking into account both the tangible transaction cost savings as well as the time-value of money.

In terms of the defendant's incentive, in particular, even regardless of statutory duty to comply with the OPA obligations, for a corporate defendant to choose a private mass settlement structure, it must expect that the costs of the claims facilities and its administration will be less than the cost of resolving the case through litigation. This baseline calculation may also incorporate other costs in the forms of business considerations such as consumer goodwill, the public-relation cost, and the value of a fast closure for shareholders as reflected in share price, as well as other time values of money, given other business interests of the corporate defendants.³⁶⁷

On this premise, the presumed mutual benefits should, to certain extent, create a substantial zone of potential agreement, in which not only both the corporation and the victims can receive, more or less, the highest possible net value of the aggregate litigation, but they can also mutually enjoy their cost-saving portion by splitting the remaining fund where systematic litigation costs and other related losses can be avoided under the out-of-court regime.³⁶⁸

In other words, the private claims facilities under the OPA framework should, to some extent, have the ability to offer a simultaneously superior outcome for both the would-be defendant and would-be plaintiffs.

Compared with the lengthy and costly litigation, such private claims facilities may have the advantage of "distributing funds to affected claimants more quickly and at less cost to the claimants".³⁶⁹ At least in theory, the private claims facility under the OPA framework, like the

³⁶⁷ See Dodge, *supra* note 160, at 349.

³⁶⁸ See Issacharoff & Rave, *supra* note 58, at 403.

³⁶⁹ See Faure & Weber, *supra* note 71, at 138.

GCCF, was an “expedited, procedurally more accessible, and lower cost damage recovery alternative to litigation.”³⁷⁰ While claimants could hire attorneys, the lawyer fees were typically lower than litigation costs, reflecting the decreased professional effort and lower risk involved in bringing a claim under the GCCF procedures.

In addition, given that under the OPA regime the claimants were left with a choice on how to proceed—which can, in a sense, be evaluated positively³⁷¹, the claimants may, nevertheless face information costs.³⁷² However, such information cost might not be a major issue and can potentially be offset by other benefits provided by the rapid compensation regime in terms of cost savings and time value of money.

Especially in the context of oil spill catastrophes, and, given the sensitivity of the coastal business, a fast procedure with low costs can provide the additional benefit where the follow-on damages, as well as potential bankruptcies resulted by the oil-spill catastrophe can be prevented. Therefore, through this cost-efficiency potential offered by the OPA claims settlement model, both the private and social costs of the would-be bankruptcies,³⁷³ suffered by the coastal business sector can be prevented with in due time.³⁷⁴

370 See Issacharoff & Rave, *supra* note 58, at 398.

371 It is suggested that bringing a claim in the GCCF was a no-risk alternative to litigation since claimants could obtain interim relief and still file a lawsuit for claims that were not available in the GCCF such as punitive damages. See Steiner, *supra* note 59, at 1341.

372 This can be referred to the information costs of choosing between the GCCF and the tort system via courts. In other words, such a complex systems, whereby, a rapid claim mechanism exists in addition to the tort system may raise an individual’s information costs. For the discussion on information cost, see Faure & Franziska Weber, *supra* note 71, at 144-149.

373 See generally Joseph L. Bower & Stuart Gilson, *The Social Cost of Fraud and Bankruptcy*, HARVARD BUSINESS REVIEW (Dec. 2003), <https://hbr.org/2003/12/the-social-cost-of-fraud-and-bankruptcy>. See also Faure & Weber, *supra* note 71, at 126.

374 See Dan Simon & Augie Martin, *Alaska fishermen still struggling 21 years after Exxon spill*, CNN (May 7, 2010 1:11 PM), <http://www.cnn.com/2010/US/05/06/exxon.valdez.alaska/> (reporting that, in the context of Exxon Valdez Spill, the herring loss alone has cost the region about \$400 million over the past 21 years. The fisherman suffered averagely a 30 percent loss in income after the spill, but those who specialized in just herring lost everything and many went bankrupt, 30 to 40 families have left Cordova since the disaster.)

Overall, with regards to the cost-saving criteria in particular, there may be a preference for the OPA scheme of private or out-of-court claims facilities for rapid compensation, which can be accessed at a lower cost. At least in theory, this can be translated into the stakeholders' greater potential joint-benefit, due to the relatively greater cost savings, as well as, the societal benefit offered by the regime's potential in terms of preventing business interruptions in due time, especially where these coastal businesses often financed their activities based on credits.³⁷⁵

On balance, the cost-efficiency nature of the private claims facilities should, in principle, increase the joint welfare of both parties, thereby improving the individuals' cost-benefit ratios.³⁷⁶ In other words, the lower the transaction and administrative costs allowable under the out-of-court regime should lead to a greater joint welfare in terms of cost-savings for the parties. Typically, this feature of the lower transaction costs is also a common characteristic of other Alternative Disputes Resolutions (ADR), making them *prima facie* an attractive candidate for the victims, reducing the rational apathy problem.³⁷⁷

375 See KRISTEL DE SMEDT, ET AL., CIVIL LIABILITY AND FINANCIAL SECURITY FOR OFFSHORE OIL AND GAS ACTIVITIES 324 (2013) (“rapid payment may be of particular importance, for example, for restaurants and hotels in coastal areas affected by offshore related pollution, but also for the fishing sector. Often those industries have financed their activities based on credit. Hence, when, for example, a fisherman or hotel owner loses income as a result of business interruption following an offshore related incident, this can have devastating consequences and potentially lead to bankruptcy since further income may be lacking, whereas loans still need to be paid back.”)

376 See Faure & Weber, *supra* note 71, at 130.

377 *Id.*

3.3 PERFORMANCE IN TERMS OF COMPENSATION OFFERS AND THE FINALITY FUNCTION

3.3.1 THE APPARENT PARADOX

In principle, as previously discussed, economic theory would predict that lower transaction costs means that both parties could mutually benefit from the “new-found” surplus, and all parties should be better off in a system with lowered transaction costs.³⁷⁸ Logically, this is not a complex insight and the discussion might not need to be at length. Because claimants will be paid from the same source of money possessed by BP, it would seem, therefore, that they would share with BP a desire to minimize transaction costs.³⁷⁹

Paradoxically, however, Issacharoff and Rave posit that the public litigation system with relatively higher cost—i.e. the BP class settlement supervised by the court that replaced the GCCF—seems to have worked exactly to the opposite of such logically straightforward insight.³⁸⁰ Instead of reducing the claimants’ ultimate recoveries due to its higher built-in transaction cost,

³⁷⁸ See Issacharoff & Rave, *supra* note 58, at 403.

To briefly illustrate, Coase, economic analysis of law typically uses the concept of “transaction costs” in an (illusory) attempt to provide an objective economic answer to the question of how to determine which sums of cost and benefits represent internalized market prices (a functioning market) and which represent resource depleting externalities or cost-shifting redistributions (market failures). Policies may be presumed efficient or inefficient, depending on the extent to which transaction costs are present—because unimpeded (costless) market bargaining will by economic definition lead to the efficient result. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 95-96 (1988) (reprinting R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960)). For a discussion of the impact of Coase’s article, see Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 *HARV. L. REV.* 483, 491 (1998) (discussing an internal critique of the law and economics ideal of a perfect market and explore the concepts of the perfect market, transaction costs, and the Coase Theorem largely on their own terms and in the language of legal economists). See Pierre Schlag, *An Appreciative Comment on Coase’s The Problem of Social Cost: A View from the Left*, 1986 *WIS. L. REV.* 919, 921 n.6, at 921-44. For a insightful summary of this famous Coase’s article, see Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 *VA. L. REV.* 397, 418-20 (1997).

³⁷⁹ A straightforward illustration for such straightforward insight can simply be as follows: Anytime two parties must divide a fixed sum, say \$100, they will optimize their joint welfare if they can share the entire \$100. By extension, any transaction costs incurred by the parties in resolving the distribution—such as payments to lawyers to negotiate or litigate—reduces their joint welfare. Basically, every penny paid to outside parties in determining the distribution comes out of that \$100. See Issacharoff & Rave, *supra* note 58, at 403.

³⁸⁰ See Issacharoff & Rave, *supra* note 58, at 403.

the BP class settlement regime that replaced the GCCF in June 2012 appears, instead, to have, paradoxically, resulted in relatively greater compensations for the oil-spill claimants.³⁸¹

Although the overall administrative cost of the GCCF is not publicly available,³⁸² it is very likely that the public litigation system, or the BP class action settlement, was much costlier than the GCCF regime.³⁸³ To illustrate, while the GCCF provided compensation to victims without a trial, class-certification procedures, and so on, or even a need for lawyers, the BP class action settlements, on the other hand, include a reserve fund of \$600 million that can be awarded as fees by the court to private counsel—not to mention the costs of notice to the class and the formalities and discovery procedures of litigation in federal court.³⁸⁴ In addition, a court similarly emphasized the greater transaction costs of class action litigation in the form of attorneys' fees and cost of notice, suggesting that a representative who proposes to incur these costs when a defendant has already set up a voluntary compensation program is not adequately protecting the class's interests.³⁸⁵

Taking into account the various types of costs associated with the BP class action settlement altogether, it is not difficult to conclude that, more likely than not, such a public litigation system required relatively higher built-in transaction costs. Questionably, given that the BP class settlement and the GCCF could reach, more or less, the same end result, the class settlement system, on this premise, might trigger an accusation that “class counsel becomes

381 *Id.*

382 *Id.* at 402

383 *See, e.g.,* Stier, *supra* note 129, at 256. *See* Issacharoff & Rave, *supra* note 58, at 404-413.

384 *See* Issacharoff & Rave, *supra* note 58, at 404-413.

385 *See* *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

unimaginably wealthy . . . and the class (the plaintiffs) gets nothing they wouldn't have had before."³⁸⁶

Yet, some proponents of the public litigation system, especially Issacharoff and Rave, argued that, by all appearances, claimants seem to receive higher compensations under the class settlement than under the GCCF.³⁸⁷ In other words, they argued that the public system of dispute resolution with higher transaction cost (i.e. the BP class settlement) appears to be superior to a private claims facility under the OPA framework (i.e. the GCCF) in terms of the amounts of the compensations being offered under this system.

3.3.2 THE FINALITY FUNCTION AND THE PEACE PREMIUM NARRATIVE

Because receiving higher recoveries in the system with higher built-in transaction costs is seemingly counterintuitive, there should, therefore, be some explanation for why this might be the case.³⁸⁸ Some explanations for such disconnect between the basic transaction cost theory and real-world experience as in the case of the BP have been offered by certain public-litigation advocates.

In terms of defendant's incentive, According to Issacharoff and Rave, the claimant's ability to obtain greater compensation under the class action settlement under the system of public litigation, despite its greater transaction costs, might, arguably, reflect some factors that gave BP

³⁸⁶ See Memorandum in Support of Objections to the Economic and Property Damages Settlement by Objectors Hunter Armour and Judith Armour at 2, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179, 10-cv-7777 (E.D. La. Aug. 31, 2012) (Document No. 86). See Issacharoff & Rave, *supra* note 58, at 402.

³⁸⁷ See Issacharoff & Rave, *supra* note 58, at 405.

³⁸⁸ *Id.* at 412-413.

something it valued—and for which it was willing to pay—but could not get through the GCCF: Issacharoff and Rave proposed that such factor is “peace” or formal closure.³⁸⁹

“Peace” is arguably the heart of a given class action settlement, where finality is believed to an expected function of any mass claims resolutions.³⁹⁰ On this premise, the task of any mass claims settlement regime is, according to some commentators, not only to resolve the multiple individual claims but also to provide a coordination mechanism that can bring finality to the dispute.³⁹¹ Hence, to put it in the terms of the incentive framework, defendants in mass litigation want peace,³⁹² and they are often willing to pay for it.³⁹³

The corporate defendants in particular are interested in minimizing their total payout over the course of a mass litigation, including not only the amount that they pay plaintiffs in judgments or settlements, but also the other costs of ongoing litigation both in terms of legal fees and in the form of bad publicity, which could reduce their access to capital,³⁹⁴ as well as the other forms of associated costs given various business incentives.

In principle, the marginal cost of adding another claim to a group settlement is typically less than the cost of individually negotiating a separate settlement.³⁹⁵ Therefore, the settlement of mass claims may be what economists would term a *discontinuous*, rather than continuous,

389 See Issacharoff & Rave, *supra* note 58, at 403 (proposing that the central argument or hypothesis for why this might have been the case is that—“the claimants did better under the class action settlement because it allowed them to offer BP something it valued—a greater degree of finality than the GCCF could ever provide—in exchange for a peace premium.”).

390 See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, at ix–xi (2007).

391 See *id.*

392 See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1185 (2013) (“Defendants want peace, and they are often willing to pay for it. Plaintiffs therefore may stand to gain if they can package all of their claims together and sell them to the defendant . . .”). See Issacharoff & Rave, *supra* note 58, at 413–17; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 164 (2003).

393 See Issacharoff & Rave, *supra* note 58, at 413.

394 See Rave, *supra* note 392, at 1195.

395 See Issacharoff & Rave, *supra* note 58, at 761–62, 766.

function.³⁹⁶ Given such discontinuous feature, defendants will sometimes even pay a “peace premium” or offer high compensation rates to avoid the potentially disproportionate costs and risks of continued litigation against a small number of claims.³⁹⁷ If an incomplete settlement leaves the defendant litigating against a handful of unsettled plaintiffs, there are fewer cases across which to spread the costs of developing common factual and legal issues that will arise at trial.³⁹⁸

As Judge Scirica observed in *Sullivan v. DB Investments, Inc.*, “achieving global peace is a valid, and valuable, incentive to class action settlements,” for which a defendant “may be motivated to pay class members a premium.”³⁹⁹ Apparently, therefore, “buying peace” is the primary motivation of defendants in most class settlements.⁴⁰⁰

3.3.3 GCCF’S BARRIERS TO FINALITY: ADVERSE SELECTION AND STRATEGIC PLAYERS

At the outset, it should be noted that, the additional purpose of the discussion in this part with regards to the behavioral dynamics of mass claims settlements can also help the designers of payment structures to see, at least, the expected corresponding settlement behaviors of the claimants with regards to different types of payments options.⁴⁰¹

Given the inherent plurality nature of mass claims, plaintiffs (and the lawyers representing groups of plaintiffs) tend to possess superior information with regards to the relative strength and

396 *Id.* at 414-416 (“The peace premium is a reflection that there may be thresholds that are critical to defendants. The premium comes from the realization of whichever threshold is of enhanced value to the defendant such that each individual plaintiff does not add very much to the value of the potential settlement until a sufficient number of claims have been aggregated”).

397 Rave, *supra* note 394, at 1185.

398 *See* Issacharoff & Rave, *supra* note 58, at 414.

399 *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311, 339 (3d Cir. 2011) (Scirica, J., concurring). *See id.* at 413.

400 *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 (2002) (discussing the asbestos, silicone gel breast implant, and fen-phen class settlements, which he noted “all aspire to create some form of private administrative system” that “promises more efficient compensation for plaintiffs, long-term peace for defendants, and a reduced litigation burden for the courts”).

401 For an excellent discussion of the dynamics of modern class settlements, see Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1651 (2008).

value of their individual claims and not the defendant. Hence, if they are allowed to elect whether or not to participate in a group settlement, there is a real threat that the plaintiffs with the strongest claims will opt out.⁴⁰² Potentially, the potential of such “adverse selection” can, therefore, be the main driver for the peace premium offers.⁴⁰³

Adverse selection can be found in the context of mass claims resolutions. Such practice requires claims that are: (1.) large enough to be viable in individual or small group litigation and (2.) vary significantly in strength or value so that the plaintiffs have an informational advantage over the defendant.⁴⁰⁴ In this scenario, a defendant rationally does not want to pay “top dollar” to settle a collection of weak claims only to be left facing the strongest claims in continued litigation.⁴⁰⁵ Strategically, a defendant tends to pay less per claimant to settle an incomplete aggregation of claims than it would pay in a truly comprehensive settlement, because it must hold back money to litigate against the opt-outs.⁴⁰⁶

While these payments did not include a damages multiplier to compensate for potential future losses, they allowed claimants to “keep going back to the well” for additional Interim Payments over the life of the GCCF, without giving up the right to later litigate against BP.⁴⁰⁷ The presence of Interim Payments, thus, made the cost of holding out very low.⁴⁰⁸ Claimants could

402 See Issacharoff & Rave, *supra* note 58, at 414; see also Rave, *supra* note 392, at 1192-98.

403 See Issacharoff & Rave, *supra* note 58, at 414

404 See Rave, *supra* note 392, at 1193-93. See also D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475 (2016) (discussing nationwide settlement Proceedings, citing *In re Trans Union Corporation Privacy Litigation*, 741 F.3d 811 (7th Cir. 2014)).

405 See Issacharoff & Rave, *supra* note 58, at 414.

406 For a more intensive discussion of why defendants might be willing to pay a peace premium see Rave, *supra* note 392, at 1192-98.

407 See Issacharoff & Rave, *supra* note 58, at 421-422.

408 *Id.*

obtain much of the benefit of participating in the GCCF compensation on an ongoing basis for past losses, without giving up the right to sue.⁴⁰⁹

Arguably, according to Issacharoff and D. Theodore Rave, a private claims facility like the GCCF, structured to meet the OPA's statutory obligations was necessarily an open-ended offer (i.e. opt-in structure) that facilitated adverse selection for the following reasons:⁴¹⁰

First, with regards to the Quick Payments approach, the availability of this quick pay option could make the GCCF relatively more attractive for low-value claims than for high-value ones.⁴¹¹ Expectedly, it is not surprising that far more claimants accepted the fixed-sum offers under the Quick Payments option than the Full Review Final Payments option, while the strongest claims would refuse to settle through the GCCF, sticking with the interim payment option in order to retain the right to sue BP.⁴¹² To illustrate, the Attorney General of Alabama, Luther Strange reported that 98.9 per cent of claimants opted for Quick Payment option.⁴¹³

Second, with regards to the interim payment, being "interim" or on-going in nature, BP did not know how many claimants would elect to participate or what percentage of total claims would be resolved through the GCCF's administrative process at the time it began paying claims. This is, precisely, because under the Interim payment, claimants could obtain "Interim Payments" from

409 *Id.*

410 *Id.* at 419-420.

411 *Id.* at 420.

412 *Id.* See also David Hammer, *Most BP oil spill claimants opt for one-time 'quick payment*, THE TIMES-PICAYUNE (Jan. 26, 2011) (" It appears the vast majority of people ending their claims with quick payments are those Feinberg was targeting: 92 percent are people who work in retail sales and service jobs or for restaurants, bars or hotels. Only 5 percent are fishers or seafood processors and distributors, whose jobs are directly tied to the offshore spill zone. The data suggest that the quick payments are mostly working as envisioned, ending claims by people who were able to show indirect losses from the spill, but who aren't likely to be able to show more losses going forward.")

413 See Press Release, Attorney General Luther Strange, Local Officials Deplore Human, Economic Effects of Gulf Coast Oil Spill as Well as Delay in Processing Claims (Mar. 21, 2011) http://www.ago.state.al.us/news/03212011_134757916.pdf.

the GCCF for documented past losses as often as once per quarter without signing a release.⁴¹⁴ As such, under the GCCF relatively, BP had no advanced guarantee that it would achieve any degree of finality—the GCCF paid claims seriatim, without any assurance that later plaintiffs would be bound to the same procedures.⁴¹⁵

On this premise, as Issacharoff and Rave argued, GCCF payment structure can potentially facilitate strategic players, where the GCCF did not offer BP an opportunity to back out of the compensation scheme if too many claimants elected not to participate.⁴¹⁶ Indeed, BP could not even know how many opt-outs there would be until it had already paid everyone who opted in—and because adverse selection is predictable, BP had to hold back money to litigate or individually settle the strongest claims that were most likely to opt out. In other words, BP arguably had to withhold the peace premium, under the GCCF regime.⁴¹⁷

3.4 CAN THE OPA REGIME BE, AT LEAST IN THEORY, DEFENDED?

While the analysis on finality function can be extremely useful in providing behavioral insights and dynamics of mass claims settlement, via different types or possible designs of payment offers, the world might, however, not be that complicated. In fact, even a straightforward utilization of one’s simple logic might help to explain such obvious “paradox”, i.e. the apparent greater amounts of compensation payments offered by the BP class settlement.

414 See BDO CONSULTING, *supra* note 111, at 35. See Issacharoff & Rave, *supra* note 58, at 421. See also FEINBERG, *supra* note 167, 173 (noting that “claimant[s] could select an interim payment and take a ‘wait and see’ approach to the future”).

415 See Issacharoff & Rave, *supra* note 58, at 419-420.

416 *Id.*

417 *Id.*

To illustrate even at a basic level, for instance, since the two regimes were carried out longitudinally, it would not be logical to compare the two regime superficially in this sense, as we cannot construct the world without the GCCF—i.e. more than 200,000 of claims were absorbed by the GCCF prior to the commencement of the BP class settlement. Predictably, if only the GCCF was not subsequently replaced by the new BP class settlement regime, the amounts offered at the ‘imaginary’ latter stage of GCCF lifetime would have similarly been increased, following the greater degree of the strength of the remaining unsettled claims. Although, this point will be revisited also in the latter part.

Sarcastically, using a simple incentive analysis, one might also expect huge “professional” opposition to the OPA approach of the out of court mass claims resolutions from lawyers. Lawyers, being lawyers, would find the lack of attorney involvement in the system as a loss to their business and this notion can well explain the underlying source of a built-in conflict of interest.⁴¹⁸

Intuitively, lawyers involving in public litigations will hardly support a system that will no longer generate their income, for instance, in the form of contingent fees inherently available in the class action system. Equally, they will unlikely to support the system that has the ability to deliver rapid compensations to the claimants because a speedy handling of claims is not in their interest if their remuneration based on an hourly basis.

While this straightforward suspicion of personal bias might also be true, such simple explanation should, none the less, be left aside to allow a search for other additional deeper reasons explaining such paradox. The attention should, therefore, be directed, instead, to the other source of additional alternative explanation for such alleged disconnect between the theory and the real-

418 *Id.* at 400.

world outcome—i.e. the formal settlement system with higher built-in costs and, paradoxically, the more generous offers made to the plaintiffs.

3.4.1 THE EXTRINSIC CAUSE DEFENSE: PUBLIC REGULATORY CLOSURE AS AN ALTERNATIVE NARRATIVE

Indeed, looking beyond the sphere of private economic loss liability, one might propose, instead, that the suggested causal link between the peace premium hypothesis and the apparent greater amounts of compensation offered at the class settlement regime might not be so certain. Put in other words, looking at a broader global litigation context, this section argues that while, in general, there are some merits in the rationale of the peace premium theory, a deeper question might, however, be whether these premises justify the apparent greater amounts of compensation also in the case of BP, which is the biggest settlements in the US legal history? Or whether something more was at play?

