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Inadequacies of the Oil Pollution Act of 1990: Why the United States Should Adopt the Convention on Civil Liability

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Abstract

This Note addresses the United States' enactment of the Oil Pollution Act as an alternative to the Convention of Civil Liability. Part I describes the history of maritime transport and the development of oil spill liability regulations. Part I also discusses major oil spills and different approaches to assessing liability for clean-up. Part II shifts the focus to OPA and the CLC commentators' reactions to these legislative schemes. Part II explores critics' positions on the effectiveness of OPA and the CLC in handling spill liability. Part III concludes that oil spills are an international problem. Part III advocates that the United States should become a member of the CLC so that it can effectively apportion liability for oil spills.

INADEQUACIES OF THE OIL POLLUTION ACT OF 1990: WHY THE UNITED STATES SHOULD ADOPT THE CONVENTION ON CIVIL LIABILITY

Jaclyn A. Zimmermann*

INTRODUCTION

On February 4, 1999, the New Carissa¹ ran aground in Coos Bay, off the coast of Oregon.² When the ship ran aground, the fuel tanks were intact, and held 400,000 gallons of fuel oil.³ The United States attempted to burn the oil in order to prevent pollution, but the vessel split in half.⁴ The oil tanks broke and oil spilled onto the coast.⁵

The New Carissa leaked as much as 140,000 gallons of fuel oil and created clean-up costs of over US\$35 million.⁶ When the U.S. Bureau of Land Management completes an assessment of the injury to wildlife, it will determine damages.⁷ Members of the commercial fishing industry are currently seeking over US\$3 million in compensation for their damages.⁸ The public paid US\$7 million in clean-up costs, which the U.S. Coast Guard guar-

* J.D. Candidate, 2001. I would like to dedicate this Note to my family who have supported me throughout my educational career and have encouraged me to follow my dreams. I would like to thank the Editors and Staff of the Journal who worked exceptionally hard to help me publish this Note.

1. See John Griffith, *Cargo Ship Beaches near Coos Bay*, PORTLAND OREGONIAN, Feb. 5, 1999, at A1 (noting that New Carissa is Panamanian flag ship with Filipino crew).

2. See *id.* (explaining that while New Carissa waited outside harbor for local pilot, rough weather caused vessel to drift into sand). The New Carissa was a 639-foot-long trans-Pacific cargo ship bound to dock in Coos Bay to take on cargo. *Id.*

3. See Nona Brazier, *Double Hulls the Best Way To Prevent Oil Spill*, SEATTLE POST-INTELLIGENCER, May 27, 1999, at A15 (describing New Carissa as single hulled vessel).

4. See Brent Hunsberger, *Insurer Seeks Partial Removal of Carissa's Stern*, PORTLAND OREGONIAN, Feb. 4, 2000 (reporting that U.S. Navy and Coast Guard attempted to burn oil onboard in effort to remove threat of pollution). Subsequently, the U.S. Navy and Coastguard towed the bow section into international waters and sank it with gunfire and torpedoes. *Id.*

5. See *id.* (noting that stern section of New Carissa continues to leak oil from single hull).

6. See *id.* (noting that due to high clean-up costs, U.S. Coast Guard gave Oregon authority over beach monitoring and removal of stern).

7. See *id.* (noting that spill is near nesting area of federally protected western snowy plovers and foraging area of federally protected marbled murrelet).

8. See *id.* (establishing that oyster growers were shut out of federal damage assessment by loophole in Oil Pollution Act of 1990 ("OPA")).

antees to pay back in full.⁹ In the past decade, however, the federal government has only reimbursed US\$.19 on every dollar of public spending for clean-up.¹⁰

This Note addresses the United State's enactment of the Oil Pollution Act¹¹ (or "OPA") as an alternative to the Convention of Civil Liability¹² (or "CLC"). Part I describes the history of maritime transport and the development of oil spill liability regulations. Part I also discusses major oil spills and different approaches to assessing liability for clean-up. Part II shifts the focus to OPA and the CLC and commentators' reactions to these legislative schemes. Part II explores critics' positions on the effectiveness of OPA and the CLC in handling spill liability. Part III concludes that oil spills are an international problem. Part III advocates that the United States should become a member of the CLC so that it can effectively apportion liability for oil spills.

I. UNITED STATES AND INTERNATIONAL RESPONSES TO MARITIME OIL SPILLS

Since early times, people have used the ocean for travel and transportation of goods.¹³ Maritime commerce increased in 1000 A.D., and generalized sea codes emerged, which ruled until the 1400s.¹⁴ During the 1400s, Europe began incorporating maritime law into national statute law.¹⁵ The United Kingdom and the United States first implemented oil pollution regulation in the 1800s.¹⁶ After the Torrey Canyon disaster, several nations

9. *Taxpayers Paying for Oil Spills Liability Limits Shield Polluters*, NEW ORLEANS TIMES-PICAYUNE, Mar. 5, 2000, at F1.

10. *See id.* (asserting that only US\$4.5 million of US\$81.7 million spent by public was paid back after Exxon Valdez spill).

11. Oil Pollution Act, 33 U.S.C. §2701 (1994).

12. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter CLC].

13. *See* MICHAEL MARSHALL, *OCEAN TRADERS FROM THE PORTUGUESE DISCOVERIES TO THE PRESENT DAY* 12 (1990) (noting that monks, merchants, and Vikings all traveled by sea before Age of Discovery).

14. *See* NICHOLAS J. HEALY & DAVID J. SHARPE, *CASES & MATERIALS ON ADMIRALTY* 2 (3d ed. 1999) (providing that sea laws in compilations of various degrees of authority were primary sources of law).

15. *See id.* (establishing that English maritime law remained decisional and Europe incorporated maritime law into statute).

16. *See* Joseph C. Sweeney, *Oil Pollution of the Oceans*, 37 *FORDHAM L. REV.* 155, 155 (1968) (describing legislation prohibiting deposit of refuse into navigable waters).

met to allocate international liability law for oil spills.¹⁷ The United States participated in the CLC, but declined to join.¹⁸ The United States did not have a comprehensive oil spill liability scheme until it enacted OPA, after the Exxon Valdez oil spill.¹⁹

A. *Maritime Oil Transport*

As technology advanced, sea travel became an integral part of society, increasing the need for maritime regulation.²⁰ From as early as 300 B.C., ancient laws held shipowners liable for damage to the property of others.²¹ Under traditional maritime law, shipowners were able to limit their liability in order to prevent responsibility for acts beyond their control.²² Maritime nations were forced to evaluate liability laws after major spills, such as the Torrey Canyon.²³

1. History of Maritime Transport Liability

Maritime scholars approximate that ocean travel for the transport and trade of goods began as early as 3100 B.C.²⁴ As a trading industry evolved, maritime societies constructed rules.²⁵

17. See HEALY & SHARPE, *supra* note 14, at 876 (asserting that Intergovernmental Maritime Consultative Organization ("IMCO") met in November 1969 to restate law of liability for oil spills).

18. See WU CHAO, *POLLUTION FROM THE CARRIAGE OF OIL BY SEA: LIABILITY AND COMPENSATION* 221 (1996) (noting that United States declined to join Convention on Civil Liability ("CLC") because CLC failed to provide for unlimited liability).

19. See Tyler J. Savage, *North American Oil Pollution: Who Is Liable for a Canadian American Catastrophe?*, 4 ROGER WILLIAMS U. L. REV. 335, 346 (1998) (asserting that Exxon Valdez was catalyst in U.S. decision to enact federal law).

20. See JOANNA BURGER, *OIL SPILLS* 19 (1997) (noting increase in production of oil correlated with increase in maritime laws regulating transport).

21. See BENEDICT ON ADMIRALTY, § 2 1-5 (M. Cohen 7th ed. 1982) (noting that Rhodian Sea Law held shipowners liable for loss of jettisoned cargo); see also HEALY & SHARPE, *supra* note 14, at 760 (describing law of general average, which apportioned loss).

22. HEALY & SHARPE, *supra* note 14, at 817.

23. See CHAO, *supra* note 18, at 9 (noting Torrey Canyon's significance in terms of size and effect).

24. See MARSHALL, *supra* note 13, at 12 (stating that during first dynasty, Egyptians constructed ships to transport cedar from Lebanon forests); see also BENEDICT, *supra* note 21, § 2 1-5 (finding that by Middle Kingdom, circa, 2133-1603 B.C., Egyptians used vessels 150 feet long with crews of up to 120 sailors).

25. See BENEDICT, *supra* note 21, § 1 1-5 (stating that as early as 900 B.C., Phoenician and Rhodian civilizations had formed and began to develop primitive legal systems); see also MARSHALL, *supra* note 13, at 12 (discussing Roman Empire's development of first efficient maritime legal system between 200 and 160 B.C.).

While few specific details are known about the laws and customs of the ancient seamen,²⁶ laws governing ships on the seas date back as far back as 1600 B.C.²⁷

Commentators maintain that even during early civilization, jettison²⁸ was a common practice among sea-farers to rescue their vessels from jeopardy.²⁹ Legal experts note that under Rhodian law,³⁰ seamen were subject to liability for the loss of jettisoned cargo.³¹ There is little evidence, however, of laws governing liability for damage to the marine environment caused by cargo released into the sea.³²

In 1814, the United Kingdom enacted water pollution legislation, becoming the first nation to address water pollution.³³ In 1866, the United States prohibited all discharge in New York Harbor.³⁴ The United States expanded the prohibition to include all navigable waters in 1899.³⁵ Since then, nations throughout the world have addressed oil spill liability both domestically and internationally.³⁶

26. See BENEDICT, *supra* note 21, § 2 1-6 (arguing that while laws may have been important to sea-farers, they lacked general public's interest).

27. See *id.* § 2 1-3 (explaining that sea laws from Ancient Babylon—which discusses proper procedures for loss of cargo or ship—are estimated to date from between 2000 and 1600 B.C.).

28. See HEALY & SHARPE, *supra* note 14, at 1 (defining jettison as shipmaster's right to throw cargo overboard to save ship and other cargo).

29. See WALTER ASHBURNER, *THE RHODIAN SEA LAW* (1909), *quoted in* BENEDICT, *supra* note 21, § 3 1-13 (noting that early laws held that during jettison, there should be voting among passengers to determine what should be done); HEALY & SHARPE, *supra* note 14, at 760.

30. See ASHBURNER, *supra* note 29 (noting that maritime customs and practices of ancient Rhodes became framework for maritime laws of other cultures).

31. See HEALY & SHARPE, *supra* note 14, at 760 (noting that law of general average is oldest doctrine of maritime law referred to in written records). General average provides that because jettisoned merchandise was thrown overboard for benefit of all, the loss should, and must, be made by contribution of all. *Id.*

32. See ASHBURNER, *supra* note 29 (proposing that there was little concern for oil pollution damage because oil was not yet used for fuel and not yet transported across oceans in mass quantities).

33. See Sweeney, *supra* note 16, at 155 (noting that U.K. legislation prohibited discharge of rubbish or filth into any navigable river, harbor, or haven).

34. See Refuse Act of 1886, ch. 929, § 3, 24 Stat. 329 (1886) (making it unlawful to dump any waste, whatsoever, into New York City Harbor).