Arguably, the notion of finality function in a traditional sense confined to the class action regime, cannot unequivocally explain such generosity of the compensation offers, and instead certain extrinsic causes might have been at play—namely, the defendant’s incentive to secure the wider public regulatory closure.⁴¹⁹ Viewed in this context, as proposed by Jaime Dodge, BP’s class settlement may not have simply been about the closure of the victims’ claims directly, but, rather, about their collateral effect on other public-law proceedings.⁴²⁰ In other words, BP settled

419 See Dodge, *supra* note 160, at 340.

420 *Id.* at 365-367

its economic loss claims cases in the shadow of the pending criminal charges, which were the largest in U.S. history.⁴²¹

By offering the generous terms of private-law class action settlement, BP could remove the uncompensated victim as a symbol of BP's wrongdoing from the table of negotiation with the U.S. government.⁴²² Presumably, this could affirmatively allowed BP to argue that neither retributive nor corrective justice required government regulators to seek the harshest possible punishment against this London-based oil giant.⁴²³ This strategy should allow BP to argue that while it had done wrong, it had already compensated victims—and even the remote potential victims—with extreme generosity.⁴²⁴ In this tale, BP might have expected that, given such a great amounts of compensation offers and its attempt to make right its wrongs, any severely harsh regulatory punishments were, therefore, simply punitive rather than deterrent.⁴²⁵

Not only can this alternative narrative help to explain the paradox of apparently generous compensation offers emerged at the time of the BP class settlement, but it can also explain, even more puzzlingly perhaps, what drove BP's sudden change of heart, in which BP suddenly began appealing the terms of settlement to which it had just consented “with the ink barely dry.”⁴²⁶

421 *Id.* See also Press Release, U.S. Dep't of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>.

422 See Dodge, *supra* note 160, at 365.

423 *Id.* at 365-366.

424 *Id.* at 366 (“As BP—and before it, Haliburton—have argued (if not demonstrated) in their filings, there are persons being generously compensated who may not have suffered any legally cognizable injury, while for others the payments outstrip the actual harm suffered. Why did BP agree to—and some would say actually pushed for—this over-compensation in terms of both the scope of the class and damages paid?”).

425 *Id.* at 366

426 *Id.* at 366. See also Alison Frankel, BP Plays Twister in Latest Deepwater Horizon Appellate Brief, Reuters (Sept. 3, 2013), <http://blogs.reuters.com/alison-frankel/2013/09/03/bp-plays-twister-in-latest-deepwater-horizon-appellate-brief/>.

Given the massive financial resources possessed by this multinational oil company which is one of the world's "supermajors",⁴²⁷ and, consequently, the potential of having the country's top lawyers in the BP's lawyers team, the story should definitely not be the one in which BP did not know the widest possible extent of what it was agreeing to pay and to whom.⁴²⁸

Equally, if the story was one of closure in a traditional sense that is confined to the context of the class action system, one would expect that BP might have been facing the higher opt-out rates at that time than it had anticipated such that it did not receive closure, prompting BP to increase its generosity at that time.⁴²⁹ But, according to Judge Barbier, the reality does not suggest that the opt-out rate at that time was higher than what would be anticipated for this type of case.⁴³⁰ Moreover, if such finality in a traditional sense was an *ex ante* concern of BP's, its superior legal team knew how to draft participation rate guarantees (i.e. the walk-away agreement).⁴³¹ Thus, even if part of the premium paid was for closure, it could not entirely account for "the sudden change of stance" by BP—rather, such a sudden change of heart might, in turn, suggest a different *ex ante* motivation for the deal.⁴³²

More likely, the generous terms of the BP class settlement were the one that BP knowingly consented to, in order to make the class as wide as possible even to the point of paying compensation to what it regards as too-remote victims, strategically in an expectation for a

427 BP is a formidable corporation--the fourth largest in the world --with the ability to withstand penalties that would easily bankrupt most companies. The company is worth over \$ 127 billion in 2012 when the deal was concluded, its earnings have almost doubled every quarter since 2000, and even in the aftermath of the oil spill, the energy giant reported second-quarter earnings per share had risen about 48% due to higher oil prices. *See* Danny King, BP Earnings Preview: Profits Set to Surge despite Oil Spill, Daily Fin. (July 26, 2010, 11:50 AM), <http://www.dailyfinance.com/story/company-news/bp-earnings- preview-quarter-profits-oil-spill/19568519>.

428 *See* Dodge, *supra* note 160, at 366.

429 *Id.* at 366-367

430 *See* Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement, No. 10-md-2179, (E.D. La. December 21, 2012) at 66 (stating that "The number of opt-out rate is low")

431 *See* Dodge, *supra* note 160, at 366-367.

432 *Id.*

favorable outcome of the talks with government agencies—and yet, it suddenly changed its stance after the talks turn out badly for BP.⁴³³

As Dodge pointed out, the timeline of BP’s sudden change of heart does suggest an alternative “theory”. On March 2, 2012, BP and the PSC had reached an Agreement-in-Principle.⁴³⁴ On November 15, 2012, the DOJ announced that BP had “agreed to plead guilty to felony manslaughter, environmental crimes and obstruction of Congress and pay a record \$4 billion in criminal fines and penalties for its conduct leading to the 2010 Deepwater Horizon disaster.”⁴³⁵ On November 28, 2012, less than two weeks later, the U.S. Environmental Protection Agency (EPA), relying on BP’s agreement to plead guilty with DOJ, announced that it has “temporarily suspended BP Exploration and Production, Inc., BP PLC and named affiliated companies (BP) from new contracts with the federal government”.⁴³⁶ The ban prevented BP, which held an estimated \$2 billion in federal fuel contracts, from obtaining new government contracts.⁴³⁷ But, more dreadfully, the ban prevented BP from entering into any new oil and gas leases in the United States.⁴³⁸

433 *Id.* at 367- 369.

434 *Id.*

435 *Id.* at 367-389. *See also* Press Release, U.S. Dep’t of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>.

436 *See* Dodge, *supra* note 160, at 367-369; *see also* Press Release, U.S. Env’tl. Prot. Agency, BP Temporarily Suspended from New Contracts with the Federal Government (Nov. 28, 2012), <https://yosemite.epa.gov/opa/admpress.nsf/0/2aaf1c1dc80c969885257abf006dafb0> OpenDocument.

437 *See* Dodge, *supra* note 160, at 368-369; *see also* Alan Neuhauser, EPA to Lift Ban Barring BP from New Federal Contracts, U.S. News & World Rep., Mar. 13, 2014, <http://www.usnews.com/news/articles/2014/03/13/epa-to-lift-ban-barring-bp-from-new-federal-contracts> (noting that experts saw the drop from “plus \$ 2 billion to minus \$ 600 million” as unprecedented among federal contractors (internal quotations omitted)).

438 *See* Dodge, *supra* note 160, at 367-369. *See also* Stanley Reed, BP Sues U.S. Over Contract Suspensions, N.Y. Times, Aug. 14, 2013, http://www.nytimes.com/2013/08/15/business/global/bp-sues-us-over-contract-suspensions.html?_r=0. *See also* Neela Banerjee, EPA bans BP from new federal contracts, L.A. TIMES, NOV. 29, 2012, <http://articles.latimes.com/2012/nov/29/nation/la-na-bp-contracts-20121129>.

The effect of the ban could be devastating for BP’s business—BP is the largest oil and gas producer in the Gulf of Mexico and operates some 22,000 oil and gas wells across United States, and those wells produce 39 percent of the company’s global revenue from oil and gas production each year.⁴³⁹ Particularly devastating, this meant that BP was not only losing a “crucial profit center” in the short term, but it was losing potential new leases that were coming available—while it was prohibited from bidding—to competitors like Royal Dutch Shell and Chevron.⁴⁴⁰ Reportedly, BP is among the U.S.’s largest corporate contractors and supplies more than \$1 billion a year worth of fuel to the military, where BP itself has also declared that “BP has invested more than \$52 billion in the United States, more than any other Oil and Gas Company and more than it invests in any other country.”⁴⁴¹ Accordingly, basing on these business facts, it is not difficult to see why BP might have had a very high incentive to obtain the public-law closure by, as part of this strategy, trying to be as “generous” as possible in an attempt to show its willingness to remedy its wrongdoings under the private-law settlements.

In fact, even as late as at the time of the fairness hearing conducted on November 8, 2012—but still before the time when the unfavorable result was announced to BP—BP’s apparent generosity was still manifested.⁴⁴² At that fairness hearing, BP still had expressed no reservations about the special master’s interpretation of the terms, and where more than 79,000 claims were processed on the basis of such understanding, authorizing payments of more than \$1.3 billion.⁴⁴³

439 See Abrahm Lustgarten, *EPA Officials Weigh Sanctions Against BP’s U.S. Operations*, ProPublica, (Nov. 28, 2012), <https://www.propublica.org/article/epa-officials-weighing-sanctions-against-bps-us-operations> (“The broad sanctions announced Wednesday target the BP corporation writ large — the British-based parent company and 21 international subsidiaries are included”).

440 See Dodge, *supra* note 160, at 368; see also Stanley Reed, *BP Sues U.S. Over Contract Suspensions*, N.Y. TIMES, Aug. 14, 2013, <http://www.nytimes.com/2013/08/15/business/global/bp-sues-us-over-contract-suspensions.html?r=0>.

441 Abrahm Lustgarten, *Latest Sanction Against BP Goes Beyond Gulf Spill*, PROPUBLICA (Nov. 29, 2012), <https://www.propublica.org/article/latest-sanction-against-bp-goes-beyond-gulf-spill>.

442 See Dodge, *supra* note 160, at 368.

443 *Id.* See also Brief for Appellees at 22, *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (No. 13-30315).

Strikingly, BP's counsel even warmly told the court that Mr. Juneau, the new claims administrator, "is doing a wonderful job."⁴⁴⁴

According to the special master, it was December 5, 2012—not many days after the EPA ban—that BP suddenly changed its stance, where that change was subsequently evidenced in writing on January 8, 2013.⁴⁴⁵ Given this timeline, as Dodge suggested, there is a potential argument that it was not only closure vis-à-vis the victims, but obtaining a closure with the U.S. government, and hence, relieving its shareholders, that drove BP's generosity or offering greater amounts of compensation at the BP class settlement at that time.⁴⁴⁶ Arguably, if, at that time, the GCCF was not replaced by the BP class settlement and was still operative along this public regulatory dynamic timeline, the same *ex ante* motive in terms of the need for public regulatory closure could have similarly resulted in the increase in the compensations (e.g. greater multipliers) offered under the GCCF regime.

With regards to the incentive driving its settlement strategies, BP, in anticipation of the DOJ talks, might have wanted to eliminate all the potential victims in the realm of private-law liability from the negotiation table, in order to limit not only the range of actions available to DOJ, but also to incentivize it to agree to less severe terms of sanction, increasing BP's chance to obtain public regulatory closure.⁴⁴⁷ Indeed, this notion proposed by Dodge also touches on with an interview given by EPA officials suggesting that "if the civil suits against BP remain unresolved,

444 See Dodge, *supra* note 160, at 368-369.

445 *Id.* See also Brief for Appellees at 22, *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (No. 13-30315) at 24-25.

446 See Dodge, *supra* note 160, at 368-369.

447 *Id.* at 368 ("Of course, just as the class settlement did not buy complete closure (but instead was subject to the caveat of opt-outs), so too the DOJ settlement was not anticipated to buy complete closure as to public claims. For example, parallel state litigation remained pending with respect to the harms to the Gulf States. Rather, BP seemingly expected the DOJ settlement would resolve its litigation with the federal government").

the suspension could stay in place longer.”⁴⁴⁸ By December, however, BP’s incentive to offer peace premium—formerly driven by the pending DOJ investigation—had not only been vanished, but it also discovered that it had not obtained such public-law closure.⁴⁴⁹

Contextualizing the settlement within this broader global litigation framework helps, at least in part, explain, as Dodge suggested, why BP would pay such a premium for a settlement that was offering less closure than comparable class settlements might typically offer.⁴⁵⁰ It might also explain, partly, the sudden change of stance, from pressing for a broadest possible coverage of the settlement terms, and actively advocating for its approval by the court, to suddenly opposing the settlement and appealing the implementation of those formerly consented terms.⁴⁵¹

In fact, in an interview with a media, Mr. Juneau, the court-appointed Claims Administrator also point out that he asked BP in September 2012, two months before BP asked a judge to approve the settlement, if he should pay an accounting firm that met the V-test eligibility formula but clearly suffered its losses because of a partner's illness and not the spill. Here, BP's lead lawyer, Mark Holstein, replied “yes, as long as the test was satisfied.”⁴⁵²

448 See Abraham Lustgarten, *supra* note 441.

449 See Dodge, *supra* note 160, at 369.

450 *Id.* at 368

451 As late as May 2012, BP agreed to a modification of the settlement agreements, indicating its continued support for their terms. Cf. MDL-2179 Oil Spill by the Oil Rig "Deepwater Horizon," U.S. Dist. Court, E. Dist. of La., <http://www.laed.uscourts.gov/oilspill/oilspill.htm>. See Dodge, *supra* note 160, at 368.

452 See David Hammer, *BP fights agreed-upon oil spill claims process*, WWL-TV, (May 8, 2014), <https://www.usatoday.com/story/money/business/2014/05/08/bp-oil-spill-claims-process/8851179/> (“When federal appeals Judge Edith Clement asked BP lawyer Ted Olson in July 2013 why BP ever agreed to that, he said, "It was part of a compromise." But when Olson appeared on CBS' "60 Minutes" on Sunday, he insisted that claimants "had to have been hurt by the oil spill" to collect. Morrell, the BP spokesman, also appeared in the "60 Minutes" piece and said "no company would ever agree to a settlement that compensates people that were never harmed by their actions. And we most certainly did not agree to such a settlement"

"He believes whatever he believes, but the record is clear," Herman retorted in an interview with WWL-TV on Wednesday. "There are statements made by lawyers, there were statements made by experts. There were statements made in proposed findings. There were statements made in court to Judge Barbier. So they can say, I guess, whatever they want, but the record is pretty clear.") See *id.*

This alternative narrative to a mere traditional finality function hypothesis suggests also that the problem in BP's lawyering came not in the class settlement, but in the parallel negotiations with the federal government.⁴⁵³ And, indeed, it was precisely when these negotiations turned out badly for BP that it suddenly shifted to a far more aggressive stance towards both the government and the private-law settlements.⁴⁵⁴

On balance, it is, nevertheless, difficult to know with certainty what happened behind the closed door—and indeed, we may never know. But whatever the actual motive of the BP litigation strategy was, some insights about potential settlement paths can be traced and, thus, some reasons can be drawn. As Dodge proposed, just as private settlements can obtain a peace premium, the public regulatory closure can also have disproportionate value such that it generates a peace premium,⁴⁵⁵ albeit reflecting in the parallel private settlement resolution in the form of peace premium offers, thus, a possible extrinsic cause explaining the previous paradox.

Clearly we will see the increasing degree of the interrelationship between public and private enforcement in the coming years, such that the public-law sanctions can influence the terms of private settlements and vice versa.⁴⁵⁶

453 See Dodge, *supra* note 160, at 369.

454 *Id.* See also Janet McConnaughey, U.S. Supreme Court rejects BP appeal of spill settlement, ASSOCIATED PRESS (Dec. 8, 2014), <https://www.usatoday.com/story/money/business/2014/05/08/bp-oil-spill-claims-process/8851179/> (“BP ultimately filed the appeal to the U.S. Supreme Court. BP PLC wanted the court to consider whether people and businesses seeking payments under the settlement included some who haven't actually suffered any injury related to the spill. A district court and an appeals court ruled that, under the settlement BP agreed to, businesses do not have to prove they were directly harmed by the spill to collect money - only that they made less money in the three to eight months after the spill than in a comparable pre-spill period. The U.S. Supreme Court rejected BP's appeal of its oil disaster settlement, ending the British oil giant's two-year fight over interpretation of the agreement. The decision affirms lower court rulings that, under the settlement terms, businesses claiming damages from the 2010 Gulf of Mexico oil disaster need not prove direct harm.”)

455 See Dodge, *supra* note 160, at 369.

456 *Id.* (suggesting that the remaining questions for future research might be how this premium should be negotiated, or sequenced or intertwined with private rights of action, and ultimately who should capture this premium. In future cases, corporate defendants may attempt to negotiate for increasing levels of global regulatory settlement, in which all government regulators and even attorneys general may be pressed to settle simultaneously—

3.4.2 THE INTRINSIC DEFENSE: POTENTIAL BENEFITS OFFERED BY OPA’S PRIVATE CLAIMS FACILITIES REGIME

Given the notion of public regulatory closure as a possible extrinsic cause or alternative narrative explaining the greater amounts of compensation offered at the BP class action settlement, it seems that the mere hypothesis about the GCCF’s relative functional limit—in terms of its ability to deliver finality to the defendant—might not, therefore, be certain enough, if not entirely ruled out specifically for the case of BP. Accordingly, one should be more cautious when overly relying on such notion of finality function to show the limit of the OPA approach, as a core ground for abandoning the OPA framework.

As such, provided that one of the proposed grounds for abolishing the OPA scheme could not be sufficiently ascertained, this section will, subsequently, provide a more complete picture to account for the typical perceptions about the private nature of the out-of-court claims facilities regime under the OPA framework, in terms of the relative strengths and weaknesses.

(1) THE INTERIM PAYMENT CONCEPT: FINALITY FUNCTION VERSUS FUNDAMENTAL FAIRNESS.

Even when supposing that the peace premium concept can help to provide certainty and finality for the defendant, and hopefully, the claimants will benefit from a resulting increase in the

for example, here “ensuring that the EPA would not bring separate process only days after and expressly relying upon the DOJ settlement. Defendants may also attempt to expressly link these public settlements with the private ones, whether in a single settlement document or through informal linkages. Such a condition might seek to preclude redundant litigation of a cause of action for compensation that is tied to the individual victims’ harm but which may be pursued by either the government or the victims directly. In such a case, the waiver would simply clarify the preclusive effect of the settlement with the private parties. But the settlement demand could also go further - expressly pitting the victims’ desire for payment now against the public agency’s interest in conducting further investigation. Or, the defendant could make a truly global settlement offer inclusive of fines and penalties, as well as compensation, stating that it would leave the allocation to the plaintiffs’ attorneys and government officials. In short, the opportunities for innovation in linkages in nearly endless, if defendants follow this path.”)

amount of compensation, the OPA's doctrine of interim payment should not be abolished merely because it cannot deliver systematic closure to the responsible party with any credibility. Again, this was not necessarily a design defect of the GCCF, but rather an expected function of OPA's statutory requirement that the responsible party must establish a process to pay claims for interim, short-term damages, without precluding later recovery for full damages.⁴⁵⁷

Frequently, the OPA compensation structure particularly with regards to the "interim payment" was a soft target for the attack from the advocates of the public aggregation system, arguing that the interim payment concept is inherently facilitating the strategic behaviors, and, thus, an "unanticipated defect" of OPA's attempt to incentivize private settlements given its inability to organize systematic closure for the defendant.⁴⁵⁸

Nevertheless, focusing too heavily on the ability of a regime to secure closure for the defendant (i.e. on the side of defendant incentive) might, however, create a danger of bypassing the foundational rationale of the interim payment concept in terms of protecting the interest of the oil-spill victims with regards to the amount of their compensation, particularly in the light of the principle of fairness.⁴⁵⁹ This caution should be given some merits, especially when the linkage between the finality function narrative and the possible mutual benefit on the side of the claimants in terms of greater compensation amounts could still be open to scrutiny or the question of certainty, at least in the case of BP, by contextualizing the settlement within this broader global litigation framework.

457 See 33 U.S.C. § 2705(a) (2006). See Issacharoff & Rave, *supra* note 58, at 421.

458 See Issacharoff & Rave, *supra* note 58, at 417-418.

459 For a more complex discussion on the concept of fairness see e.g. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001) ("In the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice.")

More accurately, such a perceived inability to provide closure was not necessarily a design defect of the GCCF, but rather a function of OPA's statutory requirement that the responsible party establish a process to pay claims for interim, short-term damages, without precluding later recovery for full damages.⁴⁶⁰ Claimants could obtain "Interim Payments" from the GCCF for documented past losses as often as once per quarter without signing a release.⁴⁶¹ The presence of "Interim Payment" concept was undoubtedly for the interest of the oil-spill victims, even though it made it impossible for claimants to offer BP the formal closure or finality with any credibility.⁴⁶² Hence, such inability was not necessarily a defect of the GCCF; the purported lack of a closure strategy, as Issacharoff & Rave also explained, reflected an attempt to implement OPA's statutory preference, allowing the victims to claim the remaining portion of their justified compensation from the responsible party.⁴⁶³

(2) THE LIMITED EFFECT OF THE INTERIM PAYMENT ON FINALITY: THE HYPOTHESIS VERSUS THE REALITY

Alternatively, even assuming that the presence of the interim payment as an available option for claimants made it difficult for BP to secure a closure, and, hence, is a design defect of the GCCF or, more broadly, the OPA Framework, the reality on the ground seems, however, to suggest that the effect of interim payment option on the finality function might not be so significant as one might have imagined, given the actual implementation by the GCCF.

460 33 U.S.C. § 2705(a) (2006). *See* Issacharoff & Rave, *supra* note 58, at 421.

461 BDO CONSULTING, *supra* note 111, at 35. *See also* FEINBERG, *supra* note 167, at 173 (noting that "claimant[s] could select an interim payment and take a 'wait and see' approach to the future"). *See* Issacharoff & Rave, *supra* note 58, at 421.

462 For the critic of the interim payment approach *See* Issacharoff & Rave, *supra* note 58, at 424 ("But it made it impossible for claimants to offer BP finality with any credibility.")

463 *See id.* at 423-424

To illustrate, for instance, because the interim payment claims must be filed quarterly, and the GCCF has 90 days for the claims to be resolved, the receipt of interim payment could, therefore, be delayed by up to six months from the time they incur damages.⁴⁶⁴ As such, the interim payments were largely delayed in the process of the GCCF, and might not have been approved easily, limiting its perceived effect as a barrier to achieve finality as a matter of fact.

Similarly, the GCCF reportedly paid a total of 230,370 claimants during the “Phase II”—of these only 35,261 were interim payments.⁴⁶⁵ In other words, only 15 per cent of the claimants were approved for interim payments while the other 85 per cent were settled under either Quick or Full Review Final payments.⁴⁶⁶ Remarkably, this might suggest that BP seemed to have certain ability, whether honestly or strategically, to limit the number of the approved interim-payments claims effectively on the grounds.

Leaving aside the issue of accuracy of determination or the motive driving the results for now, these GCCF statistics seem to suggest that the negative impact of the interim payment, as being an ongoing threats of litigations, and hence, in terms of preventing satisfactory closure might have been potentially overstated or the result might not be substantially drastic in practice.

(3) THE PROBLEMATIC COMPARISON: THE CARRIED-FORWARD PARTIAL CLOSURE

Alternatively, and more likely perhaps, even if the claimants subsequently decided to accept the offers under the BP class settlement terms, such decision might have been driven by the fact that substantial part of their economic loss had already been compensated under the GCCF regime through the interim payment option. As a consequence, the cost of bringing individual case

464 See Dan Murtaugh, Justice Department Official Asks Claims Czar to Reconsider Denials to Coastal Businesses, PRESS-REGISTER, Feb. 4, 2011, available at http://blog.al.com/live/2011/02/justice_dept_official_asks_cla.html.

465 Kenneth R. Feinberg: “BP oil spill victims were never under financial duress!”, THE DONOVAN LAW GROUP (Apr. 21, 2015), <https://donovanlawgroup.wordpress.com/category/duress/>

466 See *id.*

against BP in the court become less attractive, given a lesser amount of damages left to be pursued in the court. In terms of the claimants' incentive, each claimant choosing to opt out must, rationally, anticipate that the underpayment under the class action settlement is substantial enough to justify the litigation costs of proceeding.⁴⁶⁷ Because of the partial closure was already provided by the GCCF scheme, the defendant might not face that high numbers of claims brought against them at the formal litigation.

Thus, just as we should not merely evaluate the potential and limits of the private claims facilities like the GCCF in a vacuum, so too that it would not be appropriate to merely compare the relative potential of the two regimes in terms of delivering a closure or finality without accounting for the effect of the previous regime on another—they were created at a different period of time longitudinally.

In short, because of the prior GCCF, BP had already received partial closure. The fact that substantial number of the oil-spill victims had already been paid under the GCCF since 2010 prior to the approval of the class settlement in 2012 should not be omitted from the analysis in terms of the relative capacity to provide a closure in the case of BP Oil Spill.

In addition, ultimately, the argument that the finality function offered by the public litigation system can provide a win-win solution to both parties might also be problematic, and subject to specific facts of each case. With regards to the defendant's incentive, for instance, while the corporate defendants, like BP, might need to end lawsuits to ease shareholders' minds about future business prospects; it is, however, less certain that the increase in peace premium will go to

⁴⁶⁷ See Dodge, *supra* note 160, at 364 (“[E]ach claimant choosing to opt out rationally must anticipate that the underpayment under the Rule 23 settlement is substantial enough to justify the litigation costs of proceeding, or that there will be enough individuals who opt out to generate cost spreading sufficient to overcome this dynamic.”)

plaintiffs' pocket proportionately.⁴⁶⁸ The repeat players—the defendant and the class counsels—may be “tempted to design mutually beneficial deals, allowing them to reap the peace premium—not the plaintiffs.”⁴⁶⁹ Hence, the push for “peace” does not always work to add additional benefits to the plaintiffs as a class as much so as to justify the additional increase in litigation costs, especially in terms of agency cost and the time-value of money associated with the public aggregation regimes.

(4) THE OPA REGIME'S POTENTIAL OF PROVIDING INFORMAL CLOSURE

As a practical matter, the private claims facilities regime can also provide an informal closure, on the condition that the exceptionally high participation rate can be obtained under the opt-in structure of the private claims facilities. This scenario should even be more viable especially for the case in which the magnitude of the oil spill incident is relatively smaller, like the Rayong Spill in Thailand.

Here, the logic is relatively straightforward—as participation rates increase, the number of victims with actionable claims decreases.⁴⁷⁰ Just as only large-value claims can be viably prosecuted by opt-out class members, so too as participation rates under the private claims facilities increases, the ability of victims to pursue litigation decreases corresponding to the extent to which the costs of litigation can be spread across plaintiffs.⁴⁷¹

Admittedly although, while the private claims facilities might also have an ability to offer an informal closure, such an ability might not be as strong as the one offered by the formal class

468 See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 127

469 See *id.*

470 See Dodge, *supra* note 160, at 350-351.

471 *Id.* (“this similarly comports with the initial impetus for adopting the class-action settlement mechanism given the recognition that many harms are not individually viable but instead require aggregation to incentivize an attorney to bring the claim.”)

system. Nevertheless, the more-or-less similar potential to offer a closure, albeit *informal*, might suggest that while the class settlement regime seems to be, in theory, substantially superior in this respect, the practical consequence might not be drastically different in practice.

After all, in response to the question: “Why Are Companies Turning to These Types of Resolution Programs?”, in terms of the behavioral studies and companies’ business incentives, it is suggested that the GCCF approach “reflects a shifting view of the necessity of achieving complete “closure” through a single mechanism.”⁴⁷²

(5) FLEXIBILITIES OF THE PRIVATE CLAIMS RESOLUTIONS: THE CAPACITY TO OFFER SUPER COMPENSATION

While the skeptics of the private-claims facilities have generally concluded that mass settlement offers made unilaterally by the defendant will favor the defendant by offering under-compensation to plaintiffs than that would be available in litigation system.⁴⁷³ Yet, the reality can be rather different.

Sophisticated defendants are increasingly realizing that offering super-compensation can increase perceptions of legitimacy and, in turn, goodwill and participation rates.⁴⁷⁴ Bearing the notion of high litigation costs in mind, companies might decide to offer relatively generous compensation without exceeding the anticipated costs of litigation and settlement in the public

472 See Deborah Greenspan & Fredric M. Brooks, *Keys to a Successful Claims Resolution Program*, LAW360 (Apr. 11, 2016), <https://www.blankrome.com/index.cfm?contentID=37&itemID=3907> (“By turning to a “self-help” type of claim resolution program, companies can achieve a significant measure of peace relatively quickly. Even if the program resolves only a portion of the potential litigation, the company can succeed in substantially reducing the scope and number of participants in litigation.”)

473 See, e.g., Gilles, *supra* note 160, at 376; Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 *Stan. J. Complex Litig.* (forthcoming 2015); Judith Resnik, *Comment, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 161-68 (2011). See Dodge, *supra* note 160, at 355.

474 See Dodge, *supra* note 160, at 355-360.

aggregation system.⁴⁷⁵ Not only can high litigation costs drive defendants to make mass settlement offers for amounts in excess of the maximum amount that may be awarded in litigation, but even to make offers on claims that they believe are meritless or too remote.

In terms of the defendants' incentive, private mass settlement offers in general are designed to decrease litigation costs, often through a defendant conceding liability on a particular substantive issue.⁴⁷⁶ Such a concession is rational where the defendant believes that it is likely to be found guilty, such that the continuation of litigation is unlikely to result in a decrease in liability, but will certainly generate additional costs to business and company reputation.⁴⁷⁷

Similarly, enticing the high participation rates at the earlier stage may help to disincentive the filing of public aggregation or class action due to the limited ability to spread the costs among the would-be plaintiffs.⁴⁷⁸ As such, the corporate defendants, in some cases, might be willing to offer generous compensation as early as possible to settle the case outside the public litigation system, in order to save the would-be legal and business costs of the prolonged litigations.

For the claimants, private claims facilities, which are relatively less formal in nature, should allow them to enjoy a greater flexibility to make the full or even super-compensation available at a lower cost and speedier time.⁴⁷⁹ Potentially, the private claims facilities can, subject to its particular design and implementations, similarly create a situation in which both parties are better off.

475 *Id.* at 339-354

476 *Id.* at 359

477 *See id.* Additionally, this scenario may also include the situation where the substantive issue is one whose determination is likely to cost more than the liability at stake—making it a negative-value defense.

478 *See id.* 351 (“For companies offering bilateral mass settlements, a high participation rate may thus disincentivize the filing of aggregate litigation, effectively insulating them from a class action even if only a portion of the class accepts the offer. For participants, these programs often provide full or even super-compensation”)

479 *Id.* at 1279.

Indeed, corporations, including BP with regards to its substantive promise following the Deepwater Horizon incident, are frequently making offers of full compensation. More broadly, a number of the private mass claims experiences have shown that corporations even offered a premium beyond the best possible result available in litigation.⁴⁸⁰ For example, when Hyundai discovered the defect that some of its cars actually obtained 26 miles per gallon instead of 27 miles per gallon,⁴⁸¹ not only it offered consumers a full reimbursement of these additional fuel costs for the life of their ownership, but also a 15% premium to cover any inconvenience—a premium not available by law.⁴⁸² More interestingly, when a class action was later filed on the same grounds, the lump sum payment option negotiated by class counsel offered only a fraction of this recovery for plaintiffs.⁴⁸³

To certain extent, these private regimes of mass claims settlements, although not directly under the OPA framework since the GCCF is the only comprehensive model so far, can, at least, show that other factors, like the business incentive—such as customer goodwill and negative publicity—may drive corporations to offer generous terms that can even go beyond the legally available remedies. Therefore, the offers made under the defendant’s designed regimes are not

480 *Id.* at 356-357

481 *Id.* See also *Voluntary Fuel Economy Adjustment, Hyundai* (Nov. 2, 2012), <https://hyundaimpginfo.com/news/details/hyundai-and-kia-initiate-voluntary-program-to-adjust-fuel-economy-ratings>. (The incongruity in the fuel economy rating was the result of procedural errors made during so-called "coastdown" testing at Hyundai and Kia's joint testing facility in South Korea.)

482 See Dodge, *supra* note 160, at 356-357; Jaelyn Trop, *Hyundai Expands Choices in Gas Mileage Settlement*, N.Y. TIMES (Dec. 23, 2013), <http://www.nytimes.com/2013/12/24/business/hyundai-expands-choices-in-gas-mileage-settlement.html>. The mileage formula has four components: “(1) 2012 average fuel prices for the Hyundai owner’s geographic area; (2) mileage accrued by the owner; (3) change in combined (city/highway) EPA estimates for the vehicle; and (4) the fuel grade (regular or premium) recommended for the vehicle.” Hyundai Reimbursement Program Facts, Hyundai (Nov. 2, 2012), <https://hyundaimpginfo.com/resources/details/hyundai-reimbursement-program-facts/>.

483 See Dodge, *supra* note 160, at 356-357.

always inferior, given the long-term or wider business incentives of the defendants beyond the calculation of the specific case at hand.

Of course, this does not mean that there would be no room for improvements of these out-of-court mass claims resolution regimes, and the legal framework should be carefully designed in order to guarantee the reasonable degree of fairness even more systematically. This suggestion for design development or the system of minimum guarantee of fairness is necessary, especially in the context of the OPA facilities, in order to ensure that the appropriate balance will be properly carried out across the board as far as possible, instead of merely relying on a particular design of each model, or the integrity of the corporations.

In a sense, private mass settlement offers can generate substantial net gains through the elimination of contested litigation and, in turn, plaintiffs' counsel. On one level, this out-of-court streamlining would seem to be highly efficient. In most cases, the defendant is in the best position to know whether it anticipates a finding of liability or not and hence how much they should offer to settle the case taking into account all the would-be costs under the alternative scenario of the public aggregation system.⁴⁸⁴ Similarly, the victim typically has superior information as to his or her particular injuries and damages.⁴⁸⁵ On this premise, private mass claims resolution should, presumably, save the costs of litigation in most cases.

On balance, it might be possible to argue that, if certain conditions can be reached or some relative weaknesses can be improved to provide a better balance between efficacy and fairness, the use of private claims facilities seems to be rational option for the stakeholders, at least because the public litigation system will, among others, require expensive resources, either in terms of money

484 *Id.* at 357.

485 *See id.*

or time, or both. Especially in terms of the time, the oil-spill victims need to survive in short-run first, yet, of course, with reasonable degree of fairness given relevant circumstances, before they can enjoy the benefit of a greater degree of fairness when time is less of essence (i.e. the need for urgent remedies is reduced).

Understanding, through the lens of stakeholders' incentives, both the limits and potentials for a win-win solution of the claims facilities under the OPA framework, can add another dimension to some existing literature in Thailand. It is rather more challenging, however, to assess the potential and limits of these facilities beyond the sphere of the individual stakeholders, for example, in terms of the compensation amounts leading to the desirable or socially optimal deterrence and compensation. And the next section will provide a brief account on this matter.

3.5 STRIKING AT THE RIGHT BALANCE: THE NEED FOR REBALANCING THE DESIGN

More specifically, so far, the strongest parts of the GCCF criticism in terms of its relative weaknesses seems to be, or related either directly or indirectly to, the problem of transparency and fairness, inter-connectedly.⁴⁸⁶ The claim administrator, Kenneth Feinberg, was the common target for the attack on this ground, as he could retain a relatively high degree of discretion to make changes to the GCCF's procedures and claims criteria on the fly.⁴⁸⁷ As a result, as Issacharoff and Rave suggested, the claims procedures could be frequently adjusted in response to changing

486 See, e.g., Mullenix, *supra* note 64, at 842 n.107, 881–86 (2011); Conk, *supra* note 61, at 141; Amicus Brief of the States of Alabama, et al. in Support of Appellees and Affirmance of the District Court at 6--13, In re Deepwater Horizon, No. 13-30315 (consolidated with No. 13-30315) 2013 WL 2474803 (th Cir. May 31, 2013) (summarizing complaints made to the attorneys general of Alabama and Mississippi and the governor of Alabama about GCCF's problem of transparency). See Issacharoff & Rave, *supra* note 58, at 422.

487 See, e.g. FEINBERG, *supra* note 167, at 163-173 (“I did promise that the GCCF would continue to monitor the Gulf and reserved the right to modify the recovery factor, up or down, as events unfolded.”); Mullenix, *supra* note 64, at 841–44. See Issacharoff & Rave, *supra* note 58, at 422-423.

circumstances, allowing the holdouts to bargain for prospective changes to the compensation criteria.⁴⁸⁸ Thus, the problem of transparency of the regime could also “facilitate strategic behavior by claimants and made it more difficult for BP to achieve closure”⁴⁸⁹, and it might need to hold back the money in anticipation of “closure-compensation” spirals.⁴⁹⁰ Accordingly, the design that appropriately increases the degree of transparency within the out-of-court system of mass-claims resolutions should raise the cost of holding out.

In essence, the commitment to, at least, reasonable and workable degree of transparency of a regime should help to protect legitimate interest of the oil-spill victims in terms of procedural fairness, comporting with the due process doctrine.⁴⁹¹ In effect, the increase in transparency should work to increase accuracy in compensation and, hence, the deterrence level from societal point of view.

Yet, also in the interests of the victims, one might ask whether a greater transparency or the full degree of procedural fairness—especially in the form of having a court to regulate private compensation schemes—benefit victims? Only the “right” kind of transparency should allow the private claims facilities regime to exist alongside the traditional public litigation system as an advantageous alternative for certain plaintiffs, given their relevant circumstances and personal

488 See Issacharoff & Rave, *supra* note 58, at 8–9 (“The GCCF’s approach to the development and implementation of its protocols and methodologies was, by necessity, a dynamic one. The GCCF constantly made adjustments and improvements as it gained a greater understanding of the myriad challenges that emerged during its operations.”).

489 See Issacharoff & Rave, *supra* note 58, at 423.

490 This terms is merely adapted from the wage-price” spiral. For a useful discussion on the problems of transparency hat could also related to closure or finality function, see Issacharoff & Rave, *supra* note 58, at 423 (“As a result of evolving standards under the GCCF, the efforts at settlement created a dynamic of serial individual negotiations between a single repeat-player defendant and many single-shot claimants faced with a collective action problem. The claimants would maximize the collective value of their claims if they could coordinate to offer the defendant peace. But if the criteria for determining the compensation amount are up for grabs with each claimant, then each claimant is a potential holdout.”)

491 See Issacharoff & Rave, *supra* note 58, at 424; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597–98 (1997).

needs, for instance.⁴⁹² Otherwise, an overly restrictive checks and scrutiny might raise the costs of such schemes to the point where their distinct advantages are disappointingly diluted.⁴⁹³

As such, one of the main targets of the forthcoming mission in developing the new legal framework is, perhaps, to strike the appropriate and workable balance between the two conflicting objectives—namely, fairness and the efficiency. Similarly, the ultimate suggested design of the claims facilities might result in a different degree of transparency or fairness desirable at a different phase of time along the timeline of the compensation regime, corresponding to the change in the degree of emergency at each point. This issue will, in turn, be discussed more comprehensively in the next Chapter in an attempt to design “a new framework for Thailand”, and to provide some suggested design considerations for the claims facilities, which is a primary objective of this study.

On balance, the U.S. experience with regards to the OPA framework and the GCCF in particular, can be taken as a meaningful step in terms of identifying the desirable degree of procedural fairness and taking care of the stakeholders’ incentives, while still ensuring rapid compensation in the context of oil-spill disasters.

3.6 CONCLUDING REMARKS

Many of the evolutions that have taken place in the compensation of victims of disasters via tort law in the past have mostly focused on substantive law issues. Increasingly however, it has become clear that mere changes in substantive law might not be enough. In the US, a number of cases show that complex litigation, especially in the context of mass torts litigations, can take so long as to substantially increase the victim’s losses. Often, the example of the *Exxon Valdez* is

492 See McDonell, *supra* note 98, at 795.

493 *Id.*

cited, where the incident happened in 1989 but the litigation was concluded only after 2010, taking more than 20 years.

Even if the victims finally obtain compensation after years of litigation, they may still face bankruptcy, as a result of which total social losses would be substantially higher than if compensation had taken place faster. In the context of Oil Spill catastrophe in particular, often those coastal businesses—such as commercial fishermen, and even hotels and restaurants owners—have financed their activities based on credit.⁴⁹⁴ Hence, when, for example, a fisherman or hotel owner loses income as a result of business interruption following an offshore oil spill incident, this can have devastating effects on the sensitive coastal economic activities, potentially leading to bankruptcy where further income may be lost, but loans still need to be paid back.⁴⁹⁵

It is, therefore, not surprising that progressively the focus has shifted to procedural solutions that can guarantee expeditious compensation to the victims. Those procedural solutions often constitute alternatives to the traditional public litigation system. BP experience of mass-claims resolutions for economic loss following the Gulf Oil Spill 2010 can meaningfully be used to illustrate the relative potentials and limits offered by the alternative approach of oil-spill compensation regime under the OPA framework.

The scheme established by OPA reflects Congress's intent to facilitate speedy recovery, and reduce the need for litigation.⁴⁹⁶ Congress believed that oil-spill litigation is so costly and cumbersome that it should be avoided, and are appropriate only “where attempts to reach a

⁴⁹⁴ See Faure & Weber, *supra* note 71, at 126.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

settlement with the responsible party . . . were unsuccessful.”⁴⁹⁷ On this premise, the OPA revealed a preference for expeditious compensation and cost efficiency, in pursuance of a streamlined, non-adversarial procedure for resolving mass claims and providing compensation for oil-spill victims. By thinning or reducing the traditional formalities, the painful delays, and the need for costly legal representation, this alternative regime should, at least in principle, provide a superior alternative to the traditional venue of public litigation in terms of efficiency.

Although the OPA statutory text provides a very limited guidance on what the responsible party’s claims process should look like, GCCF is the first comprehensive model of the private claims facility established in light of the OPA’s statutory obligation imposed on BP as a responsible party for the Deepwater Horizon incident. Following the internationalized images of the birds covered in oil trying to flap their wings, the company was threatened with massive public fiasco in terms of their reputation and ability to continue business and to calm its shareholders. BP subsequently decided to be proactive and the GCCF was established to pay out the oil spill victims within a short period of time.

Although the GCCF has been criticized mainly for its lack of transparency, the facility was highly praised for its speed in processing the claims and getting the payment out for the oil spill victims. Reportedly, more than one million claims of 220,000 individual and business claimants were processed and more than \$6.2 billion was paid out from the fund from August 2010 —before it was replaced by the court supervised settlement program or the BP class settlement in June 2012.

⁴⁹⁷ See H.R. REP. NO. 242, at 66 (1989); 135 CONG. REC. H7962 (statement of Rep. Hammerschmidt); 135 CONG. REC. H7965 (statement of Rep. Lent); see also *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310-311 (E.D. Va. 1993) (suggesting that “[t]he purpose of the claim presentation procedure is to promote settlement and avoid litigation”) See Issacharoff & Rave, *supra* note 58, at 399.

Specifically, in terms of its performance regarding the cost efficiency criteria, it is certainly likely that the public litigation system was more costly in this case, incurring higher built-in transaction costs.⁴⁹⁸ Such costs-saving potential of the OPA's scheme may be seemed, at first glance, as a minor benefit, however, until one considers that the ratio between the administrative costs of the mass-tort litigations and compensations averagely stands around 2:3.⁴⁹⁹ More drastically, in some cases, the legal fees actually exceed compensation⁵⁰⁰—eating up substantial downward departure from the actual damages suffered by the plaintiffs.⁵⁰¹

Potentially, the OPA scheme should, at least in principle, work to the benefits of the oil-spill victims by facilitating speedy compensations, free from the deduction for lawyer fees, and other related litigation costs, as well as the time value of money or even any other forms of detrimental effects caused by the inherently prolonged system of public litigation. In addition, in terms of the victims' incentive, the lower costs of bringing the claims to obtain compensation should also help to alleviate the “rational apathy” problems, if any, significantly.

On the issue of compensation amounts, however, basing on the “peace premium” hypothesis, some commentators recently attacked the OPA regime on its ability to delivery finality

498 See, e.g., Stier, *supra* note 129, at 256.

499 See Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813, 820–21 (1989) (collecting studies).

500 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991)) (pointing out that the transaction costs exceeded the recovery in the asbestos cases by a 2-to-1 ratio). See Dodge, *supra* note 160, at 361.

501 See Dodge, *supra* note 160, at 349-350. (suggesting that statistically, the public aggregation system imposes substantial transaction costs that allows only \$1 of every \$3 spent by the defendant in litigation to reach the victims.); see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (“The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.” (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991))) ; see also David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1727 (2005) (suggesting that “on average, it costs approximately one dollar in legal expenses for the legal system to transfer one dollar from a defendant to a plaintiff,” even in settlement). See Dodge, *supra* note 160, at 349.

to the defendant and, accordingly, its failure to provide the claimants with “peace premium” (i.e. generous compensation offers made by the defendant to buy “peace” or closure from the claimants). Nevertheless, while the analysis on finality function can be extremely useful in providing behavioral insights and dynamics of mass claims settlement, via different types or possible designs of payment offers, the world might, however, not be that complicated.

In fact, even a straightforward utilization of one’s simple logic might help to explain such obvious “paradox”, i.e. the apparent greater amounts of compensation payments offered by the higher-cost regime of BP class settlement. To illustrate even at a basic level, for instance, since the two regimes were carried out longitudinally, it would not be logical to compare the two regime superficially in this sense, as we cannot “artificially construct the world without the GCCF”—i.e. more than 200,000 of claims were absorbed by the GCCF prior to the commencement of the BP class settlement.⁵⁰² Predictably, if only the GCCF was not subsequently replaced by the new BP class settlement regime, the amounts offered at the ‘imaginary’ latter stage of GCCF lifetime would have similarly been increased, naturally following the greater degree of the strength of the remaining unsettled claims.