35. Refuse Act of 1899, ch. 425, § 16, 20 Stat. 1152 (1899) (to be codified at 33 U.S.C. § 407). This Refuse Act exacted compliance by imposing fines and imprisonment. *Id.*

36. See CHAO, *supra* note 18, at 2 (describing provisions of international and U.S. law for oil spills); A.H.E. Popp, Q.C., *A North American Perspective on Liability and Compen-*

2. Development of Maritime Oil Transport

Scholars conclude that as technology advanced, the demand for oil rose drastically.³⁷ The additional ships needed to fulfill the growing demand for oil increased the possibility of a maritime accident and underscored the need for protective regulation.³⁸ In response, the United States passed the Oil Pollution Act of 1924,³⁹ making it illegal to dump oil—carried as fuel or cargo—into U.S. coastal waters.⁴⁰ In 1948, the United States passed the Federal Water Pollution Control Act, granting Congress the power to control states' rights concerning legislation of water pollution.⁴¹ Although laws addressing water pollution were in effect for decades, statutory efforts to control the effects of maritime environmental damage only began in 1966.⁴²

Currently, oil accounts for nearly forty percent of the world's consumption of energy.⁴³ The majority of known oil reserves are found within member countries of the Organization of Petroleum Exporting Countries ("OPEC"); oil is transported from these countries by oil tankers in mass quantities on a daily basis.⁴⁴ Many scholars concede that it is inevitable that some of this oil will be spilled.⁴⁵

sation for Oil Pollution Caused by Ships, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT 109 (Colin M. De La Rue ed., 1993) (describing formulation of U.S. and Canadian liability laws).

37. See BURGER, *supra* note 20, at 19 (noting that little use was made of petroleum until invention of gasoline engine, when use for automobiles, trucks, tractors, and airplanes increased demand for oil); Sweeney, *supra* note 16, at 155 (noting move in maritime industry from sail to coal to oil).

38. See BURGER, *supra* note 20, at 19 (suggesting that increase in number of ships was due to imbalance between consumption and production in most areas).

39. Oil Pollution Act of 1924, 43 Stat. 604 (1924) (repealed by The Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 81 Stat. 91, 84 Stat. 1161 (1970)).

40. See *id.* (instituting fine of US\$500 to US\$2500 and imprisonment for 30 days to one year if oil was discharged into coastal waters); see also HEALY & SHARPE, *supra* note 14, at 867 (stating that in this early act there was no concern for prevention or cleanup of spills and penalties were solely criminal).

41. Federal Water Pollution Control Act, 62 Stat. 1161 (1948).

42. See HEALY & SHARPE, *supra* note 14, at 869 (noting that Clean Water Restoration Acts required polluting shipowner to either clean-up himself or reimburse United States for clean-up expenses).

43. See BURGER, *supra* note 20, at 19 (describing rise in world oil consumption from 53,000 to 60,000 barrels per day since early 1980s).

44. *Id.*

45. See *id.* at 26 (noting that between 20 and 340 million gallons of oil are spilled into oceans each year); see also PERCIVAL, ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 138 (2d ed. 1996) (explaining that more than 6000 oil spills occur

3. Traditional Maritime Liability Doctrines and Oil Spill Regulation

In 1851, after a US\$22,224 judgment against a shipowner,⁴⁶ the U.S. Congress passed the Act of 1851,⁴⁷ which created the defense of limited liability.⁴⁸ Prior to the Act of 1851, the doctrine of respondeat superior applied when a ship's crew navigated negligently and harmed the plaintiff's cargo.⁴⁹ While the Act of 1851 did not remove the doctrine of respondeat superior, it did set a ceiling on damages recoverable from a shipowner under vicarious liability for the conduct of employees.⁵⁰

Traditional maritime law allowed limited liability for three types of losses—loss of cargo, collision damage liability, and personal injury or death claims.⁵¹ Recently, the U.S. Congress added to the scope of limited liability: clean-up costs, environmental harm and economic damage arising from oil pollution in coastal waters.⁵² Limited liability is available as an affirmative defense to any claim that falls under admiralty jurisdiction.⁵³

Catastrophic oil spills are the crux of the legislation regulating oil pollution both domestically and internationally.⁵⁴ Since the 1960s, notorious maritime accidents caused devastating envi-

every year—making total amount in some years equal to amount of oil spilled in Exxon Valdez spill); Sweeney, *supra* note 16, at 156 (stating that there are certain expectable and inconsequential risks in loading and discharging oil); Capt. S. Pullat, *An Overview of Pollution Compensation Claims*, BUSINESS LINE, Mar. 3, 1997 (noting that as oil activity increases, so does potential for pollution).

46. See *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. 344 (1848) (holding corporate owner liable for gross negligence with respect to construction, equipment, and loading of vessel).

47. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (1851).

48. *Id.*; see HEALY & SHARPE, *supra* note 14, at 814 (noting that Congress' response was due in large part to reaction of shipowners to case).

49. See HEALY & SHARPE, *supra* note 14, at 813 (asserting that only negligent actions could be tried *in personam*, all others were tried *in rem*).

50. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (1851).

51. See HEALY & SHARPE, *supra* note 14, at 817 (explaining history of limitation of liability as applied to damages).

52. See *id.* at 818 (describing environmental claims as most recent, largest, and most difficult claims to insure adequately).

53. *Id.* at 819.

54. See Steven T. Smith, *An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Oil Pollution Damage*, 14 Hous. J. INT'L. L. 115, 117 (1991) (describing impact of major spills such as Torrey Canyon, Amoco Cadiz, and Exxon Valdez on regulation of oil transport); Emmanuel Fontaine, *The French Experience: "Tanio" and "Amoco Cadiz" Incidents Compared*, in *LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* 101 (Colin M. De La Rue ed., 1993); Christopher B. Kende, *The United*

ronmental damage.⁵⁵ Oil tankers that are synonymous with environmental destruction include the Torrey Canyon,⁵⁶ the Amoco Cadiz,⁵⁷ the Tanio,⁵⁸ the Exxon Valdez,⁵⁹ and most recently the Braer.⁶⁰ After each of these spills, injured parties sought compensation for losses and expenses.⁶¹ When assessing liability, world governments faced the task of evaluating the liability laws to determine how they could be improved.⁶²

4. Maritime Oil Spills: The Torrey Canyon

The Torrey Canyon was a super-tanker transporting oil from Kuwait to Milford Haven, Wales.⁶³ On March 18, 1967, the ship ran aground, spilling 10,000 tons of crude oil into the English Channel and damaging both the English and French coastlines.⁶⁴ This was the first highly publicized maritime disaster; it

States Approach, in *LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* 131 (Colin M. De La Rue ed., 1993).

55. See BURGER, *supra* note 20, at 35 (charting locations of major oil spills in waters of France, United Kingdom, and United States).

56. See HEALY & SHARPE, *supra* note 14, at 871 (explaining that Torrey Canyon spilled 100,000 tons of oil into English Channel). The Torrey Canyon was the first major maritime oil spill and brought about international awareness of the potential catastrophic effects of oil transport. *Id.*

57. See *In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1285 (7th Cir. 1992) (stating that Amoco Cadiz spilled 68 million gallons of oil, damaging approximately 180 miles of French coastline).

58. See Fontaine, *supra* note 54, at 105 (describing March 7, 1980, when Tanio broke in half in heavy weather conditions, spilling more than 13,500 tons of oil off coast of Brittany, polluting more than 200 kilometers of coast).

59. See John Gallagher, *In the Wake of Exxon Valdez: Murkey Legal Waters of Liability and Compensation*, 25 NEW ENG. L. REV. 571, 571 (1990) (asserting that in 1989, Exxon Valdez went aground on Bligh Reef spilling over 11 million gallons of oil into Alaskan waters).

60. See Paul S. Edelman, *Issues in the Wake of Recent Oil Spills*, N.Y.L.J., Mar. 5, 1993, at 3. (noting that Braer ran aground on Jan. 5, 1993, off Shetland Islands, spilling 600,000 barrels of oil in North Sea).

61. See Smith, *supra* note 54, at 115 (asserting that these disasters changed world view of oil transport).

62. See CHAO, *supra* note 18, at 2 (discussing influence of Torrey Canyon on creation of international oil spill liability regime, questioning fairness of regime after Amoco Cadiz, and U.S. radical stance after Exxon Valdez).

63. See BURGER, *supra* note 20, at 35 (noting Torrey Canyon was 118,285-ton vessel carrying oil from Kuwait when it hit rocks in Scilly Isles, causing world's first publicized oil spill catastrophe).

64. See *Huge Tanker in Danger on Rocks off Britain*, N.Y. TIMES, Mar. 19, 1967, at 79 (noting primary reason for Torrey Canyon collision was captain's bad judgment). There was pressure to beat the tide, and the ship's master made a decision to steer between the Seven Stones and the main islands. *Id.*

brought about awareness of pollution dangers.⁶⁵

The oil reached the United Kingdom first, which was unprepared to deal with the pollution.⁶⁶ In an attempt to salvage some of the vessel, the English set fire to the crude oil in both the hull and on the surface of the ocean.⁶⁷ After bombing the ship, the United Kingdom used detergents to emulsify and disperse the oil.⁶⁸

Eventually, the oil reached the French shores.⁶⁹ France responded by spilling chalk into the waters, which bound the oil into particles that sank to the bottom of the ocean.⁷⁰ Although France was more successful in handling the spill than the United Kingdom, long term environmental damage still occurred to both coastlines.⁷¹

Due to the lack of clear liability regulations, the compensation claims after the Torrey Canyon proved difficult to adjudicate.⁷² Initially, a judge approved an ex parte order, enjoining the prosecution of all independent action, and proceedings in the United States, and approving a stipulation valuing the interest of the responsible parties at US\$50, the worth of the vessel

65. See Wang Mao Shen et al., *The Normal Procedure of Assessment of Damage to the Marine Environment in Chinese Judicial Practice*, in *LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* (Colin M. De La Rue ed., 1993) (asserting that Torrey Canyon was widely reported and people began to realize possibilities of disaster that came with oil spills).

66. See BURGER, *supra* note 20, at 35 (noting that government waited 10 days before taking any action). When the U.K. Government finally responded, the Royal Air Force attempted to burn the oil remaining in the tanker by aerial bombardment. *Id.*

67. See *id.* at 36 (describing flames shooting 200 to 300 feet in air, smoke rising miles up and out, and soot dropping on English Channel).