Equally, while the “peace premium” concept may have some merits in general, by contextualizing the BP settlement within the “broader global litigation framework” however, it seems that for the case of BP, another possible real driver for its strategy resulting in such an apparent generous compensation offers might in fact, at least in part, turn out to be an extrinsic

⁵⁰² See Faure & Weber, *supra* note 71, at 140 (“It is interesting to notice that many of the critics of the GCCF were involved, either as attorneys or counsels for (some of the) claimants, which may undoubtedly have created some bias. Importantly, also from the settlement a certain proportion of individuals again opted-out. The value of the GCCF can only really be evaluated once all the settlements have been finalized, or rather can actually never really be evaluated because we cannot artificially construct a world without the GCCF”).

cause. In other words, such apparent generosity at that time might have been driven by BP's need to secure public regulatory closure, as observed by Dodge.

Precisely, therefore, part of the real *ex ante* motive in offering such peace premium might not have much to do with the suggested inferiority of the interim nature of the OPA's out-of-court regime. And in fact, paradoxically, relying on the merits of the "global peace" notion, the OPA regime, according to the courts, does not seem to explicitly prevent the use of second phase "finality" conditioning on the release requirement, provided, however, that other necessary conditions are satisfied to maintain a reasonable degree of fairness, and subject to evidentiary test for informed consent, for instance.

Rather, the proposed paradox of the apparent increase in generosity of the compensation offers might be partly explained by BP's need to prevent sanction or the bans relating to the future petroleum contracts with the US government(which could have devastatingly effect on BP's business), given the timeline of negotiations and the sudden change of its stance. As such, assuming that the GCCF were still active along the same timeline, the offers made under the "imaginary" phase of the GCCF might have also been increased in terms of generosity following the similar possible *ex ante* motive to secure public law closure as well as to attract the remaining stronger unsettled claims. And the evidence seems to suggest that the changes resulting in the increase in compensation were made to the GCCF's compensation methodology on the fly (e.g. the "multipliers" applicable to some marine species) even before it was terminated.

On balance, it is, however, not possible to know with certainty what actually happened behind closed doors—and indeed, all the outsiders may never know. But whatever the actual origins of the BP litigation strategy or the reason for the apparent "peace premium" offers are—either the

“finality” function under the private-law system of class action settlement or the wider public regulatory closure, or both contributorily—some settlement lessons can be drawn. Potentially, the main lesson in this respect is that: Just as private settlements can obtain a peace premium, public regulatory closure can also have disproportionate value such that it generates a settlement premium,⁵⁰³ albeit paradoxically reflected in the parallel settlement of the private-law regime.

Most importantly, as suggested, the superficial comparison between the two regimes in terms of the compensation rates in order to advocate the relative superiority of the public litigation system in terms of providing finality and, hence, greater compensations, can be problematic. Longitudinally, the BP class settlement came after the GCCF at a much later stage, and, indeed, because of the prior GCCF operation, BP had already received partial closure. Logically, therefore, due to such a significant overlapping—i.e. the astonishing number of claims that had already been absorbed or “finalized” under the GCCF—it is difficult to evaluate the relative performance of the two in terms of closure against each other discretely.

Even assuming that the finality function has some merits not only in general but also in the case of BP class settlement, the suggestion to abandon the OPA regime—especially by criticizing the Interim Payment concept because, according to the OPA sceptics, it might prevent closure—is, however, not justifiably admissible.

More precisely, in light of the interim-payment concept under the OPA regime, some advocates for OPA abandonment argue, among other grounds, that the interim-payment is an unanticipated defect of OPA’s attempt to incentivize private settlements, due to its inability to organize formal closure. More accurately, however, such a perceived inability to provide closure

⁵⁰³ See Dodge, *supra* note 160, at 369.

was not necessarily a design defect of the GCCF, but rather a function of OPA's statutory requirement that the responsible party must establish a process to pay claims for interim damages, without precluding remaining recovery for full damages. In effect, claimants could, legally, obtain "Interim Payments" from the GCCF for documented past losses as often as once per quarter without signing a release. Hence, more fundamentally, the presence of "interim payment" concept was undoubtedly for the interest of the oil-spill victims, even though it made it impossible for claimants to offer BP finality with any credibility.

Therefore, such inability to provide closure for the defendants was not necessarily a design defect of the GCCF, the purported lack of a closure strategy, as Issacharoff & Rave also explained, reflected an attempt to implement OPA's statutory intent.⁵⁰⁴ As such, focusing too heavily on the ability of a regime to secure closure for the defendant might create a danger of bypassing the foundational rationale of the interim payment concept in protecting the interest of the oil-spill victims with regards to the fairness and the right to full compensation.⁵⁰⁵

This OPA defense basing on a foundational objective of the fairness for the victims' compensation deserves a high weight, especially when the hypothesized linkage between the finality function and the alleged mutual benefit in terms of greater compensation amounts for the claimants can still be subject to uncertainty and other potential alternative explanations. Especially in the extreme case of BP, again, when one contextualizes this private-law settlement within a broader global litigation framework, one might see that some external factors leading to such apparent greater amounts of compensation offers might be at play. More ascertainably, therefore,

504 See Issacharoff & Rave, *supra* note 58, at 423-424

505 For a more complex discussion on the concept of fairness, see Kaplow & Shavell, *supra* note 460, at 967 ("In the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice").

at least in light of the US experience, the more serious problems associated with the out-of-court approach of oil-spill compensation are the problem of transparency and fairness, and less on the finality function. And these more fundamental problems existing within the US' design of the out-of-court regime should be addressed in the developing of the design for the new legal framework for Thailand, to prevent a similar problems potentially experienced by the victim of the Gulf Oil Spill 2010 and , most relevantly, the spill victims of the Rayong Spill 2013.

Besides, while it might be generally plausible to assume that the private claims facilities have a limited capacity to provide closure for corporate defendants, these facilities might, nevertheless, provide an informal closure, depending the relevant circumstances of each case that could incentivize both parties into such direction, such as business interests, for example. Indeed, a number of private mass claims experiences have shown that corporations sometimes offered “super-compensation” even beyond the best possible result available in the litigation and even in the class-action settlement that followed it, as previously illustrated by the Hyundai example. Ultimately, in light of the behavioral approach and business incentive, there is “a shifting view of the necessity of achieving complete “closure” through a single mechanism.”⁵⁰⁶

Potentially, therefore, certain instances evidenced that the private mass claims settlements, even when they were unilaterally designed by the corporate dependents, could also offer super-compensation—which can be even more generous than those available under the relevant laws—given the inherently flexible nature of these regimes.⁵⁰⁷ Relatedly, another example of the

506 See Greenspan & Brooks, *supra* note 472 (“By turning to a “self-help” type of claim resolution program, companies can achieve a significant measure of peace relatively quickly. Even if the program resolves only a portion of the potential litigation, the company can succeed in substantially reducing the scope and number of participants in litigation”).

507 Such flexibility of the relatively informal regimes under the OPA framework can also be seen in terms of the defendant’s approach to the fund structure. Arguably, the GCCF’s structure, even though it was formally structured as a fixed fund, created very different incentives and efficiencies than Rule 23 fixed funds. See Dodge, *supra* note

flexibility can also be in terms of avoiding certain formal procedural barriers to rapid compensations for the spill victims. For instance, the private claims facilities under the OPA framework can be created immediately after the incident, and, can be available for most victims of oil-spill catastrophes without the need for judicially-approved class certification, which can be a painfully time-consuming process, given the complex nature of oil-spill litigations.

Psychologically, a rapid claims resolution facility enables the parties to resolve issues of liability for damages and compensations, without waiting for the time-consuming process. If the victims can be compensated rapidly, and, also fairly, the trauma on affected communities caused by prolonged litigation would largely be alleviated.⁵⁰⁸

Ambitiously, “OPA was intended to prevent a downward economic cascade by bringing a quick infusion of cash to the afflicted community”—reflecting a “congressional preference for informal private dispute resolution over litigation in the public court system.”⁵⁰⁹ Equally ambitious is to answer the key remaining question: how to strike an appropriate balance between efficiency and fairness in designing the new legal framework for Thailand, given the specific context of the Thai problems primarily, as well as some lessons learned from the U.S. experience. The next

79, at 1280-1283(The GCCF’s structure did not require the investment of resources prior to settlement. The Fund was given substantial resources that currently appear to far exceed the actual damages it is meant to secure, and, were the Fund to become insolvent, uncompensated claimants could avail themselves of the default litigation system. This largesse was possible because the residual of the Fund reverts to BP, and because the payments to the Fund are structured longitudinally, allowing BP to fund the GCCF with future revenues. This allowed the Fund to be created while the oil spill was still ongoing—a result that would be highly improbable under the traditional fixed fund class settlement, given the fiduciary obligations of class counsel. Thus, although disapproved under the traditional Rule 23 structure, an opt-in early settlement fund can utilize a BP-style fund structure to deliver compensation much more quickly than traditional settlement funds.)

508 See generally *The Exxon Valdez Disaster: Readings on a Modern Social Problem* (J. Steven Picou, et al., eds., 1997) (collection of articles focusing on the spill as a systemic “technological disaster” and describing the ecological, economic, social, cultural, and psychological impacts); Sharon K. Araji, *The Exxon Valdez Oil Spill: Social, Economic, and Psychological Impacts on Homer* (1992).

509 See Issacharoff & Rave, *supra* note 58, at 399.

chapter will provide the answer for this key question, in an attempt to build a new framework for Thailand.

After all, the discussion on the finality function in this part with regards to the dynamics of mass claims settlements can also help the designers of payment structures to see, at least, the expected corresponding settlement behaviors from the claimants side, with regards to different types of payments options. Rather than translating it into a ground for abandonment of the OPA approach of out-of-court rapid compensation regime, the global peace concept should, at best, be used, instead, as a ground for allowing the would-be defendants to utilize a subsequent phase of compensation structure to achieve some finalities, as recognized by the courts, provided that some necessary conditions to guarantee fairness in the use of release requirements are fairly and adequately established, allowing not only the defendant to achieve some closure but also the victims to move on to the next chapter of their life.

At a highly level of technicality, if the purported need for certainty for defendant was utmost necessary, as claimed, in order to prevent holding back of money, as argued by some, one might imagine trying to utilize the two-separate phases structure of the compensation design, for instance, to make Phase 1 as chance to obtain, roughly, a default list of potential participants, while Phase 2 might be conversed, roughly, to an “opt-out” system. Although, it might not be a perfect substitute for the official opt-out system of the class action regime, and the precise design to put this broad strategy into effect might be overly complicated, nevertheless, with a much smaller probable scale of future oil spill impacts like in the case of Thailand, such ambitious strategy might be reasonably obtainable. After all, the need for such certainty for the defendant, as discussed previously, might, nevertheless, be outweighed by other fundamental values in order to protect the victims’ interest in the first place.

At a policy level, the discussion in this part can also provide a deeper understanding or some technical implications for the designer of the new legal framework or payment structure, supplementary to other common issues such as fairness and legitimacy. More correctly, the discussion on the defendant's demand for finality should not actually be used as a ground for abandon the OPA framework, but in fact, merely as a support for the notion of fairness, in that if the defendant want closure, they simply need to offer a fairer amount of compensation.

Hence, it should be desirable, not only for the macro-policy designers to increase fairness in the design of the new legal framework to protect the interest of the oil-spill claimants, but also for the responsible party itself to increase the degree of fairness in the design of their compensation offers to ensure that they will achieve, more or less, substantial closure, preventing the other related costs of undesirable ongoing litigations. As such, more appropriately, the finality function narrative should act as the incentive for the responsible party to improve fairness in the design of their compensation structure, rather than as a ground for abandoning the out-of-court regime, destroying the victims' chance to rely on other benefits offered by this alternative regime, like advocating an undesirable all-or-nothing approach.

CHAPTER 4 BUILDING A NEW FRAMEWORK FOR THAILAND

4.1 INTRODUCTION

As Chief Justice of the United States Warren E. Burger noted in an address to the American Bar Association in 1970: “*inefficiency and delay will drain even a just judgment of its value.*”⁵¹⁰ As such, while the highest possible degree of procedural fairness can be achieved under the traditional system of the public litigation, the time-consuming nature of the formal process can, in a sense, be a form of unfairness itself and not merely just inefficiency.

When public litigation is in response to a major and complex case of oil-spill disaster as a system of mass claims resolution, its psychological effects on the oil-spill victims and the coastal communities can be more severe, due to its painfully time-subsuming nature. Social scientist Dr. Steven Picou asserts that in the communities affected by the oil-spill catastrophe, “the legal system itself can become a *secondary disaster*, exacerbating and prolonging psychological stress and perceived community damage.”⁵¹¹ Dr. Picou described this phenomenon as the “corrosive community” which relates to certain characteristics displayed in coastal communities socioeconomically affected by oil spill incidents—including “a loss of trust in civic institutions, group conflict, mental health problems, and deteriorating social relationships”.⁵¹²

Even though the terms “corrosive community” was derived from a study conducted in the US context, a similar narrative of miserable experiences had often been displayed in the Thai media

510 See Burger, “*What's Wrong With the Courts: The Chief Justice Speaks Out*”, 69 U.S. NEWS & WORLD REPORT 68, 71 (1970).

511 See Picou, *supra* note 48, at 1515.

512 *Id.* at 1494. (“Although many factors have been identified as contributing to the emergence and persistence of corrosive communities . . . none are as debilitating as litigation processes that typically ensue to redress environmental, economic, social, and psychological damages.”); see also Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL., PUB. POL'Y & L. 880, 881 (2000).

in the aftermath of the Rayong spill. Repeatedly, in many interviews, the victims of the Rayong Spill expressed their sufferings both in terms of the immediate financial difficulties caused by the oil spill itself, and the follow-on social problems—either at the level of family or community—caused by the manner in which the compensation regime was carried out in Thailand.

To some degree, while the broad nature or categories of economic losses suffered by the victims of the Gulf Oil spill and the Rayong Oil Spill are generally similar as a matter of fact—especially in terms of the losses of earnings and subsistence use; the ways in which the impacted populations were treated under the compensation regime operated in the two countries are substantially different. Although, the compensation regime carried out by BP under the OPA statutory framework is not a flawless experience, the story of the Rayong spill compensation regime can, in a sense, be described as a mess, subjecting the victims to an unprecedented experiment in the absence of any comprehensive guidance or legal framework.

The aim of this Chapter is to develop some crucial recommendations as a foundation for building a new comprehensive framework for Thailand, that should strike a better balance between efficiency and transparency, albeit, suitable for the Thai context. To this end, the following discussion in this Chapter will proceed into four Parts. The first part will begin by examining the legal environment in Thailand in order to illustrate why the current regime of Thai laws might not be adequate in providing an effective legal framework for compensating the oil-spill victims suffering economic loss. After having explained such an inadequacy in the first part and, hence, establishing the need for a new legal framework as evidenced by the Rayong spill experience in particular, the second part will, subsequently, propose some crucial recommendations as a foundation for developing a new legal framework which should strike a better balance between efficiency and fairness, taking into account the specific context of Thailand. Next, to provide an

even more complete picture of this mission at an implementation level, the third part of the Chapter will offer some useful considerations with regards to the possible designs of the claims facilities model in light of this new legal framework. Ultimately, the final Part of the Chapter will proceed to provide some concluding remarks on the recommendations for the new legal framework, including implications of the new regime as an alternative to litigation system.

4.2 THE CHALLENGE OF THE OIL SPILL CASE AND THE INADEQUACIES OF THE THAI LEGAL REGIMES

The Rayong oil spill in 2013 exposed some *degree* of inadequacies, if not a complete failure, of the existing legal regimes in facilitating the economic-loss compensation to be rapidly paid to affected victims, while, at the same time, safeguarding a reasonable degree of fairness. The discussion in this part will examine the existing legal environment in Thailand, from general to specific areas of laws, significantly relevant to the compensation for economic injury caused by oil-spill incidents and explain why that might be the case.

4.2.1 THE LENGTH OF THE LITIGATION PROCEDURES.

In general, in term of the length of the court procedures, after the complaint is filed and accepted by the court, the defendant has 15 to 30 days from the date of service to file its answer to the complaint and any counterclaim, where extensions of 15 to 30 days are typically permitted upon application to the court.⁵¹³ If the defendant files a counterclaim in time, a court officer serves it on the claimant, and the claimant also has 15 to 30 days to file an answer where extensions are

513 See Dispute Resolution Guide 2016, *supra* note 46.

often available.⁵¹⁴ Then, the court schedules a hearing at which the issues in dispute are settled, although the court will encourage the parties to mediate the dispute, and, therefore, one or more mediation hearings may be scheduled.⁵¹⁵ The mediation hearings are likely to be scheduled within a few months of the settlement of issues hearing, but the trial hearings may be scheduled eight months to a year later.⁵¹⁶ In effect, the average length of time from filing a complaint until the time when the court of first instance's decision will be delivered is approximately 12 to 18 months.⁵¹⁷

In addition, similar to other jurisdictions, all judgments of the court of first instance can be appealed to the Court of Appeals, where, subsequently, the Court of Appeals' decision can be appealed to the Supreme Court, although only after they submit a petition, together with the appeal, to the Supreme Court, requesting permission to appeal the Court of Appeals' judgment.⁵¹⁸ The petition will be considered by a panel of judges appointed by the president of the Supreme Court, and the Supreme Court will allow the case to be appealed to the Supreme Court if the issue of the case is significant and deemed worthy of the Supreme Court's consideration—such as the matter is of public interest, there is no precedent regarding the issue, or determination of the issue will benefit the development of the law's interpretation.⁵¹⁹ Ultimately, it is not uncommon that it can take more than 10 years before the case can be finalized by the Supreme Court's decision. To illustrate by one of the most similar cases in terms of pollution-related litigation, where the in-land small canal was polluted, it takes 14 years before the Supreme Court could finally award compensation for the affected 8 plaintiffs.⁵²⁰

514 *Id.*

515 *Id.*

516 *Id.*

517 *Id.*

518 *Id.*

519 *Id.*

520 Case No. 15219/2558 [2015] Supreme Court (Thai.).

Compared the average length of the litigation procedure with the case of the 2013 Rayong Spill compensation program, where it took only 13 days after the spill to start paying out the compensation to the spill victims, the decision of the court of first instance in the Rayong case was delivered in August, 2016,⁵²¹ and is currently still pending for the Court of Appeals decision.

Giving also the unique nature of the case, at least this case is the first case law dealing with the oil spill incident and damages in the Thai legal history, if the parties do not satisfy with the Court of Appeal's ruling, the case is likely to be accepted and heard by the Supreme Court potentially on several grounds— “the matter is of public interest, there is no precedent regarding the issue, or determination of the issue will benefit the development of the law's interpretation”.⁵²² As such, it can potentially take long before the compensation will ultimately be paid to the victims by the virtue of court litigation.

In addition, from the US experience, it might also be possible that the oil spill defendant may use the delay tactic. In the context of the EXXON Valdez litigation, for instance, some commentators argue that Exxon designed its delay tactics because it realized it could earn money by investing rather than paying out the damages.⁵²³ As one commentator suggested: “Delaying the conclusion of the litigation process can be beneficial to a wealthy defendant because it can wear down the plaintiffs and encourage them to settle for less than the full amount in order to avoid further delay”.⁵²⁴

521 Case No.Sor.Vor. 9/2559 [2016] Court of First Instance (Thai.).

522 See Dispute Resolution Guide 2016, *supra* note 46.

523 See Jenkins & Kastner, *supra* note 346, at 210-211.

524 *Id.* (“In the future, courts should pay close attention to this problem and require the defendant to place the money in escrow so as to eliminate any question of impropriety and also to ensure that defendants cannot profit from their money in the meantime. Although this may not be legally required, it does seem within the best interest of public policy. It is simply inappropriate for an environmental polluter to appear to profit in this way”.)

On balance, as we can see both from the U.S. and the Thai experiences, the oil spill catastrophe can have particularly pronounced impact on socioeconomically disadvantaged populations of the coastal communities,⁵²⁵ including the individuals providing small-scale tourist services and especially the local fishermen whose ways of life have been heavily depended on the condition of the marine environment. As such, long delays between economic harm and compensation as well as the manner in which the compensation processes are carried out can further injure these already-burdened victims.⁵²⁶

In some ways, the fast track regime under the OPA framework, while is far from flawless, can be seen as revolutionary, especially to those who had watched the painfully protracted, 20-year claims process for the 1989 Exxon Valdez tanker spill off the coast of Alaska. In the Exxon case, after a jury awarded the plaintiffs \$5 billion in 1994, Exxon spent nearly 20 years appealing the judgment, consequently, by the time the payments from that judgment began in 2009, 6,000 of the original 32,000 plaintiffs were dead.⁵²⁷

4.2.2 THE NEW CLASS-ACTION LAW IN THAILAND

Another relevant procedural context is that the new class action that has just been introduced in Thailand, which could be potentially relevant to the context of mass claims resolution in response to the future oil spill disasters. On 8 April 2015, the Act to Amend the Civil Procedure

⁵²⁵ See generally Osofsky et al., *supra* note 56, at 149-50.

⁵²⁶ See *id.* In the context of BP, see also Osofsky et al., *supra* note 56, at 149-50 (“To the extent that plaintiffs who are low-income or persons of color win monetary settlements or at trial, this compensation may alleviate some harms incurred by the BP Deepwater Horizon Oil Spill. On the other hand, long delays and eventual losses may strain an already-burdened population”).

⁵²⁷ See Katy Reckdahl, *Five Years After the Deepwater Horizon Oil Spill, BP’s Most Vulnerable Victims Are Still Struggling*, THENATION (Apr. 15, 2015), <https://www.thenation.com/article/five-years-after-deepwater-horizon-oil-spill-bps-most-vulnerable-victims-are-still-st/>.

Code (Number 26) B.E. 2558 (the “Class Action Act”) was published in the Royal Gazette and has become effective since 8 December 2015.⁵²⁸ This 14-year-long amendment project was supported by the U.S. Agency for International Development (USAID).⁵²⁹

The Thai class action law is largely based on U.S. class action law, albeit with certain exceptions.⁵³⁰ Nevertheless, unlike the US where the rich body of jurisprudence of class-action law has been established, without the availability of class-action jurisprudence delivered by the Supreme Court of Thailand, it would be difficult to see the precise effect of the class-action lawsuits in the context of oil-spill litigation. On balance, this class action law represents the paradigm shift of legal landscape, providing a new procedural vehicle for the plaintiff in mass claims under the Thai litigation system, potentially increasing the risk of mass claims litigations to oil-spill responsible parties .

Unlike the Thai context, the US class action system already has a rich body of cases, and have played an important role even in the case of the BP oil spill class settlements.⁵³¹ As previously discussed in Chapter 3, some commentator even attacked the OPA regime on its ability to measure up with the class settlement in terms of securing legitimacy and delivering finality. Despite this,

528 *Class Action Regime: A new legal landscape for Thailand and its potential impact on business*, BAKER & MCKENZIE (Aug. 2015), <http://bakerxchange.com/rv/ff00212a5a0bfcfe6b741ab8ab45acbed2fd59ae/p=0>.

529 Chukiert Rattanachaichan, *A Primer on the Thai Draft Law on Class Action*, <http://www.aseanlawassociation.org/9GAdocs/Thailand.pdf>, at 4.

530 *Id.*

531 For instance, while the class action law has just arrived in Thailand, the US class action law, is, arguably under assault following a number of recent court decisions. See Issacharoff & Rave, *supra* note 58, at 428-429 (“While the class mechanism proved effective in the Deepwater Horizon context, the broader prospects for such class resolutions remain unclear. Class actions are under significant assault. Again and again in recent years, the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries. The pullback began with *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* and their restrictions on mass tort class action settlements. From there, the Court has introduced heightened requirements of “commonality” of claims under *Wal-Mart Stores Inc. v. Dukes* and has allowed mandatory arbitration requirements to close out class treatment of even identical consumer claims under *AT&T Mobility LLC v. Concepcion* and its progeny. The result is a pressure to find alternative means of effectively resolving mass disputes at a wholesale level outside of the courtroom.”).

while the legitimacy ground of the critic seems to be similarly strong, the finality ground might be even substantially less problematic for the oil spill cases in Thailand.

Apart from other proposed possible counter-arguments to the critic of the OPA regime on the finality function basing on the US experience, as discussed in Chapter 3, the problem of finality or closure is also less problematic for the case of Thailand, largely because, geographically and practically, the feasible magnitudes of the Thai spills would be unlikely to cause as devastating damage as the extreme case of the Gulf Oil Spill where more than 200,000 victims were involved. To further illustrate, precisely, the magnitude of the Rayong Spill, as the most devastating oil spill incident in the Thai history involved only 13,200 gallons of crude oil leaking into the Gulf of Thailand.⁵³² On the contrary, the magnitude of the 2010 Deepwater Horizon Oil Spill involved 206.2 million gallons of crude oil pumping into the Gulf of Mexico.⁵³³

Arguably, in the case of Thailand, given relatively smaller sizes of potential magnitudes of the oil spill, if the compensation program was reasonably regulated and fairly designed to increase legitimacy, the closure might even be achieved under the out-of-court regime, even, retrospectively, in the case of the Rayong spill. Thus, if the problem of legitimacy can be improved, the new regime should be a good alternative to the litigation in the Thai context, whereas the problem of finality might be less relevant in practice.

On balance, while there is a big gap of legal development in some areas of law,⁵³⁴ it should, more or less, be useful for Thailand to keep an eye on the lessons provided by the US system while

532 See Thailand's Civil Society Statement, *supra* note 33.

533 Geographically, the two regions seem to have a significantly different capacity with regards to the upstream petroleum production and discovery as well as volume of transportation.

534 For example, apart from the fact that the class action law is still relatively a new topic in Thailand, the issue of punitive damage has also not been raised up in the Rayong case, due to the unavailability of such type of damage

still waiting for its own jurisprudential development, not for the purpose of direct legal transplant, but for learning the experience and see how they could be relevant to the Thai problems, given the specific needs and context of Thailand.

4.2.3 THE INEFFICIENCY OF THE EXITING THAI LAWS SPECIFICALLY RELEVANT TO CONTEXT OF COMPENSATION REGIMES FOR ECONOMIC LOSSES CAUSED BY THE OIL-SPILL INCIDENTS.

To begin with, clearly, unlike the U.S. regime, there is no legal framework or comprehensive guidance for setting up an out-of-court claim facilities to provide rapid compensation to the economic loss in the context of oil spill disaster under the current Thai law.

Historically, in terms of the laws addressing the environmental litigations, there was no one codified piece of legislation governing the environmental lawsuits specifically until 1975—when the Enhancement and Conservation of National Environmental Quality Act (ECNEQ) was

under Thai laws in general (except for the new product liability law which was enacted as a *lex speclis* law). By contrast, in the US oil spill context, the development went as far as reaching the creation of the class wide punitive damages. See e.g. Catherine M. Sharkey, *The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence*, 64 DEPAUL. L. REV. 681, 710 (2015) (“ In the course of the multidistrict litigation, Judge Barbier made a key ruling that a significant portion of the oil spill victims would be able to pursue punitive damages claims against BP and its codefendants. Thus, even after the comprehensive class action settlement with BP, many victims retained punitive damages claims against codefendants Halliburton and Transocean Ltd. (Transocean) - including BP's own punitive damages claims against its codefendants (which it assigned to the plaintiff class in the settlement), as well as a portion of the class's reserved direct punitive damages claims against the codefendants. Differences among subgroups of plaintiffs in terms of their eligibility for punitive damages likely influenced the settlement negotiations between the parties.”). To illustrate, the Halliburton Energy Services, Inc. (HESI) Punitive Damages Settlement Class includes , for examples, commercial fishermen and charter boat operators that were in business at any time between April 20, 2009 and April 18, 2012 and individuals that fished or hunted in specified areas and depended on their catch for subsistence, barter or trade. In future, the policy makers might study whether the approach of punitive damage can be useful in the context of oil spill liability, especially in terms of its implication on the out-of-court settlement. This process is similar to the time when Thailand decided to adopt the punitive damage concept for the product liability law, albeit with some limitations specifically suitable for the Thai context. See The Liability for Damages Caused by Unsafe Goods Act B.E. 2551 (2008) (the “Product Liability Law”)(Thai.).

enacted.⁵³⁵ This Act of Parliament is the first law directly dealing with the environment and pollutions liability in general.

Accordingly, with regards to the current regime of Thai laws, the most immediately relevant law addressing the oil spill problems in terms of the polluter's liability is Section 96⁵³⁶ of the current ECNEQ (1992), along with Section 420⁵³⁷ and Section 437⁵³⁸ of the Civil and Commercial Code of Thailand B.E. 2466(1923), in respect of the liability for wrongful acts.⁵³⁹

535 See Ruangsri, *supra* note 54, at 2-3.

536 With regards to Civil Liability, section 96 of the ECNEQ 1992—being the most relevant provision to oil spill liability for non-governmental or private claims for economic loss under the existing regimes— in Chapter V of the Act, employed the notion of strict liability in order to hold a person liable to pay compensation for damages as a result of a leakage or contamination caused by any point source of pollution, regardless of whether such leakage or contamination is the result of willful or negligent act of the owner or the processor thereof. Section 96 states in full as follows :

Section 96 states in full as follows :

“Section 96

If leakage or contamination caused by or originated from any point source of pollution is the cause of death, bodily harm or health injury of any person or has caused damage in any manner to the property of any private person or of the State, the owner or possessor of such point source shall be liable to pay compensation or damages therefor, regardless of whether such leakage or contamination is the result of a willful or negligent act of the owner or possessor thereof, except in case it can be proved that such pollution leakage or contamination is the result of

(1) Force majeure or war.

(2) An act done in compliance with the order of the Government or State authorities.

(3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the leakage or contamination.

The compensation or damages to which the owner or possessor of the point source of pollution shall be liable according to the foregoing first paragraph shall mean to include all the expenses actually incurred by the government service for the clean-up of pollution arisen from such incident of leakage or contamination.”

537 In Thailand, the oil spill victims who suffers economic loss may have a private cause of action in general tort law under the Civil and Commercial Code of Thailand B.E. 2466(1923). Section 420 of the Code implemented the fault-based liability approach, where the plaintiff has the burden to prove the defendant's intention or negligence in causing the injury suffered by the plaintiff. Section 420 states as follows: “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.”

538 Section 437 states in full as follows: “A person is responsible for injury caused by any conveyance propelled by mechanism which is in his possession or control, unless he proves that the injury results from force majeure or fault of the injured person.”

539 This can be illustrated by the decision of Court of First Instance's ruling on the Rayong Spill Case delivered in August 2016. See Case No. Sor.Vor. 9/2559 [2016] Court of First Instance (Thai.).

While the private law remedies also play a significant role in environmental law, and the relevant provisions of the Thai CCC have been served as a basis for adjudicating most the pollution cases alongside the section 96 of the ECNEQ 1992,⁵⁴⁰ the Thai judiciary has expressed a common concern that the nature of environmental law cases significantly differs from other civil-law cases in general, explaining the reason for such concern as follows:

“[T]he act or the violation committed causing damage to public domain natural resources not personally belonging to any individual, affecting on the livelihood of large number of people in society, requiring experts to prove damage and taking time to materialize.”⁵⁴¹

According to the Justice of the Supreme Court of Thailand, compensation claims caused by the damage to environment can be highly complex when private individuals become a party to an environmental case after their economic interest was affected by the industrial pollutions.⁵⁴² Among other things, these litigations are complex because: first, the harm is often difficult to be assessed in economic terms and, second, the existing procedural rules employing adversary fashion for civil proceedings, while was originally intended to protect private rights and provide a dispute resolution mechanism, are not suitable for providing equality when adjudicating such type of disputes, and create more problems and difficulties to the parties and the Courts.⁵⁴³ In addition, a Supreme-Court study also suggested that, in a Thai perspective, high litigation costs – court fees or trial expenses as well as lawyers’ fees – provide a significant disincentive against litigation initiated to protect environmental interest of the local communities:

⁵⁴⁰ See Ruangsri, *supra* note 54, at 3.

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 7.

⁵⁴³ *Id.*

*“The economic imbalance between the parties may be reinforced by the fact that most affected people are usually poor and lack of financial resources.”*⁵⁴⁴

Clearly, in light of public litigation regime, the judicial clarification on how the issue of economic losses as claimed by the plaintiffs in the oil-spill context should be systematically analyzed under the relevant provisions of the existing laws (i.e. the judicial guidance) is largely inadequate.⁵⁴⁵ More inefficiently, the litigation process, while presumably capable of allowing the best degree of procedural fairness, is painfully time-consuming, where it could take longer than 10 years before the case can reach the Supreme Court’s decision and the victims can ultimately get compensated. As such, whereas the highest possible degree of procedural fairness is undeniably and ideally desirable and which might only be achieved under the litigation system, the time-consuming nature of the formal procedure, can , under oil-spill context, be a form of unfairness itself and not, just a mere inefficiency.

Again, as Chief Justice of the United States Warren E. Burger noted in an address to the American Bar Association in 1970: *“inefficiency and delay will drain even a just judgment of its value.”*⁵⁴⁶

4.2.4 PUSHING THE OIL-SPILL VICTIMS TOWARDS THE OUT-OF-COURT REGIME WITHOUT A CLEAR AND FAIR GUIDANCE

⁵⁴⁴ *Id.*

⁵⁴⁵ A number of governmental and Judicial Reports as well as a number of Thai legal scholars—such as the National Reform Council Report on National Reforms Agenda no.6 concerning Environmental Courts and Litigations (2015) and the Academic Document for “the Program for Senior Executive on Justice Administration Batch 14 National Justice Academy”, Office of Judiciary (2010)—have provided a similar analysis on the problem and the limitation of section 96 and the general tort law in relation to the recoverability of economic loss damages or loss of earnings suffered by private parties in the context of pollution litigations, both in terms of the law and, in terms of the judicial interpretation.

⁵⁴⁶ See Burger, *supra* note 510, at 71.

On balance, it can be seen that the existing regime of Thai laws is relatively ill-equipped to cope with the unique nature of compensation for economic injury suffered by the fishermen and other coastal businesses, especially in terms of the time consuming nature of the litigations given the inherent complexities both as a matter of facts and laws, surrounding the oil-spill incidents.

With regards to the pollution litigations, the former President of the Supreme Court of Thailand has also expressed the concern about the uniqueness and complexities of these types of litigations as contained in the Supreme Court's guidance addressed to the judges at the lower courts. This official guidance stated that the disputes concerning pollutions and ecosystem usually involve interdisciplinary approach, necessitating the judges to be well prepared to deal with multiple experts and complex scientific evidence.⁵⁴⁷ Interestingly, the guidance from the Supreme Court also encourage the use of Alternative Dispute Resolutions (ADR) such as the settlement of disputes outside the court presided over by the relevant experts as the main method for resolving the pollution cases, hopefully to render the outcome in a more reasonable timeframe.⁵⁴⁸

In the wake of the Rayong Spill 2013, the Thai government also similarly encouraged the oil-spill victims to negotiate directly with the PTTGC rather than filing lawsuits against the company in the court. To illustrate, the then Energy Minister urged people affected by the oil spill to negotiate with PTTGC for compensation instead of resorting to the public litigation, emphasizing that “negotiation is a better option...lawsuits could take more than three years to run their course”, and the company has also “admitted full responsibility”.⁵⁴⁹ Equally, the then Minister of Transportation, as the head of the Prevention and Elimination of Marine Pollution

⁵⁴⁷ This official Guidance provided by the Justice of the Supreme Court of Thailand was published in the official Gazette on April 29, 2011.

⁵⁴⁸ *See id.*

⁵⁴⁹ *See Plodprasop says foreign help needed to contain spill Deputy PM vows PTTGC 'will pay' for Samet spill*, BANGKOK POST (July 31, 2013, 12:28 AM), <http://www.bangkokpost.com/print/362243/>.

Caused by Oil Spill Committee,⁵⁵⁰ also added that he personally did not want to see lawsuits for oil-spill compensations, if all affected parties could talk with PTTGC, then lawsuits might be avoidable.⁵⁵¹

In the same direction, the PTTGC's executive in expressing the promise or commitment to full compensation that would be paid quickly to victims of the oil-spill disaster, suggested the oil-spill victims similarly that lawsuits against the company would entail a time-consuming procedure before the victims could receive full compensation.⁵⁵² As such, in the company representative's words, "it would be better if we could talk together".⁵⁵³

Given this apparent consensus on the desirability of the out-of-court rapid compensation regime, where the victims themselves had also strongly expressed their need for expeditious compensations,⁵⁵⁴ to simply push the victims towards a new kind of unprecedented out-of-court regime without establishing an appropriate legal framework to protect the victims' interest would be irresponsibly unfair. Put in other words, the remedy for these already socioeconomically injured victims should not be left largely in the hands of the would-be defendant, relying on the company's level of integrity or CSR, as well as the ad-hoc supervision by some urgently assigned officials. This problem is crucial especially when the issue of public trust⁵⁵⁵, and, consequently, the victims'

550 This committee is directly responsible for the incident under the NEQA 1992, and under the Thai governmental structure, the Marine Department is subordinate to the Ministry of Transportation.

551 See Pongphon Sarnsamak, *PTTGC pledges quick compensation for affected businesses*, NATIONMULTIMEDIA (Aug. 3, 2013), <http://www.nationmultimedia.com/news/business/EconomyAndTourism/30211782>

552 *Id.*

553 *Id.*

554 Undoubtedly, the fishermen and the costal businesses suffering drastic economic impacts of the oil spill would also want to receive compensation from the responsible party as soon as possible, as expressed to the media.

555 This issues have been expressed many times whenever the media interview the victims of the Rayong spill, and can also be seen from the signs attacking the role of the provincial authority carried by the protesters in Rayong. For an illustration, see Wasant Techawongtham, *Oil spill panel fails to win over public trust*, BANGKOK POST (Aug 30, 2013), <http://www.bangkokpost.com/print/367086/>.

right to fair compensation, were put in peril in the context of the out-of-court compensation program following the Rayong Spill in 2013.

In brief, there is a pressing need for a new legal framework to ensure that, while the new regime would provide a greater degree of time and cost efficiencies, it should, at the same time, uniformly guarantee, at least, a reasonable degree of fairness for the oil-spill victims.

Regrettably, the Rayong Spill case unavoidably had to be a test case for out-of-court compensation regime without any appropriate standing legal framework to ensure the reasonable degree of legitimacy and fairness, given the unprecedented nature of such catastrophe and the need for urgent compensation for the oil-spill victims. In response to the future oil spill incidents, however, there should be no justifiable excuses and Thailand should establish a clear legal framework to appropriately regulate and provide a minimum guidance for the oil-spill compensation regimes in order to preserve a minimum uniform balance between the goals of efficiency and fairness.

4.3 THE PROPOSED RECOMMENDATIONS: THE NEW LEGAL FRAMEWORK

Taking into account all the potential problems in terms of the inadequate performance, either legal or governmental, of the existing Thai regime, evidenced by the problems manifested in the aftermath of the Rayong Spill 2013, as well as the lessons learnt from the U.S. experience as the country with one of the most comprehensive legal frameworks on the claims facility specifically for handling oil-spill compensation, this part will propose some important recommendations that should be included in the new legal framework.

Indeed, while there are some benefits especially in terms of efficiency offered by the US OPA framework, it would be undesirable to simply import the U.S. approach directly and turn a

blind eye to the specific needs or relevant circumstances of the Thai context. Even in the US context itself, by overemphasizing efficiency and rapidity in resolving mass claims, Congress might have impaired, either intentionally or unintentionally, the balance between the dual goals of efficiency and fairness as reflected in some aspects of the BP's compensation scheme, i.e. the GCCF. Arguably, given the formal and informal connection between the PTT and the Thai government or, allegedly, some politicians,⁵⁵⁶ the Thai experience might even suggest a need for an even higher degree of transparency, especially in terms of additional supervision to provide checks and balances. At the same time, any suggested forms of greater control or supervision should avoid additional costs and the loss of the advantage of speed unnecessarily.

As such, to fully appreciate the advantages of an alternative out-of-court system of compensation for oil-spill victims, a careful design of the new legal framework is of crucial importance. To this end, this section will propose some important recommendations for building a new legal framework for Thailand to create a fairer and more efficient regime to resolve claims of victims for economic injury caused by the oil spill incidents.

4.3.1 A CHANCE TO MAKE A DUTY TO SET UP A CLAIMS PROCEDURE A STATUTORY DUTY.

Although, regardless of the criticism of legitimacy and fairness, the PTTGC should be praised for voluntarily taking a responsibility to compensate the victims and for starting to pay out within a relatively short time. The oil spill incident started on July 27, 2013 and the first date when the compensation was paid to the claimants was on August 10, 2013—only 13 days after the spill. Despite this, the compensation system should not entirely rely on the responsibility or the integrity

⁵⁵⁶ At least formally, the Ministry of Finance is the largest shareholders (51.1%) of the PTT Public Company Limited. PTTGC is a subsidiary of PTT Public Company Limited, regardless of the personal conflict of interest in terms of individual politicians frequently alleged by several commentators in general.

of the future wrongdoers. Presumably, if PTTGC decided not to offer the rapid compensation program, the 2013 oil spill victims would not have been compensated at least until August 2016 when the court of first instance could deliver the opinion on the amount to be legally awarded. This scenario could lead to even more drastic flow-on damages driving some victims out of their businesses, forcing them to change their ways of life.

In fact, this statutory duty will also help to set a correct tone of the situation. As one of the former human right commissioners reminded the oil-spill victims, the victims have the legal right to be compensated and it was not the case of charity or CRS. As such, the new legal framework should clearly prescribe, in the similar fashion as the OPA language, that the responsible party shall have a statutory obligation to establish a procedure for the payment or settlement of a claim for interim, short-term damages.

In relation to the imposition of such statutory duty, the new legal framework should also clarify the status of the compensation paid by the responsible party in order to better emphasize the claimants' right to receive full compensation. More precisely, the new legal framework should set out clearly that where such payment represents less than the full amount of damages to which the claimant ultimately may be entitled, such payment shall not preclude recovery by the claimant for damages not reflected in such payment. In other words, the new legal framework should also clarify that if the claimant is paid only for interim, short-term damages, the claimant retains the right to recover further damages in the future. Similarly, in the case of payment for final damage, the effect of such final payment should also be clearly stated, by explicitly specifying that such final payments shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under any other law. In effect, these proposed provisions are in line with the OPA provisions as discussed in Chapter 2.

Another point which similarly related to the statutory duty to set up a claims facility by the responsible party, is that, like the OPA obligation, the new legal framework should also include a statutory duty for the responsible party to begin the advertisements about the claims procedure within a prescribed period of time (e.g. within 15 days, after the incident, for example). The advertisement must also be maintained for a certain minimum period of time (e.g. for a minimum of 1 month). This statutory duty of the responsible party to provide advertisements must include the necessary details about the claims process as well as a clear statement explaining the nature of the interim payments that they will not preclude the claimant from engaging in subsequent legal action to recover damages not reflected in the paid or partial claim.⁵⁵⁷ This duty to clarify the nature of the payment in the responsible party's advertisements, and not just merely being stated in the future law, should help to educate the victims of their rights even more effectively.

Retrospectively, this aspect of the new legal framework could have, at least, set a clear legal foundation for the parties to determine whether, for instance, the compensation covering the period of only 1 month should represent the entire amount that the victims would be legally entitled to under the new legal framework. With a clear legal guidance in hands, both the responsible parties and the claimants could determine how the next steps should be taken—either in terms the responsible party's decision to offer the next phase of compensation or in terms of the litigation strategies for the claimants.

⁵⁵⁷ To provide a concrete guidance as a useful example for provisions on the duty to advertise, OPA clarifies that when the responsible party publicly advertises its designation, it also includes in that advertisement notice to claimants that interim payment shall not preclude recovery for the remainder of the claimant's unpaid damages, 33 U.S.C. § 2714(b)(2) (2012), and that claimants are protected in their ability to seek any unpaid damages or any other damages allowed by law beyond those recoverable in OPA. *Id.* § 2715(b)(2) (“Payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.”); *id.* § 2705(a) (“Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.”).

As such, given the lack of clarity experienced by stakeholders in the context of the compensation regime in 2013, the oil-spill claimants should be clarified more firmly of their rights and similarly for the responsible parties in terms of their duties, given the explicit language of the new law.

4.3.2 A CHANCE TO EXPLICITLY DESIGNATE THE GOVERNMENT AGENCY RESPONSIBLE FOR DESIGNATING THE “RESPONSIBLE PARTY” TO PERFORM THE NEW STATUTORY DUTY TO SET UP A CLAIMS PROCEDURE.

To complete the new task proposed in 4.2.1, not only the responsible party need to be designated, but the government agency to be responsible for designating the responsible party also need to be designated under the new legal framework. Therefore, the new legal framework should also explicitly identify the government agency to be responsible for the duty to identify or designate the “responsible party” to carry out the compensation procedure. This new framework should be taken as a good opportunity (that should not be missed) to identify the government agency that would be legally expected to perform a similar task of the U.S. Coast Guard in the OPA context.

In contrast to the incident of September 11, 2001, the Deepwater Horizon disaster did not involve a case of “ambiguous responsibility”—shortly after the oil rig explosion on April 20, 2010, the Coast Guard designated BP as a “responsible party” under the OPA.⁵⁵⁸ This designation as a “responsible party” triggered a statutory duty on the part of BP to pay for all costs related to the oil spill,⁵⁵⁹ and, in effect, the company was charged with establishing a claims process.

⁵⁵⁸ See Mullenix, *supra* note 64, at 833.

⁵⁵⁹ *Id.* (The Coast Guard “directed BP to maintain a single claims facility for all Responsible Parties to avoid confusion among potential claimants.”).