68. See *id.* (noting that two million gallons of detergents were used to treat land while another half million gallons were sprayed at sea). The detergent spraying was an attempt to save the Cornish beaches, which are Britain's main holiday area. *Id.* In hindsight, the emulsification proved to be more damaging to the wildlife than the oil itself was, which brought attention to the how unprepared the world was to deal with a major oil catastrophe. *Id.* The spill had an extremely damaging effect on diving birds in the area, but seemingly did not have any permanent affects on the fisheries, shellfisheries, or the seals. *Id.*

69. See *id.* (asserting that French had longer to prepare for spill).

70. See *id.* (noting that French convened international team of scientists to determine how to approach spill). They decided to use chalk. *Id.* The chalk was not as harmful to the environment as the detergents used by the English. *Id.*

71. *Id.*

72. See HEALY & SHARPE, *supra* note 14, at 875 (discussing conflict between ship-owners and government in determining liability for Torrey Canyon and lack of clarity in statutes).

after the aerial bombing.⁷³ The Torrey Canyon disaster made apparent the need for oil spill liability laws.⁷⁴

The 1967 spill brought about the realization of the potential damage of oil tankers.⁷⁵ Many commentators argue that the 1969 CLC was a direct reaction to the Torrey Canyon's impact on the French and U.K. coastlines and the inability to assign liability for damages.⁷⁶ The CLC and the International Oil Pollution Compensation Fund ("IOPC") were the proposed solutions should a similar disaster occur.⁷⁷

B. *International Regulation: The Convention on Civil Liability*

The first attempt at unifying maritime law for liability for oil spills was the 1924 Convention on the Limitation of Shipowners' Liability⁷⁸ ("1924 Convention").⁷⁹ In 1954, the Intergovernmental Maritime Consultative Organization ("IMCO") implemented the 1954 International Convention for the Prevention of Pollution of the Sea by Oil⁸⁰ ("OILPOL").⁸¹ After the 1967 Torrey Canyon spill, the need for better liability laws became appar-

73. See *In the Matter of the Complaint of Barracuda Tanker Corp. as the Owner of the S/T Torrey Canyon and the Union Oil Company of California for the Exoneration from the Limitation of Liability*, 281 F. Supp. 228, 230 (S.D.N.Y. 1968) (explaining that due to Federal Rules of Civil Procedure, liability was limited to stipulated vessel); see also HEALY & SHARPE, *supra* note 14, at 813 (noting that traditional maritime law set value of ship as ceiling on recoverable damages).

74. See HEALY & SHARPE, *supra* note 14, at 876 (noting that soon after Torrey Canyon settlement, British Government asked Intergovernmental Consultative Organization ("ICO") to consider conventions); see also CHAO, *supra* note 18, at 9 (describing Torrey Canyon as benchmark in history of liability legislation).

75. See Shen, *supra* note 65, at 29 (arguing that until 1967, oil pollution from ships attracted little attention in legal community, and since then, has been subject of increasing attention internationally).

76. See CHAO, *supra* note 18, at 38 (noting that preparatory work and conference discussions must be reviewed to understand true intent of CLC); Beth Van Hanswyck, *The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law*, 22 INT'L LAW. 319, 321 (1988) (describing inadequacy of maritime legal principals in resolving compensation claims and liability issues raised by claimants after Torrey Canyon spill).

77. CLC, *supra* note 12.

78. International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Vessels, August 24, 1924 120 L.N.T.S., reprinted in 6 BENEDICT, *supra* note 21, § 5 2-10.

79. *Id.*

80. International Convention for the Prevention of Pollution of the Sea by Oil 1954, May 12, 1954, 327 U.N.T.S. 3 [hereinafter OILPOL].

81. *Id.*

ent.⁸² In 1969, several nations met for the CLC to restate liability.⁸³ The CLC was amended in 1984 and 1992 in an attempt to create an improved compensation system for those injured by oil spills.⁸⁴

1. Background

In 1924, maritime nations met to discuss the unification of maritime law concerning civil liability for oil pollution from tankers.⁸⁵ The 1924 Convention was the first international attempt at limiting shipowners' liability.⁸⁶ Commentators argue that because major shipping nations did not adopt the 1924 Convention, it had little actual effect on the maritime industry.⁸⁷

In 1948, the IMCO became a powerful force in international oil pollution law.⁸⁸ In 1954, the IMCO realized that it was necessary to take both initial precautions to insure that a spill did not occur and to assign liability after a spill happened.⁸⁹ International oil pollution regulation came into effect with OILPOL, prohibiting oil tankers from indiscriminate dumping.⁹⁰

82. See Van Hanswyck, *supra* note 76, at 321 (noting difficulty in resolving numerous compensation claims and liability issues raised by claimants after Torrey Canyon).

83. CLC, *supra* note 77.

84. See Magnus Göransson, *The 1984 and 1992 Protocol to the Civil Liability Convention, 1969 and the Fund Convention, 1971*, in *LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* 72 (Colin M. De La Rue ed., 1993) (asserting that factors for revision included inflation and oil spills).

85. See CHAO, *supra* note 18, at 33 (describing first international convention applying limited liability, entered into force in 1931).

86. *Id.* at 33.

87. See *id.* (arguing that because Belgium, Brazil, Dominican Republic, Hungary, Madagascar, Poland, Portugal, Spain, and Turkey were only parties, therefore 1924 Convention on the Limitation of Shipowners' Liability ("1924 Convention") had little effect on shipping industry); see also Donald C. Greenman, *Limitation on Liability: A Critical Analysis of United States Law in an International Setting*, 57 *TUL. L. REV.* 1139, 1142 (1983) (noting that whether they joined, many shipowners would be subject to U.S. jurisdiction).

88. Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 289 U.N.T.S. 48. The name of the IMCO was changed to International Maritime Organization ("IMO") by the 1975 Protocol that entered into force in 1984. *Id.*

89. See HEALY & SHARPE, *supra* note 14, at 870 (describing attempt at making discharge of oil or oily mixtures into sea in certain prohibited zones illegal).

90. See CHAO, *supra* note 18, at 1 (noting that International Convention for the Prevention of Pollution of the Sea by Oil ("OILPOL") was later revised to prohibit spill of oil generally, instead of just in certain areas).

In 1967, OILPOL proved ineffective, forcing major shipping nations⁹¹ to promulgate new liability laws.⁹² In 1969, the IMCO met and created the CLC to restate the law of liability for oil spills.⁹³ The current international oil pollution liability laws descend from this conference.⁹⁴

The CLC's objectives are twofold: to guarantee adequate compensation for those injured by oil spills and to provide uniform rules regarding clean-up procedures and liability for pollution.⁹⁵ Since 1969, the CLC has been amended twice, with 107 nations ratifying it.⁹⁶ The 1984 Protocol was never adopted.⁹⁷ The 1992 Protocol came into effect in 1996.⁹⁸

2. Provisions of the CLC

The CLC imposes strict liability and compulsory liability insurance on shipowners.⁹⁹ After a spill, aggrieved parties file

91. See CLC, *supra* note 12 (listing participants as governments of Cameroon, Republic of China, France, Federal Republic of Germany, Guatemala, Iceland, Indonesia, Italy, Korea, Malagasy Republic, Monaco, Poland, Switzerland, United Kingdom, United States, and Yugoslavia).

92. See HEALY & SHARPE, *supra* note 14, at 875 (noting that conventions and statutes resulting after Torrey Canyon were compromises between government interests and interests of shipowners and insurers); see also Fontaine, *supra* note 54, at 101 (asserting that CLC established strict liability-based compensation mechanism for pollution damage immediately after Torrey Canyon spill); Smith, *supra* note 54, at 117 (describing IMCO sponsored international conference as attempt to re-examine current international laws).

93. See CHAO, *supra* note 18, at 38 (naming CLC objectives as guaranteeing adequate compensation and providing uniform rules).

94. See BENEDICT, *supra* note 21, Doc. 6-4B (noting that 1992 Protocols were signed December 2, 1992 and entered into force May 30, 1996).

95. CLC, *supra* note 12. The preamble states:

CONVINCED of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,
DESIRING to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases.

Id.

96. See CMI YEARBOOK 459 (1997) (listing member Nations of CLC and 1992 Protocols and describing conditions of ratification).

97. See Göransson, *supra* note 84, at 75 (noting that entry into force for 1984 Protocols was dependent on ratification of minimum number of 10 states, including no less than six with minimum tonnage of one million tons). The author argues that many states were prepared to become parties to the Protocols, but were anticipating U.S. actions. *Id.*

98. CMI YEARBOOK, *supra* note 96, at 459.

99. See Prof. A. Kolodkin, et. al, *Some New Trends in Legislation of the Russian Federation and Its Attitude Towards Conventions with Regard to Marine Pollution*, in *LIABILITY FOR*

claims against a pre-established fund.¹⁰⁰ If the amount recovered under the CLC is insufficient, then recovery is available from the IOPC.¹⁰¹

The adoption of strict liability is one of the most important elements of the CLC.¹⁰² Scholars agree that another fundamental element is the IOPC.¹⁰³ This fund enables shipping and oil industries to share the burden of liability for an oil spill.¹⁰⁴

Unless there are certain exonerating circumstances, the CLC adopts strict liability for the shipowner.¹⁰⁵ The CLC abandons the traditional concept of liability based on fault.¹⁰⁶ Legal

DAMAGE TO THE MARINE ENVIRONMENT 40 (Colin M. De La Rue ed., 1993) (commenting that strict liability, higher limits of liability, compulsory insurance, and right of direct action against insurer have contributed to improvement of position of those injured by oil pollution).

100. See *id.* (noting that fund must be established by shipowner before ship can sail in international waters).

101. See HEALY & SHARPE, *supra* note 14, at 877 (commenting that International Oil Pollution Compensation Fund ("IOPC") was created in 1971 and financed by tax on oil imports).

102. See Måns Jacobsson, *The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution Compensation Fund*, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT 40 (Colin De La Rue ed., 1993) (explaining that owners of vessels are liable for pollution simply for being owners of oil polluting vessels).

103. See Smith, *supra* note 54, at 117 (arguing that with strict liability and IOPC available when spill occurs, international community is now able to redress quickly oil pollution problems); Rémond-Gouilloud, *The Future of the Compensation System as Established by the International Convention*, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT 85 (Colin De La Rue, ed., 1993) (asserting that key feature of system lies in apportionment of financial burden between oil transport industry, oil refiners, and traders). The risk-creators are able to bear the consequences if there is an oil spill; which truly respects the idea of a polluter pays principal. Rémond-Gouilloud, *supra*.

104. See Rémond-Gouilloud, *supra* note 103 (arguing that key feature of system is apportionment of liability).

105. CLC, *supra* note 12. Article III(2) states:

No liability for oil pollution damage shall attach to the owner if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Id.

106. See HEALY & SHARPE *supra* note 14, at 813 (describing fault-based rule of liability: persons are liable to pay damages, up to full extent of their assets, for their own negligence, for their own intentional torts, and for breaching their contracts); see also

scholars assert that if these circumstances only partially or incidentally cause an accident, then strict liability still will apply.¹⁰⁷

When traveling in CLC member waters, a shipowner carrying more than 2000 tons of oil is required to maintain insurance or other financial security.¹⁰⁸ This security ensures if there is a spill, then the polluter has the financial ability to pay for damages caused by the spill.¹⁰⁹ Under the CLC, compensation is available for the costs of preventing contamination and damage caused by contamination.¹¹⁰ Commentators assert that the CLC's limited definition of damages avoids the possibility of over compensation.¹¹¹ The CLC awards money only for quantifiable damages.¹¹²

Jacobsson, *supra* note 102, at 41 (noting that replacing fault liability by strict liability was revolutionary in 1969).

107. See CHAO, *supra* note 18, at 60 (commenting that "wholly" is clear to define in sections (b) and (c), but (a) is difficult). The author describes four types of causation: parallel, complementary, cumulative, and exclusive. *Id.*; Cynthia M. Wilkinson, et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 181, 185 (1992).

108. CLC, *supra* note 12. Article VII states:

The owner of a ship registered in a Contracting State and carrying more than 2000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention.

Id.

109. See CHAO, *supra* note 18, at 67 (remarking that strict liability would be worthless in case of pollution caused by insolvent shipowners because injured parties would be without compensation).

110. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage. [hereinafter 1992 Protocol]. Article 2.3 reads:

Paragraph 6 is replaced by the following text:

Pollution damage means:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.

Id.