Paradoxically however, although the Rayong spill incident is also different from the 911 incident, and, rather, similar to the Deepwater Horizon incident, in a sense that it also did not involve a case of ambiguous responsible party, the story of the Rayong spill is, however, quite different from the Deepwater Horizon experience in this regards.

One of the main problems of the Rayong spill 2013, causing a lack of public trust in the government, as usually reported by the media, is the fact that, no government agencies has taken a step to bring the case against the PTTGC in the court so far. Although, the Department of Marine, as a part of the Minister of Transportation, was initially expressed the intention to bring the case against the PTTGC, but until now, there is still no such action or lawsuits filed against the PTTGC in the court by any government agencies.⁵⁶⁰

To illustrate, as a head of Department of Pollution Control, working with the National Parks, Wildlife and Plant Conservation, the Marine and Coastal Resources, and the Marine departments as well as local administrative organizations to assess the spill impact, especially on the marine ecological system, once said:

“Since there are many state agencies involved in this case, we are considering which should be the one to file the lawsuit against the firm. Basically, the Marine Department may act as a plaintiff”⁵⁶¹

560 See *Fishermen in Rayong to sue PTTGC for Bt300 million*, THE NATION (July 26, 2014), <http://www.nationmultimedia.com/news/national/aec/30239513> (“Another leader of the fishermen, Lamom Bunyong, said problems had not been fully dealt with and National Human Rights Commission lawyers would soon file lawsuits against either PTTGC or relevant state agencies – the Pollution Control, Marine, Fisheries, and Coastal Resources departments.”) In addition, one of the recommendation proposed by the “civil society” targeting at the government agencies was as follows: “State agencies have to investigate to find out the reasons and the amount of the oil leakage and to enforce applicable criminal and civil provisions to bring the perpetrators to justice and to ensure that such incidence shall not happen again.” See Thailand’s Civil Society Statement, *supra* note 33.

561 See *PTTGC faces Samet spill legal action Ao Phrao slick a marine disaster, governor say*, BANGKOK POST (July 30, 2013), <http://www.bangkokpost.com/print/362094/>.

Apparently, some relevant agencies claimed that the law is unclear whether which of the relevant agencies should have legal duty to take such a step, and, equally, the government also was also in support of a faster track of compensation outside the court, relying on the PTTGC's voluntary commitment to full compensation.⁵⁶² Ultimately, the victims of the Rayong Spill also filed a separate action to the Rayong Administrative Court against the Rayong provincial governor and some other government agencies for failing to properly handle the spill. These agencies include the Committee on the Prevention and Combating of Oil Pollution, the Marine Department, the Department of Marine and Coastal Resources, the Department of Fisheries, and the Pollution Control Department for failing to properly respond to the spill.⁵⁶³

As such, taking the new legal framework as a chance to identify the responsible government agency to be legally responsible for the duty to identify the “responsible party” (in a similar manner to the U.S. Coast Guard in light of the OPA framework) should also be another major benefit in Thai context. While this approach would not be able to solve all the relevant problems stemming from these particular facts, it should help to, at least, clarify the legally expected duty of the “pointing” agency as being an indispensable mechanism for the new oil-spill legal framework.

562 Statistically, according the Marine Department, Ministry of Transportation, between 1976 and 2016, there were 225 oil-spill incidents in the Thai waters, none of which have resulted in a lawsuit against the responsible party in Thai courts, and the cases were merely reported to the police officers for the purpose of creating a normal official record. As a matter of fact, this is largely because while some spills have a relatively small magnitude with foreseeable impacts, the other major spills (i.e. only 9 out of those 225 spills have the magnitude of equal to or greater than 20,000 liters) and rarely reached the shores to cause the coastal communities to experience the economic impacts, or gained intensive media coverage, except for the Rayong Spill in 2013. Potentially, even leaving aside the reason of improper motives, without a clear legal framework specifically addressing the issue of oil spill liability, and relying, instead, on the broad regime of pollutions law in general, involving various government agencies, confusion might be caused to the relevant agencies at the implementation given the complex nature offshore oil spill incident, where the agencies' duties has not been specifically and legally clarified under the broad pollutions laws, such as the ECNEQ (1992). *See* NATIONXFILE, *supra* note 39.

563 Following the Rayong Oil Spill incident, the then cabinet assigned the Energy Ministry, the Interior Ministry, the Natural Resources and Environment Ministry, and the Transport Ministry to respond to the crisis. The committee was chaired by the Minister of Transportation.

4.3.3 A CHANCE TO CLARIFY THE NATURE OF DAMAGES COMPENSABLE UNDER THE NEW REGIME.

Although according to decision of the court of first instance in the Rayong Oil Spill case, losses of earnings in the nature of the oil-spill case are compensable under the traditional regime of the liability for wrongful acts, the new framework should set out more explicitly than the exiting language of the wrongful-acts provisions of the Thai CCC that such losses are compensable.

Having a clear language contained in the new specific law would offer a number of benefits. First, it would allow the court to comfortably award this type of damages to the victims specifically in the oil-spill context, given a clear language of the new law. Second, given the specificity of the scope of the new law where a clear language of the provision on recoverable damages would be contained, this should allow the court to have more room to consider the specific nature of the oil-spill case. To recognize this type of damage in a self-contained or *lex specialis* law, would help to narrow down the scope of other possible policy arguments discouraging the recognition of such type of damages, and, similarly, reduce the court's concern about the possible negative implications that such decision might have on other traditional cases of wrongful acts.⁵⁶⁴ Lastly, another example of the benefits is that the victims would not have to

564 This is especially true in light of the court's interpretation of the Thai CCC provisions on wrongful acts, as the CCC provisions governs the tortious liability in general, where the context can be different giving rise to certain policy consideration in terms of floodgate litigation concern, judicial efficiency, or problem of risk of indeterminate liability in the context of traditional or every-day, inland accident, for example. In the US context, see *Ultramares Corporation v. Touche*, 174 N.E. 441 (1932) (This case is a US tort law case regarding negligent misstatement, decided by Cardozo, C.J. It contained the famous phrases on "floodgates" as a policy argument that the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.") Given also, at least, that the recent decision of the court of first instance concerning the compensation for economic loss following the Rayong Oil Spill incidence, delivered in August 2016, has already helped to clarify this issue, by holding that such type of damages suffered by the fishermen and the coastal community is recognized by the law, although without fully explaining or citing the specific provisions or case-law to support such ruling. Predictably, on balance, even if this issue was included as one of the issues on the appeal petition of the defendant (pending for the court of appeal decision), it is less likely that the "compensable status" of this type of damage would be overturned by the Court of Appeal, basing on the recent trend of the Thai Supreme Court's approach on awarding the damages for the loss of use of natural resources. It should also be noted that while there is still some remaining degree of

rely on the court's creative, if not gymnastic, approach of interpretation of the traditional tort law regime (i.e. the CCC provisions). Ultimately, once the types of damages to be compensable have been clearly stated in the new specific law, the victims' bargaining power at the stage of the claims facility process should also be enhanced and strengthened, since, at least, one issue of legal uncertainty as a source of the defendant's counter argument, has been diminished.

In sum, the new legal framework, for the purpose of setting up the compensation regime for oil-spill victims suffering economic loss, should clearly stipulate, for instance, as follows: the "[d]amages equal to the loss of profits or impairment of earning capacity" are recoverable by "any claimant and that "the claimant need not be the owner of the damaged property or resources."⁵⁶⁵

In addition, while the Rayong spill had also impacted a number of local fishermen in terms of the subsistence use, such type of damages was apparently missed out from the compensation program carried out in 2013, even though the local fishermen expressed their loss in this nature.

Despite the fact that the court's decision also, itself, addressed the oil-spill impact on the ways of life of the people in the affected coastal community, the compensation program, as presented in Chapter 1, merely explicitly compensate for the loss of earnings, without specifically addressing the damage in terms of the loss of subsistence use. In effect, the fishermen were potentially compensated for their loss of income only. As such, again, instead of relying on the responsible party's integrity or the court's interpretation of the laws, the new legal framework

uncertainty, awaiting for the decision of the higher court given the context of the existing regime of Thai law, this research is not intended to enter the debate on how, in the realm of public litigation, the judges should interpret the existing laws. Instead, the purpose of this study is to provide some recommendations, more efficiently, for building a new legal framework for Thailand with regards to the out-of-court compensation program that, nevertheless, should also help to provide some clarity in the context of the future oil-spill incidents.

⁵⁶⁵ The additional part is derived from the conference report on the OPA, see. H.R. Rep. No. 101-653, at 4 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 781.

should consider including the clarification that the claimant who uses natural resources for subsistence may recover for damage to, or loss or destruction of, those natural resources, similar to the compensation regime under the OPA framework as explained in Chapter 2.

Such inclusion of the damage for loss of subsistence use should increase the accuracy of compensation, given the actual consequence of the oil spill incident on the local communities' ways of life. Accordingly, the local populations suffering an increase in expenditure for, say, finding a replacement for consumption should, therefore, be entitled to compensation for such nature of economic loss. More systematically, such proposed clarity in the future law should also be reflected in the design of the compensation program to be carried out by the responsible party following the oil-spill incident.

4.3.4 A CHANCE TO ESTABLISH A NEUTRAL BODY TO SUPERVISE THE COMPENSATION PROCESS

Although the design of the GCCF has a major advantage that the reasonable party directly and speedily *ex ante* financed the facility, the claims process is typically defendant driven, with the defendant acting as a system designer, crafting the rules and even determining the amounts of compensations.⁵⁶⁶ As such, relying solely on the self-administration of a private claims facility, like the GCCF, could potentially leave the victims with little guarantee of fairness. Even in the US context, the available degree of fairness should not depend on the intangible goodwill and integrity of future "Feinbergs". Hence, some sort of supervision may be required to reduce the risk of unfair compensation.

⁵⁶⁶ See Dodge, *supra* note 79, at 1261.

Especially in the Thai context, the oil spill victims locating in coastal communities are usually socioeconomically disadvantaged, where their legal knowledge are relatively limited and their earnings are highly inelastic to the marine resources. The fact that their ways of life and earnings are deeply integrated to the condition of marine resources makes it difficult for them to sustain a long-term financial loss or a delay in compensation. As such, these spill victims can potentially be a soft target in the claims process, where they might easily agree to settle their claims in exchange for an even outrageously unfair amount of compensation, compared to the amounts they are, in fact, entitled to receive under the law.

Together with the problem of public trust following the widespread allegation of a strong connection between the Thai government, and the oil company, and, hence, a potential conflict of interest⁵⁶⁷, it is highly necessary that the new legal framework should establish a politically neutral body to supervise the administration of the claims process in order to, among others, build public trust and secure transparency and farness of the out-of-court compensation regime.

Intuitively, the next question might be, given the constitutional structure of Thailand, which organization should perform such task? To utilize the unique feature of the system of Checks and Balances under the Thai Constitutional Structure, the suggested answer to this question can tentatively be the National Human Rights Commission (NHRC). The NHRC is expected to be politically independent, at least in principle, because it is one of the “Constitutional Organizations”, all of which, similar to the Thai Judiciary or the Courts, are constitutionally expected to be independent and separated from the government.⁵⁶⁸ Historically, these

567 *See, e.g.,* Rattanasiri, *supra* note 35 (“Aimworaniran also pointed out another important matter, that of non-transparency and unfairness in the relationship between PTTGC and the Thai Government itself”).

568 The Constitutional Organizations are the organizations established with the aim to independently perform duties in accordance with the Constitution and laws. Under the Thai Constitution 2017, these Constitutional Organizations include; the Election Commission, the National Counter Corruption Commission, the State (Budget and Finance)

Constitutional Organizations were added to the constitutional structure of Thailand to provide an even more effective system of Checks and Balances following the fear of the situation where the government with a landslide victory can manage to secure the overwhelming majority in the Parliament. In other words, where the Checks and Balances mechanism within the Parliament might be ceased in practice.

Further, as a matter of principles, the 2013 Rayong spill arguably presented an opportunity to observe a mass claims payment process and draw procedural fairness and environmental justice lessons from that experience.⁵⁶⁹ In essence, the notion of rapid payments concept under this new legal framework comports to the goal of fairness because the timely compensation should allow the victims to access to the remedy without taking away their right to obtain a complete legal remedy. Equally, to the extent that the spill victims are socioeconomically disadvantaged, they are most in need of timely interim financial compensation, and, in a sense, this seems to touch on with the concept of environmental justice where certain groups of populations are disproportionately impacted by the environmental harm and are most in need of expedited compensation.⁵⁷⁰ Potentially, these issues of concern seem to be in line with the scope of duties of the Commission.⁵⁷¹

Audit Commission, the Ombudsmen, and the National Human Rights Commission. For the constitutional provisions concerning the “Constitutional Organizations”, see รัฐธรรมนูญแห่งราชอาณาจักรไทย [CONSTITUTION] Apr. 6, 2017, art 215-247 (Thai).

⁵⁶⁹ See Thailand’s Civil Society Statement, *supra* note 33 (“There is no good reason to protect business interest at the expense of human well being and human lives as the right to live is one of the fundamental rights of human beings.”).

⁵⁷⁰ See Osofsky et al., *supra* note 56, at 101, 110–27 (2012) (analyzing the amount of spill waste and health impacts that disproportionately impacted socioeconomically disadvantaged or of color communities).

⁵⁷¹ According to Article 247 of the Thai Constitution 2017 :

“ *The National Human Rights Commission shall have the powers and duties as follows:*

(1) examine and report accurate facts in relation to the violation of human rights in every aspect and without delay, and recommend appropriate measures or approaches to prevent or resolve the human rights violations and to provide remedy for the person injured by the violation of human rights to the concerned State or private agencies;

As a matter of facts, having received a number of complaints from the fishermen in the aftermath of the Rayong spill incident, the NHRC has also been evolved in an attempt to protect the rights of the oil-spill victims in a number ways. For example, the NHRC provided an informal assistance to the fishermen by preparing a draft claims form to be filed in by the fishermen, however, the PTTGC insisted on using the forms previously issued by the provincial authorities.⁵⁷²

Further, the Chair of the NHRC sub-committee pointed out that the NHRC report will be important for the local communities as they can use it to get a fairer compensation, and it will serve as an evidence for the victims if they want to file a complaint with the court, or, alternatively, the NHRC might take the issue to court itself.⁵⁷³ As the former Chair of the NHRC sub-committee explained in an interview: “We have received complaints from local fishermen who said that after the oil spill incident, they can no longer catch enough fish. As the human-rights office, we need to

(2) prepare an assessment report of the situation of human rights in the country for submission to the National Assembly and the Council of Ministers and dissemination to the public;

(3) recommend measures or approaches to the National Assembly, the Council of Ministers and relevant agencies in regard to the promotion and protection of human rights, and the revision of laws, rules or regulations for the purpose of complying with the human rights principle;

(4) clarify and report accurate facts without delay in the case where there is an incorrect or unfair report on the human rights situation in Thailand;

(5) encourage all sections of the society to recognize the importance of human rights;

(6) other duties and powers as provided by the law.

Upon receipt of the reports under (1) and (2) or recommendation under (3), the Council of Ministers shall make improvements and revisions as may be appropriate and without delay. In any case that the proceeding may not be undertaken or may consume time, the Council of Ministers shall promptly provide the reason to the National Human Rights Commission.

In performing its duties, the National Human Rights Commission shall give due regard to the well-beings of the Thai people and the common interests of the country.” See รัฐธรรมนูญแห่งราชอาณาจักรไทย [CONSTITUTION] Apr. 6, 2017, art 247 (Thai).

572 See Wasant Techawongtham, *Oil spill panel fails to win over public trust*, BANGKOK POST (Aug 30, 2013), <http://www.bangkokpost.com/print/367086/>. (“PTTGC has insisted that the form issued by the provincial authorities be used and refused to accept one drafted by the National Human Rights Commission (NHRC), which had provided assistance to the fishermen.”).

573 See Apinya Wipatanayotin, *NHRC to probe oil spill impact*, BANGKOK POST (Oct. 9, 2013), <https://www.pressreader.com/thailand/bangkok-post/20131009/281526518773843>.

find out why this is happening...the right of local fishermen to feed their families is protected by the constitution.”⁵⁷⁴ Taking into account all the relevant circumstances in the Thai context, the neutral body under the new legal framework can, tentatively, be the NHRC.

Tentatively, with regards to the scope of the duties of this body, these may, among other things, include supervision of communication to the spill victims, making a decision on approval of the overall structure of the design of compensation scheme (including the claims forms and release forms , where applicable) , making necessary recommendations to safeguard a minimum reasonable degree of fairness (i.e. a clear-case of unfairness), or to ensure adequate stakeholders’ participations, and preparing a report or an audit on the claims process, for instance.

In addition, the new legal framework should also prescribed a fix timeframe that each decision has to be made by the neutral body in order to ensure that the underlying advantageous of rapid remedies would not be too unreasonably traded off. Ultimately, this list of duties is only tentative, and to design the precise scope and other relevant details of duties of this body, future studies will need to be conducted in the context of Thailand.

In addition, the presence of this neutral body would also help to balance out the need to rely heavily and solely on the neutrality or transparency of the claim administrator. In other words, whether Thailand has a Thai version of Fienberg or not, or even if the facility would be substantially administered by the Provincial Authority , similar to the Rayong experience, would

574 *See id.* In addition, according to the relevant Thai Supreme-Court Jurisprudence, one of the related articles of the Thai Constitution is Article 4, stating , under the 2017 Constitution, as follows: “*Subject to the provisions of this Constitution, all human dignity, rights, liberties and equality of the people protected by the constitutional convention under a democratic regime of government with the King as the Head of State, and by international obligations bound by Thailand, shall be protected and upheld by this Constitution.*” See รัฐธรรมนูญแห่งราชอาณาจักรไทย [CONSTITUTION] Apr. 6, 2017, art 4 (Thai.).

not be a major cause of concern, so long as this new proposed body does its jobs. As such, under this new legal framework, the possibility of unfair compensation and transparency should, at least in principle, be reduced.

On balance, these four major areas of recommendation for the way in which the new legal framework for Thailand should look like would help to provide, at least in principle, a uniform minimum guarantee of fast and fair compensation for victims of oil spills in Thailand across the board, and, hopefully, more appropriately than what had been experienced by the Rayong spill victims in 2013.

4.4 SUGGESTED DESIGN CONSIDERATIONS FOR FUTURE THE CLAIMS FACILITIES MODEL

While the model or the structure of claims facilities can, of course, be designed in a number of ways, depending on the relevant circumstances of each case, such as the magnitude of the spills, the purpose of this part is to suggest some essential design considerations that should lead to a “fast and fair” claims facility suitable for the Thai context. For the purpose of illustration, this part will offer the following important recommendations for designing future oil-spill claims facilities in light of the new legal framework.⁵⁷⁵

4.4.1 THE FIRST PHASE: THE EMERGENCY PAYMENT.

Similar to the design of the GCCF, to speed up the payouts of compensations to the oil – spill victims in a timely manner, the structure of any claims facilities should separately provide for

⁵⁷⁵ The suggested possible design considerations here are based primarily on the Rayong spill compensation experience and some relevant lessons, either in terms of weaknesses or strengths, from the GCCF regime.

the fast or emergency or short-term payment, as the first phase (Phase I) of the regime. This approach will not only help to emphasize a “truly” short-term or interim nature of the payments as required by the proposed law, but, technically, this “separating-phase” approach can also help to save time given that other relevant matters related to the nature of final payments will not need to be dealt with at this phase. To illustrate, those matters relating to the nature of “final payment” as opposed to the “interim payment” that would not have to be prioritized or publicly announced at this phase. These include the determinations of the issues related to the compensation for future losses (e.g. the multipliers) and the release requirements, for instance. As such, the number of potential areas of disagreements should be reduced and avoided in processing the payouts in this first phase, facilitating the goal of rapid compensation.

In terms of the payment structure, as some commentators suggested, for this first phase a simple payments structure, as opposed to a complex grid-formulas approach, should, at least, be reasonably acceptable at this phase, prioritizing the need for the rapid compensation, reducing a number of otherwise necessary supporting scientific or economic information or documentations.

However, the determination of the compensation rate, including the compensation period should be carefully and fairly determined, taking into account relevant circumstances such as the magnitude of the spill, the neutral expert opinion, and the primary income information gained directly from the victims themselves (i.e. direct participation by the victims) and to avoid the substantially unfair compensation.

Following the Rayong spill, a group of local fishermen had complained to the NHRC officer that, failing to sufficiently listen to the spill victims to gain direct information of their earnings, the compensation program ultimately used the income rate of THB 1000 per day and

compensation period of 30 days as a basis for calculation of their financial losses. Instead, the fishermen argued that they should be compensated at the rate of, at least, THB 2,000 per day and for the period of at least 2 months.⁵⁷⁶

As such, to prevent substantial unfairness or arbitrariness, the additional element of the compensation process in this first phase for the Thai context in the light of the new legal framework is that the overall structure of the first phase compensation need to be approved by the neutral body (tentatively, the NHRC) within due time. As such, the decision to be made by this neutral body should similarly be subject to a legally prescribed time period. This review of the phase-one compensation structure should be a broad review only and the disapproval should only be made for a clear-case of substantial unfairness, especially when the responsible party cannot state the reasons or any grounds for explaining how they arise at those proposed rates or compensation methodologies, for instance.

On balance, it should be reasonable or tolerable at this separated first phase of compensation structure to guarantee even only a minimum degree of reasonable fairness in order to facilitate the compensation to be quickly paid to the suffering victims of the oil spill incidents. Equally, at least, a relatively clearer status of these emergency payments, emphasized by the separating-structure approach will help to reduce confusion and remind the victims (and the responsible party itself) that the victims still retain their legal right to be compensated for the uncompensated portion of their losses. As such, while the responsible party would also benefit from the speedy payouts as it could partly rescue the company's reputational crisis in due time,

⁵⁷⁶ See คณะอนุกรรมการสิทธิฯ พบกลุ่มประมงเพื่อรับฟังเรื่องร้องเรียน (*NHRC's subcommittee met Rayong fishermen to listen to the oil-spill compensation complaints*), MGR ONLINE (Aug. 9, 2013), <http://www.manager.co.th/asp-bin/PrintNews.aspx?NewsID=9560000098898>.

easing the shareholders' mind, the responsible party would also be concretely visualized and reminded by this separating-phase structural design that it had only discharged part of its statutory obligations.

4.4.2 THE SECOND PHASE: THE FINAL PAYMENT OPTION AND THE RELEASE REQUIREMENT

Indeed, judging only in terms of the speed, the Rayong-Spill compensation program should be praised for the fact that the program began paying the victims within a short period of time—only 13 days after the spill. However, a controversially problematic aspect in the compensation design lines in the spill victims' complaints that there were paid only a one-time compensation covering a duration of only one month period.⁵⁷⁷ Basing on this claim, arguably, such payments seem to be equivalent only to the emergency or interim payment in the first-phase structure, especially when taking into account the fact that the affected island were closed for 3 months, not to mention the long-term impacts on the marine environments and species.⁵⁷⁸ To make matter worse, the company claimed that by receiving these compensations paid under the 2013 out-of-court compensation regime, the oil-spill victims must not litigate against the company in the court.

Taking into account the potential problems resulted by the design of the Rayong-spill compensation regime, the proposed recommendation in response to this problem can be that if the responsible party wishes to secure, at least, some degree of closure, their compensation structure

⁵⁷⁷ These complaints can be found generally from various sources of the Thai media interviewing the oil-spill victims. See, e.g., Rattanasiri, *supra* note 35(“the provincial government of Rayong and PTTGC have continued spreading the 30,000 Thai baht (around 700 Euros or 900 US dollars) compensation claims per person, as final “no more claims permitted”. Around 400 fisherfolks signed this agreement to receive that small amount of unfair compensation as of August 31st, not realizing they could file an appeal on this case within the effective date. Needless to say, this small amount of compensation from the reckless richest oil company means nothing comparing with fishermen’s lives that are completely destroyed”).

should include a separate second phase to provide the final payments options in exchange for the release requirement.

After having separately created the first phase for the emergency payments, the claims facility should also offer the second phase of compensation if the stakeholders wish to finalize the cases, since the emergency payments paid in the first phase are usually incapable of accounting for the entire amount of economic losses, subject, although, to the magnitude and the nature of the impact of a given oil spill.

Indeed, the victims might also want a fast “closure” for the remaining amounts from the claims facility or the responsible party, rather than going to litigate their case in the court which could painfully take longer than a decade to receive the compensation. Similarly, for the responsible party, even if the law would not explicitly require the compensation program to be set up in this manner, if the responsible party wish to achieve a greater degree of closure within a relatively shorter period of time, the responsible party may wish to provide this second phase of compensation program, taking into account their business considerations and the costs associated with long-term litigations. These final payments offers could, therefore, benefit both the oil-spill claimants and the responsible party, and might be allowable, the final payments issues should, however, not be conflated or blended with the first phase of emergency payment.

There might be some understandable, if not perfectly justifiable, grounds for allowing the final payment offers. Basing apparently on the ground of parties’ autonomy, Feinberg, for instance, explained GCCF phenomenon as follows:

“Claimants want closure. It is unsettling and troublesome to be reminded over and over again about tragedy. So although thousands of claimants would opt for an interim payment, many

thousands more would decide to move on, close the oil spill chapter, and look to the future. The choice was theirs."⁵⁷⁹

Statistically, in Alabama, for instance, Attorney General Luther Strange reported that almost all of the claims processed for his state, 98.9 percent selected for quick-pay option.⁵⁸⁰ Even in the realm of the court-supervised settlement program, the courts themselves have also recognized that “the law is settled that defendants entering into a class settlement are entitled to obtain global peace.”⁵⁸¹ Hence, the real concern is rather about the manner in which those arrangements for final payment and release requirements are to be carried out. Again, it is a matter of the “substance over forms” approach and where the “devil” is truly in the details.

Admittedly, it is not a new phenomenon that the private settlement of mass claims require a relinquishment of the right to sue—such settlements occur daily, and can even be a natural inclination that the mass torts law favors settlement, albeit the regime should also try to guarantee a reasonable degree of fairness. To this end, for instance, the regime should try to adopt or implement as far as possible some guidance as provided by the courts’ opinion as to how the arrangements for the release requirements should look like.

Distinguishably, however, it is a different thing when oil-spill victims, sometimes in stressful psychological and economic duress, must choose among remedies under pressures to elect the compensation and waive the right to sue, against a backdrop of confusing, misleading, or

⁵⁷⁹ See FEINBERG, *supra* note 167, at 171.

⁵⁸⁰ Press Release, Attorney General Luther Strange, Local Officials Deplore Human, Economic Effects of Gulf Coast Oil Spill as Well as Delay in Processing Claims (Mar. 21, 2011), available at http://www.ago.state.al.us/news/03212011_134757916.pdf.

⁵⁸¹ See, e.g., *Maher v. Zapata Corp.*, 714 F.2d 436, 438 (5th Cir. 1983); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2005) (per curiam); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004).

incomplete information. Even in simple litigation (or other alternative dispute resolution settings), claimants typically have access to some legal advice, hopefully to provide sufficient and accurate information enable the claimants to make an informed judgment about the settlement offer of final payment and the consequence of the waiver, as compared to a litigation alternative.

Accordingly, having leant some potential problems stemming from the release requirements under the GCCF experience and perhaps even under the Rayong spill itself, more attention should be paid to the issue of informed consent and the waiver of a right to sue, with regards to the final payment phase of the compensation structural design. As such, in this second phase⁵⁸², the design of the regime should try to secure informed consent as a condition for allowing a final payments option and its release requirement to take effect, because such payment is itself conditioned on the relinquishment of the right to sue.

How might the need for informed consent be achieved? The Rayong experience shows that the voluntary *pro bono* counsel service could be provided by a group of lawyers appointed by the NHRC or the tentative neutral body under the new legal framework. More importantly, the legal advice should substantively include meaningful conversations with claimants about the litigation alternative, and in weighing the comparative risks and benefits of declining a final payment offer. Most importantly, attorneys involved in such efforts must themselves be free of conflicts of interest that might influence otherwise impartial advice, for instance.

Ultimately, to prevent the problem of substantial unfairness at the outset by utilizing the neutral body under the new legal framework and by benefiting from the nature of being a second phase of the compensation process where the “tort” should be “less mature”, more scientific data

582 Although there can be more than two phases, depending on the circumstances of each case, such as the magnitude of the spill and the characteristics of the impact or the losses caused by a given oil spill.

should be available and more time should allow for reviewing a more complex design of final-payment offers. The design of the offers made under this phase should, therefore, be approved by the neutral body, such approval might include, among others, the methodology to account for future losses and the communication between the parties, as well as the approval of the release forms (e.g. the scope of the release).

To illustrate, the final payment offers should include damage multipliers to account for possibility of future loss. In this regards, the neutral body should review if there is a possibility of substantial unfairness in this respect, by relying on the neutral experts, before they would approve the compensation methodology. Again, to maintain the benefit of the speed, the timeframe should similarly be prescribed with regards to both the submission of the design of the final payments offers by the responsible party and the decision to be made by the neutral body, for instance.

4.4.3 CONSIDERATIONS FOR THE DESIGN OF THE APPEAL STRUCTURE OF THE CLAIMS FACILITIES.

Another important element that should not be missing from the design of the claims facility model, to , at least, provide some degree of fairness, before the victims have to turn to the litigation as a measure of last resort, is the feature of the appeal process.

To provide a more complete picture in order to make it fairer for the responsible party, the PTTGC claimed that the company had informed the oil spill victims that if they were not satisfied with the compensation amounts, they could appeal their case to the Rayong Provincial Authority. Nevertheless, the claimants claimed that some of them were not aware of such right and they pointed out also that there was a problem of the lack of public trust on the Provincial Authority,

and, consequently, this appeal process.⁵⁸³ It was also suggested that only a very small percentage of the claimants actually filed the appeals to the authority, and some of them claimed that they had never heard anything back from the authority after their filing.⁵⁸⁴ This seems to touch on with the report produced by the PTTGC itself, stating that only 6 claimants were successful at filing the appeals, none of them are from the fishermen.⁵⁸⁵ If that was the case, there should be some room for improving the design of the appeal structure of the claims facility.

At the minimum, the appeal process should be clearly publicized and the right to appeal the compensation determination should be informed to the claimants at the time before they accepted the payment, ideally both orally and on paper. Most importantly, especially for the Thai officers' culture in general, the deadline for the appeal panel to make the decision should be set out clearly and the length should also be within a reasonable period of time.

Subject to the availability of the resources, the judges for appeal panel should be selected from the individuals who are independent from the responsible party, at least in terms of their career positions. Alternatively, to increase public trust in the regime, which would benefit both claimants and the responsible party itself, the appeal panel could also be appointed by the neutral body supervising the claims facilities under the new legal framework. In the GCCF context, these appeal judges were selected from the retired judges and law professors at the local universities.⁵⁸⁶ In addition, if necessary for the purpose of manageability, the claims facility might also consider

583 See, e.g., Rattanasiri, *supra* note 35.

584 *Id.*

585 See Letter from PTTGC, Exec. , to the Rayong Governor (June 18, 2014). (no. 01-0475/2557).

586 Feinberg succeeded in imposing an internal appeals process that BP had to go through to contest any claims payments. The GCCF Appeals Judges were retired judges, legal academics, mediators, and arbitrators appointed by Jack M. Weiss, the Chancellor of Louisiana State University's Law Center. See Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Announces the Appointment of Jack M. Weiss to Select Appeals Judges (Mar. 24, 2011)

using the threshold amounts of compensation as a requirement before certain claims can be heard by the appellate body.⁵⁸⁷

Ultimately, the claimants should also be informed that if they do not wish to accept the appellate decision, they can still exercise their right to litigate against the responsible party in the court. On balance, these examples of possible design recommendations should, more or less, provide a relatively fairer system of appeal for oil-spill victims.

4.4.4 OTHER POSSIBLE DESIGN CONSIDERATIONS TO IMPROVE ACCURACY AND FAIRNESS OF COMPENSATION

Apart from the concern whether the amounts of compensations offered under the voluntary compensation regime in the case of Rayong spill 2013 were reasonably accurate and fair (“within the range of reasonableness”), the design of the regime itself is seemingly inadequate in reflecting the precise nature or extent of economic losses suffered by the victims following the oil spill incident. As such, again, there can be some room for improving accuracy and fairness of the compensation design via the following design suggestions.

First, the regime apparently failed to address the losses of subsistence use, at least, explicitly, and, thus, might fail to reflect or cover the true nature and magnitude of the economic

⁵⁸⁷ An example of the appeal process using threshold amounts as a condition for filing an appeal can also be seen from the GCCF experience. Under the GCCF regime, there is a limited appeals process in front of a panel of GCCF appeals judges, selected by the chancellor of the law school at Louisiana State University, Jack Weiss. Claimants may appeal a Final Payment determination by the GCCF if the total amount of compensation (including past interim compensation) exceeds \$ 250,000. BP may appeal if total compensation exceeds \$ 500,000, and Feinberg also has discretion to grant appeals. Decisions of the appeals panel are binding only on BP, and a claimant may reject the decision and pursue a claim in court. *See* Press Release, Gulf Coast Claims Facility, Weiss Announces Appointment of Judges for GCCF Appeals Process (June 9, 2011), available at <http://www.gulfcoastclaimsfacility.com/press21.php>. *See also* Protocol for Interim and Final Claims, Gulf Coast Claims Facility (Feb. 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4 (on file with the Harvard Law School Library).

losses caused by the spill adequately. Subsistence use of natural resources claims, under the GCCF regime, are supposed to be for “damages to a claimant's ability to rely, without purchase, on natural resources for food, shelter, or other minimum necessities of life”.⁵⁸⁸ Most fishermen clearly also use part of their seafood products for personal consumption or household use, and in economic terms, the oil spill undoubtedly impacted this type of their otherwise income savings, or increased their expenditure in finding a replacement for consumption, for instance. Therefore, together with the notion of environmental justice or the impacts on the ways of life as protected by the Thai Constitution,⁵⁸⁹ the future regime designer should ensure that this type of economic loss, although not in the strict form of loss of earnings, should also be adequately accounted for. This area is one of the clear benefit from exploring the US experience, otherwise, even after having a look at the Rayong spill compensation protocol, no one in Thailand might have spotted such serious inadequacy, even though such type of loss is intuitively familiar to all as a matter of fact (but not law). Ideally, to avoid conflation with other types of losses which could be a possible argument relied on by the future responsible party, the damages for loss of subsistence use should be separately treated as a distinct category of compensable types of losses, similar to the US compensation regime in the context of both the GCCF.

Second, equally, the subcategories of the type of the oil-spill victims should also reflect the different nature and extent of economic loss more accurately, allowing both allocative efficiency and fairness. In the case of the Rayong Spill compensation program, for instance, apparently there are no subcategories for different types of fishermen, despite the fact that the oil spill could

588 See Claims for Loss of Subsistence Use of Natural Resources, *supra* note 253.

589 The Thai Supreme Court in traditional pollution case usually cites Article 4 of the Thai Constitution (2007) along with other relevant laws to recognize this type of damages (to ways of life or right to use natural resources) caused by the industrial pollutions.

differently effect different types of marine species or seafood products. For example, some species are highly migratory in nature while some species, such as oysters (where experts suggested that oyster landings are returning to pre-spill levels more slowly than other species) or crabs residing at the beach surface, are less likely to escape from the crude oils stains.

To improve the accuracy and fairness, the future claims facilities should try to address the difference in the nature and the extent of loss suffered by the different sub group of each industry at least in a reasonably better way. In other words, from the Rayong compensation experience, there are still some room for improvement. While the Rayong compensation program did not explicitly deal with the issue of future losses, and, thus, no discussion on the use of multipliers (such as the RTPs)—even though the use of release requirements were apparent— if the future claims facilities will, however, not just stop at the first phase, then, different multipliers should be assigned to different types of subcategories to increase accuracy and fairness in compensation.

Lastly, another instance of the way in which the design of the compensation program can increase accuracy to reflect the losses more accurately and to increase fairness of compensation, is by applying a different requirement of “presumed causation” to differentiate locations similar to the approach under the US experience.⁵⁹⁰ This recommendation should similarly better ensure that the right amounts of money, would be allocated more efficiently and fairly to the right claimants, reflecting the real extent or characteristics of the losses suffered by individual victims locating at a different location away from the center of the oil spill incident.⁵⁹¹ This is especially the case

590 The GCCF, at least, used a relatively sophisticated “geographical proximity” approach for the compensation determination, for instance by utilizing the area/ zip codes, where different causation or revenue test might apply. (See Chapter 2).

where the impacts of the Rayong spill were experienced differently by people living at different location, depending on the distance from the spill, as explained by the figure 3 in Chapter 1.

More realistically however, given the current stage of technological development of local communities in Thailand, strictly adopting the elaborated, highly technical approach of “revenue test” as used in the US might not be viable, given the small-scale and paperless nature of individual victims in the coastal communities. Yet, the exposure to the US experience might suggest that, the design of the claims facilities program—if not using the elaborated formula like the US system in the near future—should, at least, try to provide a more thorough design that could take into account the issue of accuracy and fairness better.

4.5 CONCLUDING REMARKS

While there could have been so many more lessons—either weaknesses or strengths—to be learned from the US experience, and, equally, while there can be a number of other problems exhibited in the Thai context, it is not possible to propose the complete recommendations that can address every aspect of those problems within a single piece of an academic work, conducted mainly by only one researcher. Nevertheless, these proposed important recommendations, while is not perfect, should facilitate a meaningful first step in providing some foundational input for the future development of a complete legal framework on this matter for Thailand.

Similarly, while the approach of out-of-court regime for rapid compensation is not without flaws, and some degree of traditional procedural fairness need to be compromised, the limited capacity of the existing framework of the Thailand might, however, suggest the need for this type

of regime, at least, to facilitate the compensation to be rapidly paid to the suffering victims of the oil–spill incidents in a more reasonably fair and efficient manner.

On balance, in the mass claims context, like the oil-spill disaster, this alternative compensation regime can be an effective means that could benefit all the relevant stake holders. The victims receive prompt payment for economic losses they suffered, the courts are spared from individual litigants crowding their courtroom, and responsible parties can begin to cap or estimate their exposure and liability risk, and move on with their business. Pragmatically, a fast and fair claims process can provide an alternative to costly, protracted, and uncertain tort litigation.

Ultimately, this chapter aims to provide some important foundation for potential legislative reforms that would remedy some of the problems as faced by the oil-spill victims in the Rayong spill 2013. While there can still be a number of imperfections associated with the inherent nature of the out-of-court regimes, the devil truly is in the details, and if the stakeholders and policy makers or even the judiciary agreed to resort to it, the tradeoffs must be made between the conflicting objectives—between the goals of efficiency and fairness—suitable for Thai context.

While the out-of-court system of rapid compensation cannot completely avoid some of its inherent imperfections especially in terms of the degree of procedural fairness, such imperfections might, nevertheless, not be as distressing as some might have anticipated, given the fact that this regime will simply provide a fast-track alternative to the court. The benefit of having two compensation institutions is that each accommodates victims with different needs, preferences, and circumstances. Victims who prefer more rapid payment, are averse to the risks of litigation, or otherwise believe that they will receive greater net compensation by avoiding systematic litigation costs, would be able to choose the out-of-court compensation venue. Victims who have a strong

case, pursue the types of damage that would not be offered by the out-of-court compensation regime, or otherwise believe they would do better in court, would then have the option to litigate.

On the one hand, one might wish to propose a new framework by increasing an even far greater degree of transparency and procedural fairness than what have been proposed in this Chapter. On the other hand, to the extent that highly radical regulation can make the two systems converge—by making the private scheme more open to scrutiny and inspection, more expensive to administer, lengthier process of checks and balances, for example— the benefits of having two unique systems would be diminished.

Another benefit to having two separate compensation tracks is also that the option of litigation works to keep the private compensation scheme relatively attractive, giving an incentive to secure closure as early as possible in a competitive environment set up by the clear choices of the claimants. Especially when the claimants' benefits were clarified and clearly stated under the law—such as the types of legally compensable damages, the private scheme must, logically, offer benefits that the public scheme does not, or at least try to measure up with what being offered in the litigation system as much as possible, or else victims will choose the latter. Because the would-be defendant funding the private compensation scheme hopes to avoid the systematic and business costs of prolonged litigation, it is logically in its interest to make offers to oil-spill victims that are attractive enough to lure them from resorting to the courts.

As such, only certain degree of regulation to ensure healthy competition between the two compensation systems may benefit victims. To illustrate, the necessary types of supervision may include the increasing supervision on the use of release requirements, as unrepresented victims may not have understood the releases or may not have been aware of the extent of their right to

litigate, or on the design of the compensation offers regarding future loss in exchange for the releases, for instance. Regulations or supervisions of private compensation schemes, to the extent that they cure these defects, may be beneficial.

In the end, the manner in which private mass-compensation regimes are regulated and designed will help determine whether the regime serves as a viable choice for the parties. The right kind of regulation should allow private compensation schemes to exist alongside the tort system as an advantageous alternative for certain claimants. Overly restrictive regulation, on the other hand, might raise the costs of such regime, diluting their distinct advantages.⁵⁹²

⁵⁹² For a very interesting and more complete discussion on the appropriate degree of judicial regulation and on having an out-of-court compensation scheme as an alternative to the public litigation, benefiting the oil-spill claimants, see McDonell, *supra* note 98.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

One positive aspect that comes out of the Rayong oil spill 2013 is the spotlight on the need for a new and improved legal framework to address the problems manifested by the out-of-court compensation regime in the aftermath of the most severe oil-spill disaster in terms of economic impacts, suffered by local populations and coastal businesses in the Thai history. Similarly, from the US experience, the 2010 Gulf Oil Spill presented an opportunity to observe a mass interim claims payment process where some elements of efficiency and fairness lessons can be drawn from. As such, the BP's interim claims payment obligations for the 2010 spill, statutorily required and governed by the OPA framework, as well as the operation of the GCCF, can provide a meaningful step in terms of identifying the desirable degree of fairness, while still ensuring rapid compensation, and understanding the stakeholders' incentives.

This study looks closely at the U.S. experience especially in terms of the revolutionary provisions of OPA 1990 addressing the responsible party's duty to set up a claims procedure, as well as the features, the operations, and some interesting observations provided by the US scholars, with regards to the GCCF regime, all of which can be useful in forming the next step for Thailand.

If the recent history can advise the future, the US experience can help to remind the policies makers or the system designers that, among others, they might need to be cautious or, at least, aware of certain limits of this out-of-court regime of claims facilities. The US experience help to caution that, the out-of-court system of mass claims resolutions under the OPA regime, as well as the GCCF and its structural designs, might perform relatively poor in two mains aspects. First, the regime might be inferior in terms of transparency and/or fairness, which is a typical ground for the critiques. And second, more recently and technically, the regime has also been attacked on its

ability to provide finality for the defendant which, arguably, could deliver a peace premium for the claimants.

With regards to the issue of finality and peace premium, as Chapter 3 suggested, while the peace premium and finality function hypothesis might not be ruled out completely, there can be other alternative explanations for the apparent greater amounts of compensation (i.e. the “peace premium”) offered under the public-litigation system. To illustrate even at a basic level, for instance, since the two regimes were carried out longitudinally, it would not be logical to compare the two regime superficially in this sense, as we cannot construct the world without the GCCF— i.e. more than 200,000 of claims were absorbed by the GCCF prior to the commencement of the BP class settlement. Predictably, if only the GCCF was not subsequently replaced by the new BP class settlement regime, the amounts offered at the ‘imaginary’ latter stage of GCCF lifetime would have similarly been increased, following the degree of the strength of the remaining unsettled claims.

It should be noted also that this study only question the hypothesis using the “peace premium” concept, in the manner that linked it to the ability of the litigation system to deliver finality, as a strong ground for abandoning the OPA’s interim payment approach, specifically in the extreme case of BP, where the web of litigations is highly complex and the number of claimants is biggest in the US history. Nevertheless, the logic of the “peace premium” concept might remain largely sound in other cases in general, given the rational incentives and behavioral analysis of stakeholders. And instead, as a number of courts have suggested, it might be more acceptable and less radical to recognize the concept of “global peace” merely as a ground for allowing the utilizing of final payments arrangement and release requirements by the responsible parties, on the condition such arrangements would be carried out in a reasonably fair manners.

In any case, the out-of-court private regime can offer, at least, partial closure to the would-be defendant at a much earlier stage, signaling the shareholders, the market, and the public that the company already decided and started to act responsibly to remedy its wrongdoing in due time. This seems to touch on with the emerging trend, suggesting that current practices and settlements behaviors of corporate defendants especially in light of the GCCF model reflect “a shifting view of the necessity of achieving complete “closure” through a single mechanism.”⁵⁹³

More importantly, the root of the rationale behind the OPA approach of interim payment is principally to provide the fundamental protection for the victims’ right to receive fair compensation, which is a top priority, and more certain than relying on the function of providing finality for the defendant in return for an anticipated peace premium offered to the claimants. In any case, the OPA framework does not dictate the design of these out-of-court facilities in details, therefore, “super-compensation” can always be offered by the defendants, as exemplified by other private mass settlements regimes. Thus, on balance, finality function might not, actually, pose a strong concern, capable of triggering the rejection of the out-of-court approach to oil-spill claims.

In fact, going back to the basic, as the US experience has reminded, a relatively more imminent threat worth paying attention to, if this out-of-court approach has to be utilized, is rather on the problem of legitimacy or fairness of the regime. Arguably, given the plausible ranges of the magnitude of the oil-spills that could occur in Thailand, if the claims facility was designed to gain public trust by providing a more reasonable degree of fairness, the out-of-court compensation scheme might allow defendant to achieve even, technically, a complete closure.