111. See Rémond-Gouilloud, *supra* note 103, at 92 (asserting that only measures actually undertaken or to be undertaken will be taken into account in determining damages); see also CHAO, *supra* note 18, at 47 (noting that CLC, refuses compensation in cases of explosion or fire resulting from oil spill or in cases of intentional discharge).

112. 1992 Protocol, *supra* note 110, at art. 2.3.

The CLC limits liability to the shipowner.¹¹³ The signatories agreed to this limited definition because, by financing the IOPC, cargo owners and operators are still held to a level of responsibility.¹¹⁴ Critics commend the CLC's definition of responsible party, because it enables prompt and efficient compensation.¹¹⁵

Article III limits the liability of the shipowner.¹¹⁶ A shipowner can never be liable for more than a pre-determined amount, regardless of fault.¹¹⁷ Article IV expressly assures that claims will not be brought against servants or agents of the owner.¹¹⁸

113. CLC, *supra* note 12. Article I defines shipowner as:

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

Id.

114. See Jacobsson, *supra* note 102, at 46 (noting that Japanese oil industry contributes about 29% of IOPC); see also CHAO, *supra* note 18, at 96 (providing that if amount of oil received exceeds 150,000 tons, then person shall pay contributions).

115. See CHAO, *supra* note 18, at 55 (arguing that in order to insure prompt compensation, solution based on administrative evidence is favored). The author cites the Torrey Canyon as an example of where the real owner and the apparent owner were difficult to distinguish. *Id.*; see also Fontaine, *supra* note 54, at 106 (arguing that IOPC and victims were able to start prompt recovery actions against responsible parties). But see Rémond-Gouilloud, *supra* note 103, at 95 (arguing that Amoco Cadiz incident showed that CLC actually increased risk for some persons).

116. CLC, *supra* note 12. Article III.4 states: "No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner." *Id.*

117. See CHAO, *supra* note 18, at 56 (noting that CLC does not employ unlimited liability for shipowners unless act was purposeful or reckless); see also Robert O. Phillips *Charterer's Point of View, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* 159 (Colin M. De La Rue ed., 1993) (arguing that owners should be allowed to limit liability so long as limits are reasonable).

118. 1992 Protocol, *supra* note 110. Article 4 states:

Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer, manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any persons taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d), and (e);

unless the damage resulted from their personal act or omission, committed

Liability of a shipowner is limited based on the size of the vessel.¹¹⁹ The 1992 Protocols expanded liability so that the shipowner of a vessel weighing less than 5000 tons would be liable for 3 million Special Drawing Rights.¹²⁰ The Protocols increased maximum liability limitations from US\$87million to US\$196 million.¹²¹

The 1969 CLC attempted to provide uniform rules regarding the clean-up of spills.¹²² The CLC and the IOPC preempt any nation's laws regarding oil pollution.¹²³ The CLC also supersedes any other international conventions.¹²⁴

The 1992 Protocols expand the geographic range of the

with the intent to cause such result, or recklessly and with knowledge that such damage would probably result.

Id.

119. CLC, *supra* note 12. Article V states: "The owner of a ship shall be entitled to limit his liability under this Convention in respect to any one incident to an aggregate amount of 2000 francs for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 210 million francs." *Id.*

120. 1992 Protocol, *supra* note 110. Article 6.1 reads:

(1) The owner of a ship shall be entitled to limit his liability under this Convention in respect to any one incident to an aggregate the amount calculated as follows:

(a) 3 million units of account for a ship not exceeding 5000 units of tonnage; for a ship with tonnage in excess thereof, for each additional unit of tonnage, 420 units of account in addition to the amount mentioned in subparagraph (1); provided, however, that this aggregate amount shall not in any event exceed 59.7 million units of account.

Id.; Article 6.4 states:

The "unit of account" referred to in Paragraph 1 of this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in paragraph 1 shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the constitution of the fund referred to in paragraph 3.

Id.

121. *Id.* Article 6(1)(b) limits aggregate amount to 59.7 million units of account. *Id.*; see HEALY & SHARPE, *supra* note 14, at 909 (noting that future increases will provide about US\$290 million).

122. See CLC, *supra* note 12 (asserting that goals of CLC are uniform international rules and procedures for determining liability and providing adequate compensation).

123. *Id.* Article XII states:

This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened for signature but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States or non-Contracting States arising under such International Conventions.

Id.

124. See *id.* (referring to 1924 and 1954 Conventions).

CLC from the territorial sea of a member nation¹²⁵ to the exclusive economic zone of a member nation.¹²⁶ By extending the area covered by the CLC, the possibility of recovery became greater.¹²⁷ Prior to the 1992 amendments, there were no regulations on liability in the exclusive economic zone, and oil pollution in this area went uncompensated.¹²⁸

The CLC is broad in scope because of the many nations that are party to this convention.¹²⁹ If a vessel spills oil in CLC waters, then CLC provisions apply, regardless of whether the shipowner is a citizen of a member nation.¹³⁰ The CLC provisions do not, however, apply to the vessels of member nations outside of CLC waters.¹³¹

3. The Tanio

On March 7, 1980, the Tanio, a Madagascan tanker, spilled over 7000 tons of crude oil off the coast of Brittany, France.¹³² The ship broke in half and the bow section sank with 5000 tons

125. *Id.* The Convention did not set specific limitations to the territorial sea, but left the discretion to the member nations. *Id.*

126. 1992 Protocol, *supra* note 110. Article 3 states:

This Convention shall apply exclusively:

(a) To pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

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

(b) to preventive measures, wherever taken to prevent or minimize such damage.

Id.

127. *See* CHAO, *supra* note 18, at 156 (commenting that Protocols brought about moderate enlargement of CLC by filling some gaps left by 1969 CLC).

128. *See id.* at 155 (noting that prior to 1992 amendments, those potentially liable for pollution would be subject to national laws).

129. *Id.* at 74.

130. *See id.* (describing CLC and its relationship with other conventions).

131. *See* CLC, *supra* note 12, at art. XII (noting that CLC does not pertain to non-member nations even if member nations spills in non-member waters).

132. *See* CHAO, *supra* note 18, at 105 (noting that on March 7, 1980, Tanio broke because of bad weather conditions and polluted more than 200 kilometers of Brittany Coast, causing great ecological damage).

of cargo oil.¹³³ The stern section remained afloat with 7500 tons of oil on board.¹³⁴ To prevent further spillage from the stern section, French response teams plugged the existing holes in the hull and drilled new holes.¹³⁵ French teams attached water lines to the new holes and pumped hot water into the tanks, thereby displacing the oil.¹³⁶

About 100 parties presented claims to the IOPC.¹³⁷ The IOPC awarded seventy percent of the damages of the spill.¹³⁸ The early settlement of these claims seemed preferable to waiting for judicial resolution.¹³⁹ At least one commentator views the Tanio resolution as the most effective compensation agreement in an oil pollution situation.¹⁴⁰

In comparing clean-ups, many commentators prefer the results of the CLC to those of OPA.¹⁴¹ Both the Exxon Valdez experience in U.S. courts and the fourteen year litigation following the Amoco Cadiz spill compared unfavorably to the resolution of the Tanio spill.¹⁴² After paying the claimants, the IOPC sought compensation from the responsible parties under the provisions of the CLC and general principals of liability.¹⁴³

133. *See id.* (stating that bow section of Tanio sank to depth of 90 meters, from which oil was pumped out to avoid more pollution from occurring).

134. *See id.* (noting that stern section of Tanio was towed to Le Harve).

135. *See* Caleb Solomon, *Tanker Sinks; Most of Its Oil Is Still on Board*, WALL ST. J., Apr. 15, 1991, at A4 (describing technique used to displace oil in 1980 sinking of Tanio as possibility of way to treat sinking of Haven off coast of Italy).

136. *Id.*

137. *See id.* at 105 (noting that claims presented to IOPC totaled 527 million francs).

138. *See* Fontaine, *supra* note 54, at 106 (noting that damage assessment of Tanio incident was 348 million francs and three to five years after Tanio spill, 70 percent of estimate was paid).

139. *See id.* at 106 (all but a few claims relating to minor amounts were settled at early stage).

140. *See id.* at 108 (noting efficiency with which IOPC handled suit because of institutionalization).

141. *See id.* (remarking that IOPC has been able to achieve aim—rapid compensation of victims based on well accepted principles); *see also* Daniel Kopec & Philip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 *RUTGERS L.J.* 597, 630 (1992).

142. *Pollution Conventions Under Threat?*, *WORLD INSURANCE REPORT*, Mar. 12, 1993, at 9.

143. *See* Fontaine, *supra* note 54, at 106 (describing allotment of damages in Tanio case).

4. The Braer

In January 1993, a single hulled Liberian registered vessel was carrying over twenty-four million gallons of Norwegian light crude oil from Norway to Canada.¹⁴⁴ On January 12 the ship broke into several sections and leaked most of its oil onto the Shetland Coastline due in part to bad weather.¹⁴⁵ The weather prevented crews from working efficiently and the measures the crews did take were ineffective in dispersing the oil.¹⁴⁶

The CLC and IOPC handled the spill and approved of nearly US\$39.3 million in claims.¹⁴⁷ Realizing that the number of claims filed exceeded the amount available, the IOPC suspended the payments to Braer claimants in 1995.¹⁴⁸ While some parties pursued claims, many frustrated parties abandoned their cases.¹⁴⁹

C. U.S. Regulation: The Oil Pollution Act of 1990

Before OPA, the United States had numerous laws concerning the liability of shipowners.¹⁵⁰ The United States participated in the CLC, but did not ratify it because the liability limits were too low.¹⁵¹ The United States also participated in the 1984 CLC, but did not ratify the protocols because the caps on liability were

144. See Gavin Souter, *Spill Costs May Be Capped International Conventions on Oil Spill Liability May Limit Insurer Payout to \$32 Million*, BUSINESS INSURANCE, Jan. 11, 1993 (noting that on January 5, 1993, Braer's engines failed during bad weather and tanker grounded in Garth Ness, Shetland Islands, United Kingdom).

145. See *Braer Crude Oil Tanker Splits as Weather Hinders Containment*, OIL AND GAS., Jan. 18, 1993, at 26 (describing hull of tanker breaking into three sections as winds gusted to 100 miles per hour).

146. See *id.* (asserting that rough weather actually helped disperse oil naturally, preventing it from accumulating on Shetland shores).

147. See *IOPC Fund Has Approved Nearly \$39.3 Million in Claims from Braer Spill*, OIL SPILL INTELLIGENCE REPORT, May 12, 1994, available in 1994 WL 2521994 (noting that IOPC Fund approved 900 claims for property damage, damage to salmon, lost income, and lost tourism).

148. See Rajesh Joshi, *Braer Claims Could Drop Say IOPCF*, LLOYD'S LIST, Aug. 23, 1999, available in 1999 WL 21567821 (reporting that £50.6 million were available, £46.3 million had already been paid and additional £5.2 million were approved).