⁵⁹³ See Greenspan & Brooks, *supra* note 472 (“By turning to a “self-help” type of claim resolution program, companies can achieve a significant measure of peace relatively quickly. Even if the program resolves only a portion of the potential litigation, the company can succeed in substantially reducing the scope and number of participants in litigation.”)

In Rayong case, for instance, the spill magnitude is relatively smaller than the Gulf Oil Spill,⁵⁹⁴ and even where the payments offers seem to be unreasonable—at least, for covering only a one month period, the recent litigation brought against the PTTGC involved, nevertheless, only 223 plaintiffs out of approximately 15,000 affected victims. Although, this might be resulted by other factors, but technically, in terms of the number of plaintiffs bringing lawsuits, PTTGC has been freed from several other potential plaintiffs.

This might suggest that increasing the degree of legitimacy might indirectly, more or less, improve the finality function via a legitimate way, mutually benefiting both parties. In other words, even in the case of apparent unfair compensation, only a small percentage of the claimants decided to file a lawsuit against the company, if the company increase the legitimacy and fairness, they might have even successfully prevented this small number of the plaintiffs bringing the company into the court in the first place. In other words, if the would-be defendants want closure, they should offer a fair compensation even at the out-of-court compensation settings. And, most importantly, Thailand should not just let the victims wait until the responsible party “voluntarily” want to pay more or comply with their CRS policies. Instead, Thailand should establish a new legal framework governing the oil-spill claims facilities regime, to provide, at least, a minimum guarantee of reasonable degree of fairness to the victims of oil-spills, while allowing them to have the access to rapid compensation. In this scenario, the peace premium or, more correctly, a fairer amount of compensation should come, instead, from the reasonable fairness and increased

594 As a matter of fact, the possible magnitudes of the Thai spills would unlikely to cause as devastating damage as the extreme case of the Gulf Oil Spill where more than 200,000 victims were involved. To illustrate, precisely, the magnitude of the Rayong Spill, as the most devastating oil spill incident in the Thai history involved, reportedly, 13,200 gallons of crude oil leaking into the Gulf of Thailand. On the contrary, the magnitude of the 2010 Deepwater Horizon Oil Spill involved 206.2 million gallons of crude oil pumping into the Gulf of Mexico.

transparency, guaranteed by the legal regime, allowing, hopefully, the would-be defendant to achieve justifiable closure.

Similarly, albeit from a different perspective, the same set of facts also highlights the need for a greater protection for the oil-spill victims in terms of the design of the payments offers. Given that it would be unlikely for most victims to bring the lawsuits against the company, even if they might not be satisfied with the offered compensation, in this scenario, the only remedy they received would, simply, be the amount offered by the claims facility. In theory, this potentially translates into inappropriately under-compensations and correspondingly lower levels of deterrence. As such, this kind of situation even emphasizes the pressing need for a more appropriate legal framework that can ensure a better treatment and more reasonable degree of fairness in term of compensation offered by the responsible party through this type of the out-of-court regime.

On balance, given the potential benefits of the out-of-court regimes, especially in terms of time and cost efficiencies, together with an apparent consensus that the oil-spill claims should be handled under this out-of-court system, Thailand, therefore, need a new legal framework to appropriately guarantee an efficient and fair regime of compensation. Taking into account the specific problems under the Thai context, as well as some relevant lessons offered by the US experience, this study proposes four important recommendations as a necessary foundation for building a new legal framework for Thailand as follows:

First, the new legal framework should impose the “statutory” duty to set up the claims facility on the responsible party, in effect, clarifying that it is not a matter of voluntariness or CSR. On this premise, the new legal framework should also specify clearly the nature of the interim

payments that they will not preclude the claimant from engaging in subsequent legal action to recover damages not reflected in the paid or partial claim.

In addition, this framework should also impose the duty to begin the advertisements about the claims procedure, as well as, the “interim” nature of the compensation as prescribed by the proposed law to be contained in their advertisements.

Second, the new legal framework should explicitly designate the government agency to be statutorily responsible for designating the “responsible party” to perform the new statutory duty to set up a claims procedure. To illustrate, shortly after the oil rig explosion on April 20, 2010, the Coast Guard designated BP as a “responsible party” under the OPA, leading, among other things, to the duty to establish claims facilities. Given certain specific problems under the Thai context, this new legal framework should be taken as a good opportunity (that should not be missed) to identify the government agency that will be legally expected to perform a similar task like the U.S. Coast Guard under the OPA framework.

Third, the new legal framework should clarify the nature of damages compensable under the new legal regime. In the context of this study, specifically addressing the types of economic loss at the issue of the Rayong case, the new law should clearly stipulate, for example, as follows: the “[d]amages equal to the loss of profits or impairment of earning capacity” are recoverable by “any claimant and that “the claimant need not be the owner of the damaged property or resources.”

Further, instead of relying on the responsible party’s integrity or the court’s interpretation of the unclarified language of the existing laws, the new legal framework should consider including the clarification that the claimant who uses natural resources for subsistence (i.e. subsistence use) may recover for damage to, or loss or destruction of, those natural resources.

Under this approach, the problems of inadequacies of the existing provisions of the laws relevant to the types of compensable damages would be resolved, and the new framework should provide a clear mandatory guidance for the responsible parties as to what types of damages they are, legally, expected to include in the design of their future claims facilities.

In addition, these clarifications would have a limited impact on the jurisprudence or judicial interpretation of other general types of tortious liability case (such as the traditional inland accident cases), provided that these to-be-explicitly-identified losses would be included in a *lex specialis* law governing the oil-spill cases in particular.

Lastly, to improve the situation of public trust, and, to increase legitimacy and fairness, specifically for the Thai context, the new legal framework should establish a neutral body to broadly supervise the claims facilities, with certain necessary power, among others, to approve the payment structures –including the emergency payment (Phase I) and the final payment options (Phase II), for example. In principles, the scope of the power of this neutral body should take into account the reasonable balance between efficiency and fairness, and should only intervene in the clear case of unfair and arbitrary compensation structures, depending on, for instance, the relevant circumstances of each case, the details of which should be a subject of further research.

Tentatively, the National Human Rights Commission (NHRC) can be a potential candidate to serve this position, and the precise details about the scope of the powers and other necessary guidance related to this matter would need to be worked out in future studies. At least, introducing this neutral body should largely help to solve a number of problems as faced by the Rayong Spill victims in 2013. Ultimately, the fairness and legitimacy would, in effect, not depend solely on the

good-will of the future Thai Fienbergs (i.e. the claims administrators) or the purely unilateral design of the payments structure.

To provide an even more complete picture, although the precise model of each claims facility can be designed in a number of ways, depending on the relevant circumstances of ease case, this study also suggests some essential design considerations that should lead to a “fast and fair” claims facility suitable for the Thai context. For this purpose, this study offers the following important recommendations for designing or structuring the future oil-spill claims facility in light of the new legal framework, as follows:

First, to speed up the payout of money to be paid to the oil –spill victims in a timely manner, the structure of any claims facilities should separately provide for the fast or emergency payment, as the first phase (Phase I) of the regime. This approach will not only help to emphasis a “truly” short-term or interim nature of the payments as required by the proposed law, but , technically, this “separating-phase” approach can also help to save time given that other relevant matters related to the nature of final payments will not need to be dealt with at this phase. In addition, given the relatively simple nature of the payment design used in this phase, where even a flat-rate approach might be reasonably acceptable due to the interim-status of the payments, the approval of the overall design of the emergency payments should therefore be completed within due time, where the speed of compensation might be a top priority at this phase.

Second, accordingly, if the responsible party wishes to achieve, at least, some degree of closure outside the prolonged litigations, their compensation structure should include a separate (second) phase to provide the final payments options in exchange for the release requirement. Given that more time would be allowed in this phase, and the “tort” itself would be relatively less

“immature”, the design of the final payments should be reasonably reviewed by the neutral body under the new legal framework. Because time allows, the determination on final payments elements, such as “the multipliers” should, therefore, be more or less ascertainable, “relative” to at the time immediately after the spill incident. Therefore, subject to exceptional circumstances or specific facts of the incidents, the issue of final payments should not be invoked at the first phase. Among others, this design suggestion should also address the problems associated with the design structure of the compensation program where, apparently, most oil-spill claimants, reportedly, received one-time compensation of 30,000 THB, covering only the period of one month, although with the “chance”—which is arguably and practically limited—to file an appeal. In addition, the system should provide additional tools, to ensure informed consent with regards to the use of covenant not to sue or releases requirements.

Third, the facility should provide the appeal channel for the claimants, where, at the minimum, the appeal process should be clearly publicized and the right to appeal the compensation determination should be informed and made known to the claimants at the time before the conclusion of the release agreements (i.e. before the receipt of compensation), ideally both orally and in writing. Most importantly, especially for, arguably, some Thai officers’ bureaucratic culture, the deadline for the appeal panel to make the decision should be set out clearly and the length should also be within a reasonable period of time. In addition, if necessary for the purpose of manageability, the claims facility might also consider using the threshold amounts of compensation as a requirement before certain claims can be heard by the appellate body. Ultimately, the claimants should also be informed that if they do not wish to accept the appellate decision, they can still exercise their right to litigate against the responsible party in the court.

Lastly, the design of the compensation regime should adequately reflect the precise nature or extent of economic losses suffered by the victims following the oil spill incident. This should help to increase both allocative efficiency, accuracy, and fairness in terms of the amount of compensation, subject to, however, the balancing with the need for rapid compensations. Therefore, there is no one-size-fits-all rule but coming reasonably closer to a case by case basis analysis, taking into account different characteristics of the claims.

Give the Rayong Spill experience in 2013, there can be a number of ways for improvements in this respect. For example, with regards to the main categories, the regime should separately and explicitly include the compensation for loss of subsistence use, to avoid the conflation with the loss of earnings suffered by the fishermen as a commercial purpose.

Equally, even with regards to the sub-categories, it should not be too time-consuming to classify the different types of marine species or seafood products, at least, according to the crucial nature that could result in a substantial difference in terms of the economic impacts caused by the oil-spill incidents. To illustrate, in determining the amounts of compensation, or assigning the “multipliers” for future losses, the compensation regime should take into account the different nature of the seafood products, whether involving non-migratory nature, like oysters , where the oil-spill impact likely to be more substantial given a longer period for recovery, for instance. As such, different multipliers should be assigned to different types of subcategories to increase accuracy and fairness in compensation.

Lastly, if the circumstances permit, the use of “geographical proximity” or even “revenue -test requirements” similar to, but perhaps less complicated than the US approach, should also be utilized to allow a reasonable and fair distinction among the various victims at different locations.

This should operate as a rebuttable presumption, and the victims locating at different zone might be subject to different evidential requirements. In fact, on another side of the story, some Rayong residents expressed the sympathies for the PTTGC since they believed that certain portion of the claimants, according to them, might, potentially be frivolous claims. Hence, arguably, even for the responsible parties themselves, a careful or reasonably precise design of the compensation criteria, if done at a right degree, might also allow them to direct money to the right recipients more accurately, saving money spent on the lesser meritorious or even legally too remote claims.

Overall, it should be noted that, even on their own and without formal or mandatory force, these design considerations should be served as practical guidance for the industry, in observance of the principles of good governance and ethical practice or CSR values.⁵⁹⁵

Indeed, although the out-of-court system of rapid compensation cannot completely avoid some of its inherent imperfections especially in terms of the lesser degree of procedural fairness or formalities. Such imperfections might, nevertheless, not be as distressing as some might have anticipated, given the fact that this regime will simply provide a fast-track alternative to the court.

The benefit of having two compensation institutions is that each accommodates victims with different needs, preferences, and circumstances. Victims who prefer more rapid payment, are averse to the risks of litigation, or otherwise believe that they will receive greater net compensation by avoiding litigation costs, would be able to choose the out-of-court compensation venue. Victims who have a strong case, pursue the types of damage that would not be offered by the out-of-court

⁵⁹⁵ To ensure compliance with the law and ethical standards, many oil corporations have worked CSR values into their companies' core values, including Chevron, Marathon, and Indian Oil, but it is not mandatory. (Chevron Corporation, 2013; Marathon Oil Corporation, 2013; Indian Oil Corporation Ltd., 2013)

compensation regime, or otherwise believe they would do better in court, would then have the option to litigate.

On the one hand, one might wish to propose a new framework by increasing an even far greater degree of transparency and procedural fairness than what have been proposed in this study. On the other hand, to the extent that extensively radical regulation can make the two systems converge—by making the out-of-court compensation regime more open to scrutiny and supervision, more expensive to administer, leading to lengthier process of checks and balances, for instance— the benefits of having two unique systems will be diminished.

Another benefit to having two separate compensation tracks is also that the option of litigation works to keep the private compensation scheme relatively attractive, giving an incentive to secure closure as early as possible in a competitive environment set up by the clear choices of the claimants. Especially when the claimants' benefits were clarified and clearly stated under the law—such as the types of legally compensable damages, the private scheme must , logically, offer benefits that the public scheme does not, or at least try to measure up with what being offered in the litigation system as much as possible, or else victims will choose the latter. Because the would-be defendant funding the private compensation scheme, hopes to avoid the systematic and business costs of prolonged litigation, it is logical in its interest to make offers to oil-spill victims that are attractive enough to lure them from resorting to the courts.

As such, only certain degree of regulation to ensure healthy competition between the two compensation systems may benefit victims. To illustrate, the necessary types of supervision may include the increasing supervision on the use of release requirements, as unrepresented victims may not have understood the releases or may not have been aware of the extent of their right to

litigate, or on the design of the compensation offers regarding future loss in exchange for the releases, for instance. Regulations or supervisions of private compensation schemes, to the extent that they cure these defects, may be beneficial.

In the end, the manner in which private mass-compensation regimes are regulated and designed will help determine whether the regime serves as a viable choice for the parties. The right kind of regulation should allow private compensation schemes to exist alongside the tort-law litigation system as an advantageous alternative for certain claimants. Overly restrictive regulation, on the other hand, might raise the costs of such regime, diluting their distinct advantages.

In addition, the proposals in this study cannot be complete and there are a number of remaining issues that merit future research. Within this proposed framework, these might include the precise scope and nature of the power of the proposed neutral body, the proper period of time to be prescribed in relation to each newly imposed statutory duties, for instance. Similarly, future research should also take into other issues relating to other supporting mechanisms or closely connected regimes. These issues might include the use of the liability-cap approach, the financial instruments requirements, the governance of scientific uncertainties,⁵⁹⁶ the long-term impacts of oil-spills,⁵⁹⁷ the use of reopening clause,⁵⁹⁸ and the regimes related to other types of oil-spill damages, especially in terms of natural-resources damages, where there might be an overlapping

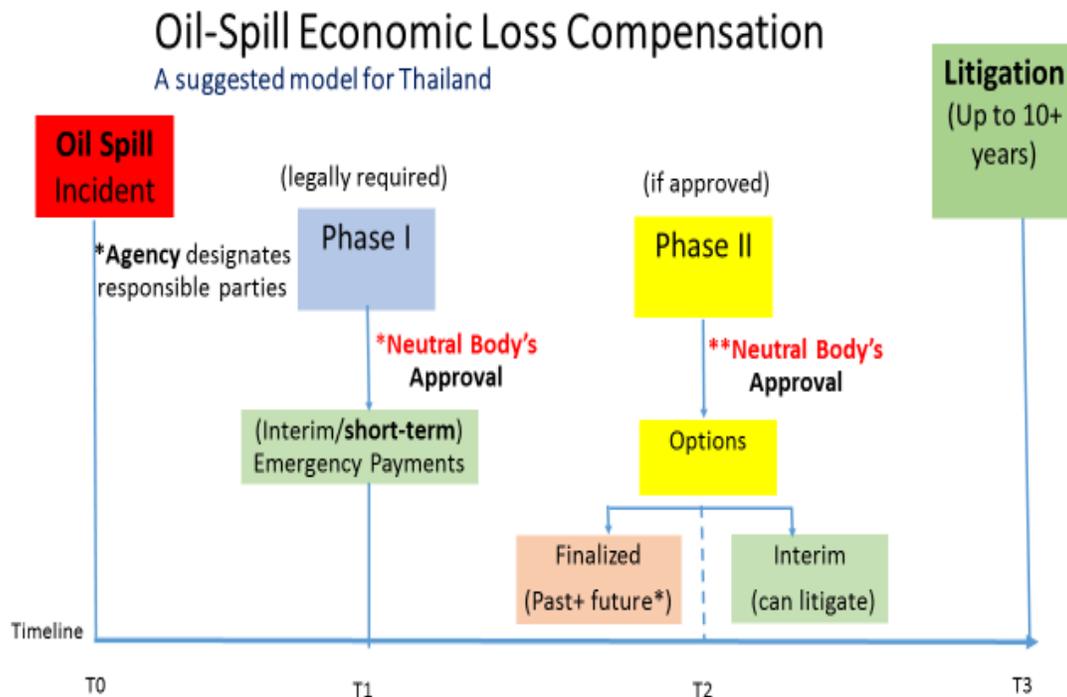
596 For example, this is largely related to the issue of scientific uncertainties, the management of baseline data, for instance. See Usha Varanasi, *Making Science Useful in Complex Political and Legal Arenas: A Case for Frontloading Science in Anticipation of Environmental Changes to Support Natural Resource Laws and Policies*, 3 WASH. J. ENVTL. L. & POL'Y 238, 265 (2013).

597 See Sanne H. Knudsen, *The Long-Term Tort: In Search of a New Causation Framework for Natural Resource Damages*, 108 NW. U. L. REV. 475, 542 (2014).

598 See William H. Jr. Rodgers; J.B. III Crosetto; C.A. Holley; T.C. Kade, *The Exxon Valdez Reopener: Natural Resources Damage Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135, 212 (2005).

part between the different liabilities, with respect to certain component of future economic losses, for instance.

Figure 4 Suggested Model of Oil-Spill Compensation Regime for Thailand



While this study prioritizes the urgent need to rectify the problems of the out-of-court regime of oil-spill compensation as a top priority, future studies need also consider the ways in which the formal regime in the realm of litigation, as the ultimate source of justice at the end of the spectrum, can appropriately be improved in response to the case of oil-spill compensation for economic loss.

To sum up, the settlement of mass claims following the oil spill incidents is usually complex and largely problematic. Not only are there the inherent difficulties given the complex nature and the number of plaintiffs, but there are also the procedural barriers related to the time consuming

nature of the litigation system, formally pressured by the rigid-formalism duty to ensure procedural fairness. In addition, in the class action context, the relatively complex nature of the impacts of the oil-spill incidents on various victims might also make the class certification process equally lengthy or even problematic. Especially when the size of the magnitude could reach a global record high, like the Gulf Oil Spill catastrophe, the finality that defendants seek is either difficult to obtain or quite costly even in the class settlement regime under the public-litigation system.

As we can see, oil spill incidents can usually give rise to the need for a more flexible approach to dispute resolutions. The need for a procedural vehicle will keep the pressure on the legal system for generations if no solutions are to be offered. In terms of the ability to provide rapid remedies for the victims, the model of claims resolution facilities or the out-of-court system of mass claims resolutions that represent such flexible approach have worked too well to be ignored.

The regime to facilitate rapid compensation that can ensure a reasonable degree of fairness should help to mitigate some of the corrosive community effects as experienced by the victims of the Exxon Valdez 1989. By overemphasizing efficiency and expediency in resolving mass claims settlement, Congress might, however, have impaired the balance between the dual goals of efficiency and fairness.

Arguably, in the context of oil-spill compensation, the out-of-court system or private aggregation of mass-claims resolutions is an emerging trend that is gaining momentum, and, at least, for a good reason—both claimants and defendants can receive the ,hopefully, better outcomes and far faster than in system of public litigation. Arguably, if a dispute or litigation sustains for a long period of time, there can be substantial cost imposed on claimants, defendants, and even an entire nation. For example, the psychic harms of uncertainty is well known. The time

value of money has well recognized. The consequential effect of uncertain liability on stock prices has been well documented. Adverse impacts on well-being and public trust can likewise generate controversy, fueled by judges facing the reality of overburdened courts and unanswered plaintiffs.

Given that disproportionately rigid formalism can produce enormous obstacles to rapid compensation, there will be a point when the pressure for a more acceptable outcome will become too great. To achieve economies of time, the legislature, the government, as well as the responsible parties, or even the courts, will then be forced to reach a more balanced solution. Yet, as this study has detailed, highly unregulated out-of-court regime or purely privatized disaggregation can be problematic, similarly creating a risk of suboptimal outcomes for not only the parties, but also for other broader normative goals. Therefore, achieving the correct balance between the different social needs becomes even more crucial for regulating the cases involving the catastrophic fat-tail risk as frequently caused by the offshore oil and gas industry.

There can be quite inventive middle paths with less finality and less cost and shorter time that are offering new opportunities for a faster and fairer resolution of mass oil-spill claims for economic loss outside the traditional litigation system. If recent history is a guide, future design of the new legal framework should try to reach a more balanced solution, “neither perfectly principled nor overly pragmatic”. To preserve a uniform balance between the goals of efficiency and fairness, the new legal framework for Thailand should consider including some fundamental elements as proposed by this study.

As many real-world examples of legislative reforms have showed, the devil is truly in the design, rather than in the broad nature of the regime, focusing superficially on whether the nature of a given regime is an out-of-court or in-the-court regime. While this proposal are not without

flaws, it should very well strike at the root of the problems existing in the Thai context, especially when the very reason, stimulating the Thai parliament to urgently reconsider the enactment of the new specific law governing the specific context of the oil-spill liability, is the problems of oil-spill compensation in the case of the Rayong Spill, 2013.

*“These proposals are not without problems. While they are arbitrary to varying degrees, they are no more arbitrary than ‘a denial of fast and fair’ recovery based on the admission of the law’s limit.”*⁵⁹⁹ *With the victims of the ‘Rayong oil spill’ as backdrop, I don’t know how I could responsibly do otherwise.”*⁶⁰⁰

599 This quote is an adaptation from part of court’s opinion as another example of the time when the court needed to make a challenging decision in facing the then immersing issue of pure economic loss rule, see 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1103 (N.Y. 2001). (“These proposals are not without problems. While they are arbitrary to varying degrees, they are no more arbitrary than a bright-line denial of recovery based on an admission of the law’s limit”). See also Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 NW. U. L. REV. 49, 64 (2010) (“Common law courts have not lacked for creative solutions to difficult social problems...Sometimes procedural barriers force courts to innovate, but procedural innovation can also advance substantive policies...The pursuit of legitimate policies may require some arbitrary lines.”)

600 This is an adaptation from the words of Congressman Walter B. Jones, (the 1981 Chairman of the House Merchant Marine and Fisheries Committee), the original sponsor of Oil Pollution Bill (from 94th Congress to 101th Congress). See Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don’t Happen to Good Bills*, 19 ENVTL. L. REP. 10,333 (1989).

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