149. *Id.*

150. See Gallagher, *supra* note 59, at 576 (asserting that U.S. laws provided various levels of liability).

151. See CHAO, *supra* note 18, at 332 (describing U.S. desire for unlimited liability provision).

still insufficient.¹⁵² The United States viewed the Amoco Cadiz case as an example of the CLC's inefficiency.¹⁵³ After the Exxon Valdez spill, the United States realized the need for better liability laws.¹⁵⁴ The United States passed OPA, setting forth a series of standards requiring compliance of shipowners.¹⁵⁵

1. Background

Scholars note that the United States depends on maritime transport to satisfy its oil consumption requirements.¹⁵⁶ The United States, therefore, faces higher risks of oil pollution incidents than nations that import less oil.¹⁵⁷ While the United States has consistently taken an affirmative role in pollution legislation, it has declined to ratify the CLC or its Protocols.¹⁵⁸

During the 1969 CLC, representatives from U.S. coastal states vigorously opposed ratification because it would preempt state law.¹⁵⁹ Some commentators argue that the United States declined to join the CLC due to fear that the international scheme failed to protect the extensive U.S. coastline from damage caused by large spills.¹⁶⁰ Officially, however, the United States rejected the CLC on the grounds that the caps on liability

152. See Savage, *supra* note 19, at 346 (describing U.S. aspiration for higher liability standards and increased limitation on liability standards).

153. *Id.*

154. See *id.* (explaining clean-up costs of Exxon Valdez spill).

155. Oil Pollution Act, 33 U.S.C. § 2701 (1990).

156. See CHAO, *supra* note 18, at 272 (asserting that half of oil consumed in United States comes from other countries and is carried by tankers and one-quarter of national oil production is brought in from Alaska by means of tankers); see also Göransson, *supra* note 84 (explaining that in 1990, United States received about 460 million tons of oil); BURGER, *supra* note 20, at 23 (noting that presently most major oil routes go from Middle East to Europe, Japan, and United States).

157. See BURGER, *supra* note 20, at 27 (discussing factors that have contributed to growing number and size of oil spills including increases in amount of oil shipped and size of oil tankers).

158. See Mark J. Yost, *International Maritime Law & the U.S. Admiralty Lawyer: A Current Assessment*, 7 U.S.F. MAR. L.J. 313, 314 (1995) (stating that United States has ratified 1990 Oil Pollution Preparedness and Response Convention, International Convention on Salvage, 1974 Safety of Life at Sea Convention, and 1973 International Convention for the Prevention of Pollution from Ships, among other international maritime conventions).

159. See Smith, *supra* note 54, at 134 (arguing that one reason for resistance to ratifying 1984 Protocols was issue of preemption of state rights).

160. See Savage, *supra* note 19, at 337 (explaining U.S. reasoning behind rejecting CLC was legislation inadequately satisfying potential cost of clean-up for spills of great magnitude); CHAO, *supra* note 18, at 76.

were too restrictive.¹⁶¹

In 1984, the member nations of the CLC met to raise liability limits and expand the scope.¹⁶² The United States again participated in the CLC, but refused to ratify the protocols without specific changes.¹⁶³ The CLC did not make the appropriate changes, and the United States declined to ratify the protocols.¹⁶⁴

The decision not to ratify the CLC and its protocols left U.S. oil spill liability law in a confusing array of statutes.¹⁶⁵ Scholars note that prior to 1990, the existing statutes did not address the issue of costs incurred by private individuals.¹⁶⁶ Furthermore, provisions addressing compensation awards differed in each statute.¹⁶⁷

Commentators note that the U.S. House of Representatives and the Senate were aware that existing laws were inefficient, but could not reach an agreement on how to treat liability for oil spills.¹⁶⁸ In 1989, the U.S. Congress proposed the Oil Pollution

161. See CHAO, *supra* note 18, at 221 (explaining that in addition to having lower amount of maximum liability available than OPA, CLC also fails to provide for unlimited liability).

162. See Göransson, *supra* note 84, at 72 (citing inflation and Amoco Cadiz spill as two reasons for 1984 amendments).

163. See Savage, *supra* note 19, at 346 (explaining that United States would ratify only if international community increased liability standards, increased limitation of liability standards, and gave broader geographic scope). When the proposed changes were not made, the United States refused to ratify the CLC and continued domestic debate on oil pollution regulation. *Id.*

164. See Edgar Gold, *Marine Pollution Liability After "Exxon Valdez": The U.S. "All or Nothing" Lottery!*, 22 J. MAR. L. & COM. 423, 424 (1991) (arguing that when changes were made in 1992, OPA was already successfully implemented in United States).

165. See Gallagher, *supra* note 59, at 576 (describing U.S. regime as providing various levels of liability and compensation, which has proven confusing to everyone concerned); see also Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 VILL. ENVTL. L.J. 283, 286 (1992) (noting U.S. statutes included Clean Water Act, Federal Water Pollution Control Act, provisions in Title III of Outer Continental Shelf Lands Acts Amendments of 1978, Deepwater Port Act of 1974, and Trans-Alaska Pipeline Authorization Act).

166. See Kende, *supra* note 54, at 131 (noting that comprehensive legislation covered only clean-up costs incurred by State and Federal Authorities); Van Hanswyck, *supra* note 76, at 319.

167. See Kende, *supra* note 54, at 132 (describing relevant Federal Statutes and their provisions); see also Van Hanswyck, *supra* note 76, at 319 (noting that each statute imposed separate liability limits, applied different definitions, and established separate funds for compensation).

168. See Gallagher, *supra* note 59, at 611 (noting philosophical difference between U.S. House of Representatives' favoring of implementation of international agreements

Liability and Compensation Act of 1989,¹⁶⁹ which limited ship-owner's liability to US\$60 million and created a fund financed by the oil industry that would pay US\$1 billion per incident to clean-up pollution and compensate parties adversely affected by a spill.¹⁷⁰ The U.S. Senate proposed its own bill, the Oil Pollution Act of 1989,¹⁷¹ which created a US\$1 billion fund available for cleaning up spills, financed primarily by placing a US\$.03 per barrel tax on all domestic and imported oil.¹⁷² The President signed the Oil Pollution Act of 1990,¹⁷³ which combined aspects of both the House and Senate proposals.¹⁷⁴

In 1992, the United States participated in the CLC, but rejected the amendments.¹⁷⁵ Most experts argue that the Exxon Valdez¹⁷⁶ disaster influenced the U.S. decision.¹⁷⁷ The Exxon spill created uncertainty as to whether the CLC could adequately

and Senate's favoring of domestic solutions); see also Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent & Effects*, 21 ENVTL. L. REP. 10119 (1991) (explaining that several times comprehensive oil spill bills were passed by one House, but because conferees were unable to resolve political and philosophical differences over preemption of state law by federal standards and relationship between federal standards and international conventions, none ever came to fruition).

169. H. Res. 1465, 101st Cong. (1989).

170. See Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10333, 10337 (1989) (noting that bill implemented protocols to IOPC Fund and CLC provisions). During the markup of the bill, most debate occurred concerning the issue of state preemption. *Id.* Ultimately, the bill offered to preempt state liability laws in tandem with a prohibition on states assessing taxes on oil to pay damage claims covered by the federal fund. *Id.*; see also Benjamin H. Grumbles & Joan M. Manley, *The Oil Pollution Act of 1990: Legislation in the Wake of a Crisis*, NATURAL RESOURCES & ENERGY 35 (1995) (noting that on November 9, 1989, House passed House Resolution 1465).

171. S. Res. 686, 101st Cong. (1989).

172. See Jones, *supra* note 170, at 10337 (asserting that on August 4, 1989, U.S. Senate passed Senate Resolution 686 unanimously).

173. Oil Pollution Act, 33 U.S.C. § 2701 (1990).

174. See Letter from George J. Mitchell, Senate Majority Leader, to Samuel K. Skinner, Secretary U.S. Department of Transportation, at 3 (Mar. 2, 1990).

175. See Savage, *supra* note 19, at 245 (noting that 1992 Protocols were introduced as effort to encourage United States to join CLC because United States had one of largest shipping fleets in world).

176. See HEALY & SHARPE, *supra* note 14, at 899 (commenting that Exxon Valdez spilled estimated 262,000 barrels of crude oil into Prince William Sound). The Exxon Valdez was a single hulled U.S. ship en route to Long Beach, California when it ran aground on March 24, 1989. *Id.*

177. See Savage, *supra* note 19, at 346 (arguing that extravagant clean-up costs of Exxon Valdez spill forced U.S. to enact appropriate legislation); see also CHAO, *supra* note 18, at 227 (arguing that Exxon Valdez spill was used as example of inadequacy of compensation limits set by 1984 Protocols).

remedy a large spill.¹⁷⁸ Critics argue that the United States determined that even with the 1992 changes, the CLC was not efficient.¹⁷⁹ The United States refuses to join an international convention that provides lower compensation than that provided for in OPA.¹⁸⁰

2. Provisions

OPA set forth—for the first time in maritime law—the possibility of unlimited liability to third parties for pollution caused by oil discharge.¹⁸¹ The four major themes of OPA are pollution prevention, federalization, the idea that the polluter pays, and antipreemption.¹⁸² OPA sets forth increased safety standards and requirements for oil tankers.¹⁸³ OPA also empowers the federal government to regulate oil spill clean-ups.¹⁸⁴ Furthermore, OPA imposes strict joint, and several liability on the responsible party and has a broad scope of recoverable damages.¹⁸⁵ OPA

178. See Savage, *supra* note 19, at 346 (noting that clean-up costs of Exxon Valdez exceeded US\$2.5 billion).

179. See *id.* (arguing that CLC was not efficient because it did not provide for unlimited liability).

180. Oil Pollution Act, 33 U.S.C. § 3001 (1990).

181. See Kende, *supra* note 54, at 136 (noting that limitation provisions of OPA are not exclusive and discharges may be subject to unlimited liability for pollution proximately caused by discharge).

182. See Grumbles & Manley, *supra* note 170, at 35 (commenting that while federalization and antipreemption were from start included in negotiations, other issues grew in importance as negotiations continued).

183. *Id.*

184. *Id.*

185. Oil Pollution Act, 33 U.S.C. § 2702(b)(2) (1990). Section 2702 states:

The damages referred to in subsection (a) of this section are the following:

(A) Natural Resources

Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net

limits the defenses of responsible parties.¹⁸⁶ Finally, OPA expressly avoids preempting state legislation.¹⁸⁷

Scholars note that OPA's main concern is to ensure that

profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) Public Services

Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

Id.

186. Oil Pollution Act, 33 U.S.C. § 2730 (1990). Section 2730 lists defenses to liability:

(a) Complete defenses

A responsible party is not liable for removal costs or damages under section 2702 of this title if the responsible party established, by a preponderance of the evidence, that the discharge or substantial threat of discharge of oil and the resulting damages or removal costs were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes by a preponderance of the evidence, that the responsible party—

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions or

(4) any combination of paragraphs (1), (2), and (3).

Id.

187. Oil Pollution Act, 33 U.S.C. § 2718 (1990). Section 2718 states:

(a) Preservation of State authorities; Solid Waste Disposal Act

Nothing in this chapter or the Act of March 3, 1851 shall—

(1) Affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect

or modify in any way the obligations or liabilities of any person under

parties injured by an oil spill are compensated for their damages.¹⁸⁸ OPA requires proof of financial ability to pay for a spill prior to a ship's entrance in U.S. waters.¹⁸⁹ OPA sets a high level of maximum liability and allows claimants to pursue claims against any and all responsible parties.¹⁹⁰ Furthermore, by imposing unlimited liability on grossly negligent polluters, OPA attempts to promote safety and pollution prevention before spills occur.¹⁹¹ Finally, OPA preserves states' rights to pass their own

the Solid Waste Disposal Act (42 U.S.C. 6901 et. seq.) or State law, including common law.

Id.

188. See Smith, *supra* note 54, at 136 (describing OPA as comprehensive, creating liability and compensation regime, prevention and removal plan, research and development program, and establishing oil spill liability trust fund); see also Wilkinson, *supra* note 107, at 190 (noting that OPA expanded liability and compensation regimes found in previous bills).

189. Oil Pollution Act, 33 U.S.C. § 2716 (1990). Section 2716 states:

Financial Responsibility

(a) Requirement

The responsible party for—

- (1) any vessel over 300 gross tons (except a non-self propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or
- (2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States;

shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 2704 (a) or (d) of this title, in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

Id.

190. Oil Pollution Act, 33 U.S.C. § 2702 (1990). Section 2702 states:

Elements of Liability

(a) In general

Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

Id.

191. Oil Pollution Act, 33 U.S.C. § 2704(c) (1990). Section 2704 excludes:
Exceptions

liability laws if they are not satisfied with OPA's compensation level.¹⁹²

Under OPA, recovery is available from the registered owner of the vessel, as well as from any person operating or chartering the vessel if that person is wholly responsible for the spill.¹⁹³ OPA institutes a minimum level of liability, dependant upon the size of the polluting vessel.¹⁹⁴ Scholars agree that OPA's broad definitions expand the scope of liability and provide injured parties with a great chance of recovery for damages.¹⁹⁵

OPA sets forth situations under which the responsible party is held liable for the total costs of the clean-up.¹⁹⁶ OPA provides the U.S. President with a catch-all provision—the ability to adjust liability limits if it is deemed necessary.¹⁹⁷ Critics argue that this restricts the shipowner from the opportunity to benefit from the traditional maritime right of limited liability.¹⁹⁸

(1) Acts of responsible party

Subsection (a) of this section does not apply if the incident was proximately caused by—

- (A) gross negligence or willful misconduct of, or
- (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

Id.

192. Oil Pollution Act, 33 U.S.C. § 2718 (1990).

193. See *id.* § 2701(32) (defining "responsible party" as any person owning, operating, or demise chartering vessel). OPA uses an equation to determine the maximum amount of liability of a ship owner and caps liability at an amount that allows for greater compensation to aggrieved parties. *Id.*; see also CHAO, *supra* note 18, at 241 (commenting that victim can pursue claim against both owner of vessel and person operating it, increasing possibility of recovery).

194. Oil Pollution Act, 33 U.S.C. § 2704(a) (1990) (setting maximum liability of responsible party at greater of US\$1200 per gross ton or US\$10 million if vessel is over 3000 gross tons, or US\$2 million if vessel is less than 3000 gross tons).

195. See Savage, *supra* note 19, at 358 (remarking that this expansive approach encourages all parties involved in transport of oil to follow appropriate regulations and guidelines to avoid liability); see also Wilkinson, *supra* note 107, at 204 (noting that OPA deletes limitations requiring claimant to show physical damage to proprietary interests before economic damage could be awarded).

196. Oil Pollution Act, 33 U.S.C. § 2704(c) (1990).

197. See *id.* § 2704(d)(3) (asserting that President has full authority to determine when it is necessary to adjust limits of liability).

198. See Sweeney, *supra* note 16, at 161 (alleging that limitation of liability is ship-owners ancient right to cut losses from marine disasters); ASHBURNER, *supra* note 29.

Under OPA, compensation is available from two sources.¹⁹⁹ First the victim obtains compensation from the responsible party.²⁰⁰ Outstanding costs are recoverable under the Oil Spill Liability Trust Fund ("Trust Fund").²⁰¹ The Trust Fund, originally established by § 9509 of the Internal Revenue Code of 1986,²⁰² is designed to cover the clean-up costs of the federal government, state governments, and uncompensated private ventures up to US\$1 billion.²⁰³

199. Oil Pollution Act, 33 U.S.C. § 2702 (1990).

200. *See id.* (assigning liability for oil spill to party responsible for spilling oil).

201. *See* I.R.C. § 9509(a) (1990) (establishing in U.S. Treasury "Oil Spill Liability Trust Fund" consisting of amount as may be appropriated). Section 9509(b) states:

(b) Transfers to Trust Fund. – There are hereby appropriated to the Oil Spill Liability Trust Fund amounts equivalent to—

- (1) taxes received in the Treasury under section 4611 (relating to environmental tax on petroleum) to the extent attributable to the Oil Spill Liability Trust Fund financing rate under section 4611(c).
- (2) amounts received under the Oil Pollution Act of 1990 for damages to natural resources which are required to be deposited in the Fund under section 1006(f) of such Act,
- (3) amounts received by such Trust Fund under section 1015 of such Act,
- (4) amounts required to be transferred by such Act from the revolving fund established under section 311(k) of the Federal Water Pollution Control Act,
- (5) amounts required to be transferred by the Oil Pollution Act of 1990 from the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974,
- (6) amounts required to be transferred by the Oil Pollution Act of 1990 from the Offshore Oil Pollution Compensation Fund established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978,
- (7) amounts required to be transferred by the Oil Pollution Act of 1990 from the Trans-Alaska Pipeline Liability Fund established under section 204 of the Trans-Alaska Pipeline Authorization Act, and
- (8) any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of such Act (as a result of violations of such section 311), the Deepwater Port Act of 1974, or section 207 of the Trans-Alaska Pipeline Authorization Act.

Id.; *see also* I.R.C. § 9602(b) (1990) (giving U.S. Secretary of Treasury duty of investing excess Oil Spill Liability Trust Fund proceeds).

202. I.R.C. § 9509(a) (1990). Section 9509 states "There is established in the Treasury of the United States a trust fund to be known as the "Oil Spill Liability Trust Fund," consisting of such amounts as may be appropriated or credited to such Trust Fund as provided in this section or section 9602(b)." *Id.*

203. *Id.* § 9509. Section 9509(c)(2)(A) states: "US\$1,000,000,000 per incident, etc.—The maximum amount which may be paid from the Oil Spill Liability Trust fund with respect to—(i) any single incident shall not exceed US\$1,000,000,000, and (ii) natural resource damage assessments and claims in connection with any single incident shall not exceed US\$500,000,000." *Id.*

OPA expressly recognizes a state's power to establish its own compensation funds and demand certificates of financial responsibility.²⁰⁴ State-regulated funds co-exist with the Trust Fund and act as a third source of recovery.²⁰⁵ Legal experts note that many coastal states have implemented their own schemes, imposing liability on either the shipowner or the cargo owner.²⁰⁶

Claimants from other nations may recover from responsible parties in some situations.²⁰⁷ Generally, however, § 2707 of OPA bars international claimants from availing themselves to the remedies provided by OPA unless there is an express agreement between the United States and the claimant's home nation.²⁰⁸

204. Oil Pollution Act, 33 U.S.C. § 2718 (1990); see Kopec & Peterson, *supra* note 141 at 628 (noting that Congress gave three reasons for maintaining states rights—first, that legislation was within states police power; second, states' would need to respond quickly to oil spills; and third, judgment that states' imposition of higher liability limits would encourage shippers to maintain their trade routes).

205. Oil Pollution Act, 33 U.S.C. § 2718 (1990).

206. See Grumbles & Manley, *supra* note 170, at 38 (noting that Alabama, Alaska, California, Florida, Georgia, Maine, Maryland, Massachusetts, Michigan, New Jersey, Oregon, South Carolina, Virginia, Washington, and Wisconsin have enacted state laws); see also Kende, *supra* note 54, at 143 (describing Alaska's provision imposing strict liability on dischargers and owners of oil for dischargers of oil into Alaskan waters).

207. Oil Pollution Act, 33 U.S.C. § 2707 (1990). Section 2707 (b) states:

A claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of discharge, of oil in or on the territorial sea, internal waters or adjacent shoreline of a foreign country, only if the discharge is from—

- (1) an Outer Continental Shelf facility or a deepwater port;
- (2) a vessel in the navigable waters;
- (3) a vessel carrying oil as cargo between two places in the United States; or
- (4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States and the discharge or threat occurs prior to delivery into that place.

Id.

208. *Id.* Section 2707(a) states:

Required showing by foreign claimants

(1) In general

In addition to satisfying the other requirements of this chapter, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that—

- (A) the claimant has not been otherwise compensated for the removal costs or damages; and
- (B) recovery is authorized by a treaty or executive agreement between the United States and the claimants country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimants country provides a comparable remedy for United States claimants.

Some scholars note that the United States is attempting to broaden the scope of OPA.²⁰⁹

3. The Amoco Cadiz

The Amoco Cadiz was a state-of-the-art 228,513-ton tanker, transporting Iranian crude oil from Karg Island, Iran and Ras Tanura, Saudi Arabia to Rotterdam, Amsterdam.²¹⁰ On March 16, 1978, the Amoco Cadiz ran aground off the coast of France, spilling almost 220,000 tons of oil into the Atlantic Ocean, creating an oil slick eighteen miles wide and eighty miles long.²¹¹ Clean-up crews arrived to remove the oil, but the response teams were ill-equipped to rehabilitate the damages to the beaches and wildlife.²¹²

CLC remedies were available to the parties injured by the Amoco Cadiz spill.²¹³ Article 1382 of the French Civil Code allows victims to choose their remedies.²¹⁴ Even though France was a party to the CLC, the Amoco Cadiz claimants opted to

Id.; see Popp, *supra* note 36, at 126 (arguing that reason for agreements is to show that claimant's country will provide comparable remedy for U.S. claimant should spill happen in their waters).

209. See Popp, *supra* note 36, at 126 (explaining that if spill affects United States and Canada, then shipowner will be responsible under both laws); see also CHAO, *supra* note 18 (alleging that because United States is predominant in oil industry, United States can determine fate of liability).

210. See BURGER, *supra* note 20, at 38 (noting that unlike Torrey Canyon, Amoco Cadiz had been built with safety in mind); see also *In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France* on March 16, 1978, 954 F.2d 1279, 1285 (7th Cir. 1992) (asserting that Amoco Cadiz measured 1095 feet long and 167 feet wide and weighed 230,000 deadweight tons). The Italian crew of the Amoco Cadiz was experienced and the officers were all properly licensed. *In the Matter of Oil Spill*, *supra*, at 1287. The route of the vessel was around the Cape of Good Hope. *Id.*

211. See BURGER, *supra* note 20, at 38 (noting that Amoco Cadiz was driven ashore by gale force winds). After an investigation, it was determined that the faulty design of the machinery was the cause of the accident. *Id.* at 39. The failure to summon assistance sooner escalated the damage, causing a total of 68.7 million gallons of oil to be spilled into the seas. *Id.*

212. See *id.* (describing clean-up efforts of 2200 men and 50 vessels including ships and personnel from British Royal Navy). Sufficient technologies to rehabilitate beaches and injured wildlife had not yet been developed. *Id.*

213. See Fontaine, *supra* note 54, at 102 (explaining that Amoco Cadiz's registered owner, Amoco Transport, immediately set up limitation fund of 77 francs). By establishing fault or privity in a French court, the injured parties could have collected the fund. *Id.*

214. See *In the Matter of Amoco Cadiz*, 954 F.2d at 1311 (finding that even though France was party to 1969 CLC, nothing in CLC precluded victims from claiming compensation outside of CLC from persons other than owner, his servants, or agents).

bring suits in a U.S. court.²¹⁵ After thirteen years of litigation, the suit was finally decided and Amoco's parent company was held liable for the spill.²¹⁶

4. The Exxon Valdez

The Exxon Valdez was a 211,469-ton, 987-foot U.S. owned tanker transporting 53 million gallons of oil from the Trans-Alaska Pipeline terminal at Valdez, Alaska to California.²¹⁷ After hitting a shoal on the sea bottom, 11 million gallons of crude oil leaked from eight of the ships' eleven cargo tanks and dispersed oil over 1300 miles of the Alaskan coastline.²¹⁸ Environmentalists argue that U.S. authorities exacerbated the damage caused by the Exxon Valdez with their poor response time.²¹⁹

215. See *id.* at 1309 (noting that when Amoco Cadiz sank, cap on recovery was 77 million francs (approximately US\$16 million at rate of exchange)); *In re Oil Spill by Amoco Cadiz off Coast of France* on March 16, 1978, 699 F.2d 909, 912 (7th Cir., 1993) (explaining that principal defendants of initial suit were Astilleros and various affiliates of Standard Oil Company, including Amoco Transport Company, owner of Amoco Cadiz). When the plaintiffs brought suit in the United States, the affiliates of the ship owner's parent company moved to dismiss the complaint, claiming a lack of subject matter jurisdiction. *In re Oil Spill*, *supra*. The district court denied the motions and the U.S. Court of Appeals affirmed the decision. *Id.* In 1993, the Court of Appeals awarded damages with interest to France and Petroleum Insurance Limited, totaling US\$160 million. *Id.*

216. See Fontaine, *supra* note 54, at 105 (comparing outcome of litigation to what would have been recovered under CLC). The aggrieved parties were able to overcome the limitation of liability set by the CLC; the compensation received was five times the amount that would have been recoverable under the IOPC. *Id.* The court also reached beyond the CLC's limitation of liability to the registered owner of the vessel, holding the party who was in fact responsible for the pollution liable. *Id.* at 106.

217. See JOHN KEEBLE, *OUT OF THE CHANNEL, THE EXXON VALDEZ OIL SPILL IN PRINCE WILLIAM SOUND* 32 (1991) (noting that on March 23, crew of Exxon Valdez loaded cargo tanks with 1,286,738 barrels of Alaskan crude oil at Alyeska Terminal in Port Valdez).

218. See HEALY & SHARPE, *supra* note 14, at 899 (discussing that cause of spill was determined to be negligent navigation). While protocol called for three watchmen on the bridge, as well as a lookout, the third mate was alone on the bridge at the time of the grounding. *Id.* It was discovered after the accident that the ship had been locked in auto pilot mode. *Id.* Captain Joseph Hazelwood, the ship's master, had gone to his cabin shortly before the accident. *Id.* A blood test given to Hazelwood 10 hours after the grounding of the Exxon Valdez indicated a high alcohol level. *Id.*

219. See *Exxon Valdez Oil Spill: Introduction* (visited on Apr. 13, 2000) <<http://library.thinkquest.org/10867/intro/index.shtml>> (on file with the *Fordham International Law Journal*) (explaining that four Principle issues that were problems over first three or four days of spill were: a) inadequacy of Alyeska response, b) handoff of spill from Alyeska to Exxon, c) disagreement about how to disperse oil, d) lack of cleanup resources).

At the time of the Exxon Valdez spill, the state mandated contingency plan in Alaska required containment of any oil spill within five hours.²²⁰ Fourteen hours passed from the time of the spill until the first clean-up crew arrived at the site.²²¹ An additional twenty-one hours elapsed before containment equipment surrounded the site.²²² By this time, the oil had spread so much that chemical dispersants became ineffective.²²³ For many days after the spill, oil continued to flow from the ship, devastating the Alaskan shores and wildlife.²²⁴

Under U.S. law, Exxon paid at least US\$3 billion in clean-up costs.²²⁵ This spill underscored the need to amend the U.S. system for handling oil spills.²²⁶ The Exxon Valdez spill also brought an end to the fifteen year Congressional debate about the best way to treat liability for clean-up.²²⁷

II. ANALYZING THE CLC AND OPA: MERITS AND SHORTCOMINGS

Some commentators note that the CLC is the best solution for the oil spill liability problem because it is an international

220. See HEALY & SHARPE, *supra* note 14, at 899 (describing contingency plan of Alyksa Pipeline Service Co., manager of pipeline, for handling 200,000 barrel spill). To prepare for spills, the U.S. government has set forth the requirement for a Ship-board Oil Pollution Emergency Plan that describes the procedure for reporting an oil pollution incident, the agencies that are to be contacted, the actions to be taken on board to reduce or control the discharge of oil, and the contact person for response activities. *Id.* at 902.

221. See *id.* at 899 (explaining that when response teams finally contained Exxon Valdez, efforts were ineffective).

222. *Id.*

223. See *id.* (asserting that although clean-up crews attempted to use booms, fences, and skimmers, so much oil had spread that they did not work).

224. See KEEBLE, *supra* note 217, at 264 (noting that otters were restored to health at cost of over US\$90,000 each and cost of rehabilitating birds was US\$25,000 each); see also S. REP. NO. 99, 101st Cong., 1st Sess. 1 (1989) (reporting that because Alaskan natives depend on fish and wildlife for subsistence, harm to society was great). The restoration of Alaskan Wildlife alone after the spill is estimated to have cost US\$41 million. S. REP. NO. 99, *supra*.

225. See CHAO, *supra* note 18, at 227 n.55 (noting that Exxon agreed to pay US\$1.1 billion to settle governments claims and US\$1.125 billion to settle litigation in addition to its own clean-up costs). If existing laws were applied, then the compensation would have been US\$46 million. *Id.*

226. *Id.*

227. See *id.* (explaining that Exxon Valdez spill was final factor in U.S. decision not to ratify 1984 Protocols and incentive to implement domestic law).

solution to an international problem.²²⁸ Other authors argue, however, that until the United States becomes a party to the CLC, the CLC will not be an efficient compensation system.²²⁹ OPA creates a system for those injured by oil spills in the United States to resolve conflicts quickly and efficiently.²³⁰ At the same time, however, OPA prevents uniformity in liability law and creates the possibility of no recovery.²³¹

A. *Merits and Shortcomings of CLC*

The CLC is effective because it represents the international nature of the oil transport industry.²³² The remedies under the CLC are broad because of the numerous member nations.²³³ The CLC allows for seizure of ships in any member nation, thereby ensuring compensation even if the responsible party has no assets in the country in which a spill occurs.²³⁴ Since the United States is a major maritime nation, the CLC lacks a fundamental element without U.S. participation.²³⁵ In order to reach its goals, the CLC must raise liability limits and broaden definitions.²³⁶

228. See Frederick J. Carr, *Statutory Liability for Oil Pollution from Vessels in Marine Environments*, 3 U.S.F. MAR. L. J. 267, 323 (1991); Smith, *supra* note 54, at 143 (arguing that OPA is significantly limited because only addresses oil spill pollution on national basis); Van Hanswyk, *supra* note 76, at 342 (asserting necessity of worldwide standards of civil liability).

229. See Göransson, *supra* note 84, at 76 (noting that IOPC would benefit if United States shared burden of contribution); see also Wilkinson et al., *supra* note 107, at 224 (asserting that reason for failure of 1984 Protocols was that United States did not join).

230. See Wilkinson et al., *supra* note 107, at 235 (asserting that OPA provisions are clear and allow claimants to recover more damages than would be available under CLC).

231. See Smith, *supra* note 54, at 143-44 (concluding that shipowners without attachable property may escape all liability).

232. See Carr, *supra* note 228, at 323 (commenting that risk of environmental damages are present wherever oil is transported); Smith, *supra* note 54, at 150 (noting that international action is necessary to resolve international oil spill problem).

233. See Rémond-Gouilloud, *supra* note 103, at 85 (emphasizing large number of contributors to CLC sharing liability for spills).

234. See Smith, *supra* note 54, at 144 (asserting that CLC establishes broad jurisdiction).

235. See Göransson, *supra* note 84, at 76 (noting CLC dependence upon involvement of major maritime nations such as Japan).

236. See Yost, *supra* note 158, at 336 (explaining that limits must be adjusted to reach current standards).

1. Arguments in Favor of the CLC

Many commentators argue that because oil transport is an international industry, oil spills are international problems, requiring international solutions.²³⁷ Legal critics opine that by refusing to join the CLC, the United States has deprived individual states of the advantages of the CLC.²³⁸ Authors support the CLC because even though a spill may occur in one country, the effects of the spill may be felt worldwide.²³⁹

Some legal commentators argue that because the CLC is international, the available remedies are inherently broader than those available under a domestic regime.²⁴⁰ Critics also state that even though the amount of monetary damages recovered under OPA might be greater, the possibility of recovery is greater under the CLC.²⁴¹ Under the CLC, claimants are able to recover from more defendants, making the available funds greater.²⁴²

Many commentators support the CLC because oil transportation is an international industry, which puts many people at

237. See Carr, *supra* note 228, at 323 (commenting that laws of nature transcend jurisdictional boundaries); Smith, *supra* note 54, at 150 (calling for unified international action); Van Hanswyk, *supra* note 76, at 342 (asserting that international uniform liability system would prevent forum shopping).

238. See CHAO, *supra* note 18, at 273 (explaining that under CLC, member nations have right to seize another ship belonging to liable party that may be located in any other member nation); Kopec & Peterson, *supra* note 141, at 599 (noting that CLC sets forth necessary uniform standard); see also Kende, *supra* note 54, at 147 (asserting that OPA has dramatically affected cost and created problems for carriers from other nations).

239. See CHAO, *supra* note 18, at 229 (noting that CLC seeks to protect all seas and oceans, not just those in United States); Sweeney, *supra* note 16, at 157 (listing dangers from oil pollution as: destruction of fish, shellfish, sea birds, fishing gear, or beach installations; creation of fire hazards in ports; fouling of small boats; and loss of natural beauty).

240. See Smith, *supra* note 54, at 143 (noting that CLC members have right to seize ships belonging to liable parties located in any other member state); see also CHAO, *supra* note 18, at 273 (asserting that members of CLC have added guarantee of compensation).

241. See Smith, *supra* note 54, at 144 (noting that CLC establishes jurisdiction over all signatory tankers and ensures that potential claimants have means of compensation); see also Wilkinson et al., *supra* note 107, at 229 (describing House-Senate Conference Committee debate calling for united international, federal, and state effort for oil spill liability and compensation).

242. See Rémond-Gouilloud, *supra* note 103, at 85 (asserting that greater compensation is available under CLC due to greater number of contributors to fund than under OPA).

risk of pollution damage.²⁴³ Critics note that an international system spreads the risk and costs of oil pollution damage over a large number of nations instead of forcing one nation to bear the entire cost of clean-up.²⁴⁴ Legal scholars encourage the United States to join the international regime, arguing that U.S. participation will encourage other countries to join.²⁴⁵

2. Criticisms of the CLC

In order to be successful, the CLC needs all major maritime nations as members.²⁴⁶ Some authors assert that the CLC is inefficient because the United States is not a member.²⁴⁷ Critics argue that if all major maritime nations joined the CLC, then it would be able to reach higher fund limits and provide greater compensation to those injured by spills.²⁴⁸

Critics of the CLC find the limits of liability too low and the international definition of environmental damage too limit-

243. See *id.* at 85 (commenting that OPA is significantly limited because it only addresses oil spill pollution on national basis); see also Wilkinson et al., *supra* note 107, at 234 (noting that oil pollution compensation scheme will not be complete without international participation).

244. See Yost, *supra* note 158, at 336 (asserting that international regime spreads risks and costs of oil pollution between shipowners and cargo interests over numerous nations); see also Smith, *supra* note 54, at 144 (noting that burden of cleaning spill falls under oil industry and consumers globally); Rémond-Gouilloud, *supra* note 103, at 85 (suggesting that greater number of contributors means more compensation).

245. See Göransson, *supra* note 84, at 76 (noting Japanese oil industry bearing disproportionately large burden for operation of IOPC—if United States joined, then burden would be split); see also CHAO, *supra* note 18, at 215 (arguing that U.S. unilateral solution is extrinsic threat to existence of CLC); Dr. I.C. White, *The Voluntary Oil Spill Compensation Agreements—TOVALOP and CRISTAL*, in *LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT* 69 (Colin M. De La Rue ed., 1993) (noting that U.S. lead could attract other nations to enact legislation).

246. See CHAO, *supra* note 18, at 387 (recognizing that 1992 Protocol required ratification by 10 states, including four with more than one million units of gross tanker tonnage to come into force); Yost, *supra* note 158, at 341 (explaining that 1992 Protocols implemented cap on IOPC contributions because it was necessary for Japanese ratification).

247. See Göransson, *supra* note 84, at 76 (reasoning that CLC is dependant upon participation of certain maritime nations); CHAO *supra* note 18, at 7 (given that United States occupies prime position in international oil movement, unilateral U.S. action reduces effectiveness of CLC).

248. See Göransson, *supra* note 84, at 76 (describing statistics of Japan's contribution and receipt of money); Yost, *supra* note 158, at 341 (noting effect if Japan would not have ratified 1992 Protocols); Smith, *supra* note 54, at 144 (arguing that with U.S. participation, insurance certificates would be recognized internationally).

ing.²⁴⁹ After the Exxon Valdez spill and the ensuing clean-up costs, the United States rejected the 1992 Protocols because the limits were too low.²⁵⁰ At least one scholar suggests that to create an effective uniform liability system, the differences between OPA and the CLC must be resolved.²⁵¹

B. *Merits and Shortcomings of OPA*

Experts argue that OPA's provisions are designed to resolve conflicts.²⁵² OPA creates strict requirements, which pressure oil companies internationally to comply.²⁵³ In practice, OPA has helped create safer design requirements and higher liability limits internationally.²⁵⁴ However, by allowing states to implement their own laws, OPA fails to create a uniform system.²⁵⁵ Even with strict state laws, shipowners have found loopholes that allow them to circumvent requirements.²⁵⁶ OPA applies only to assets subject to U.S. jurisdiction, therefore, shipowners without assets in the United States can travel in OPA waters without liability.²⁵⁷

249. See Yost, *supra* note 158, at 336 (asserting that for 1990s, CLC limits of liability are too low and definitions are too narrow); see also CHAO, *supra* note 18, at 133 (noting inadequacy of available compensation available to claimants).

250. See CHAO, *supra* note 18, at 227 (application of CLC would have resulted in US\$60 million compensation); Kopec & Peterson, *supra* note 141, at 627.

251. See CHAO, *supra* note 18, at 275 (arguing that if differences between OPA and CLC cannot be resolved, then there is danger for future of CLC).

252. See Popp, *supra* note 36, at 119 (noting that OPA attempts to make liability clear before spill occurs).

253. See Kopec & Peterson, *supra* note 141, at 627 (asserting that enhanced liability provision implicates both international and state law); Jeffrey D. Morgan, *The Oil Pollution Act of 1990: A Look at Its Impact on the Oil Industry*, 6 *FORDHAM ENVTL. L.J.* 1, 11 (1994) (noting that since OPA, many companies have implemented thorough inspection programs for chartered vessels); Yost, *supra* note 158, at 334 (recognizing 1992 study showing that younger, safer ships were coming to U.S. ports).

254. See Smith, *supra* note 54, at 150 (asserting that OPA strict liability regime will indirectly force international oil industry to be more responsible). The double hull requirement of OPA will not only help to prevent unnecessary spills, but also will serve as an example to the international community. *Id.*; Donaldson, *supra* note 165, at 319.

255. See Kende, *supra* note 54, at 147 (describing OPA as disappointment because of failure to pre-empt state law).

256. See *Shell Halts Call at US Mainland*, *LLOYD'S LIST*, June 12, 1990 (describing major shipping company's U.S. boycott).

257. See Smith, *supra* note 54, at 143 (asserting that many tanker owners from other countries do not have property subject to attachment in United States and therefore have no fear of assets being taken if there is spill).

1. Arguments in Favor of OPA

Some writers argue that OPA is more adequately designed than the CLC to resolve legal conflicts.²⁵⁸ Although the CLC sets forth guidelines for distributing money for clean-up after a spill, it is still likely that there will be litigation.²⁵⁹ OPA explicitly defines claimants and sets forth guidelines for the adjudication.²⁶⁰

Some legal experts opine that OPA intentionally expanded the scope of liability and the number of possible defendants in the hopes that it would encourage voluntary precautionary measures by potential defendants.²⁶¹ Critics claim that by creating stricter requirements on a domestic level, the United States challenged oil companies to become safer.²⁶² While OPA's provisions only apply to one country, commentators argue that they are broader than they seem, influencing the safety of oil tankers worldwide.²⁶³

When OPA was first implemented, commentators expressed fear that inferior ships would carry U.S. oil imports because of fear of liability; in fact the opposite happened and safety has increased in oil transport in the United States.²⁶⁴ The United

258. See *id.* at 143 (noting that OPA drafters used insight from Exxon Valdez spill to include strict preventive legislation); see also Popp, *supra* note 36, at 119 (asserting that while OPA has similar defenses to CLC, OPA adds important qualifications to narrow defenses); see also Wilkinson et al., *supra* note 107, at 235 (arguing that OPA provides better and quicker compensation than CLC).

259. See Randle, *supra* note 168 (noting that under OPA, remedies in admiralty and maritime law are still available).

260. *Id.*

261. See Morgan, *supra* note 253, at 12 (remarking that OPA's stiff liability provisions have caused shippers to rethink traditional shipping routes); see also Amy McKaig, Comment, *Liability for Oil Tanker Spills*, 44 Sw. L.J. 1599, 1629 (1991) (asserting that OPA provisions on crew standards and double hull requirements are valuable worldwide).

262. See Kopec & Peterson, *supra* note 141, at 627 (asserting that increased financial requirements coupled with enhanced liability could help to minimize risks); see also Popp, *supra* note 36, at 129 (remarking that OPA large compensation brings pressure on other nations to accommodate).

263. See Morgan, *supra* note 253, at 11 (arguing that companies have established more thorough inspection programs for chartered vessels to comply with OPA); Yost, *supra* note 153, at 334 (suggesting that OPA has served as model for international maritime industry).

264. See Morgan, *supra* note 253, at 11 (noting that industry's prediction has not proven accurate and that in fact there has been small but noticeable improvement in safety of chartered tankers); see also Office of Domestic & Int'l Energy Policy, United States Dep't of Energy, *Transporting U.S. Oil Imports: The Impact of Oil Spill Legislation on the Tanker Market*, prepared by the Petroleum Industry Research Foundation, June 1992

States is a leader in the oil transport industry; shippers are forced to comply with the stringent standards to stay in competition.²⁶⁵ By complying with OPA's standards to travel in U.S. waters, international transport companies are effectuating OPA standards throughout the world.²⁶⁶

Many commentators assert that although U.S. refusal to ratify the international protocols may have initially hurt the CLC, OPA's enactment could ultimately lead to safer design requirements for vessels worldwide.²⁶⁷ The 1992 Protocols were proposed in an effort to encourage the United States to join the international community.²⁶⁸ Even without U.S. participation, the Protocols succeeded in bringing about higher liability limits in the international community.²⁶⁹

2. Criticism of OPA

Many authors express concern regarding OPA's provision allowing states to implement their own pollution liability statutes—even if they are inconsistent with OPA.²⁷⁰ Critics hold that

(finding that shipowners have made attempt to change operational procedures, safety provisions and inspection routines).

265. See CHAO, *supra* note 18, at 266 (discussing impact of OPA on oil cargo owners, banks, and insurance markets—industries involved in oil transport that cannot avoid trading with United States); see also *New PIRINC Report Analyzes Impact of Spill Legislation on Tanker Market*, OIL SPILL U.S. LAW REPORT CUTTER INFORMATION CORP., July 1, 1992 (noting general consensus that maximum control is industry's best bet). But see Morgan, *supra* note 253, at 12 (asserting that insurance industry have refused to issue proof of financial responsibility and regulators have refrained from enforcing requirements).

266. See Morgan, *supra* note 253, at 11 (noting improved relationship between shipowners and charterers to work together to comply with OPA); McKaig, *supra* note 261 (asserting that many shipowners have complied with OPA standards—making ships safer in international waters as well as U.S. waters); *New PIRINC Report*, *supra* note 265 (noting that since 1990 more than half of orders for building new tankers have been for double hulls).

267. See Smith, *supra* note 54, at 150 (asserting that OPA's requirement of double hulls not only helps to prevent unnecessary spills, but also serves as example for international oil industry); Donaldson, *supra* note 165, at 319 (noting that Marine Environment Protection Committee agreed to accept safer alternative designs for ships).

268. See Göransson, *supra* note 84, at 82 (describing U.S. role in 1984 Protocols and U.S. failure to ratify as influential in 1992 Protocols).

269. See Smith, *supra* note 54, at 150 (asserting that CLC, although is harmed in some ways by U.S. refusal to join, could ultimately benefit from it).

270. See Yost, *supra* note 158, at 330 (noting that as many as 32 different states have implemented independent laws, creating possibility of reversion to pre-1990 confusion); see also Kopec & Peterson, *supra* note 141, at 626 (arguing that only result of stringent state liability limits is to divert traffic to states with lower limits and defeat

by maintaining states rights, OPA isolates the United States from the international community and fails to create a uniform standard on which carriers and producers can depend.²⁷¹ One critic remarked that the result is a contradictory system and delay in clean-up operations and in the settlement of claims.²⁷² Authors also assert that OPA could have dealt with coastal states' rights within this act or under a different federal scheme.²⁷³

Critics note that while OPA's provisions for unlimited liability could be beneficial, oil companies have found loopholes in the system to avoid the possibility of losing all of their assets.²⁷⁴ When OPA was first enacted, major shipowners reacted by announcing that they would use only chartered vessels to carry oil into the United States and refused to enter certain ports.²⁷⁵ Some authors assert that smaller, one-vessel companies, continued to bring oil into the United States because liability for a spill would only result in the loss of the single vessel.²⁷⁶ This provision may allow unlimited liability to become limited to an

initial purpose of OPA); Kende, *supra* note 54, at 147 (calling OPA disappointment both domestically and internationally because of failure to pre-empt state law and failure to adopt CLC).

271. See Wilkinson et al., *supra* note 107, at 203 (describing double layer of liability as area of potential confusion); see also Kopec & Peterson, *supra* note 141, at 599 (commenting that Congress failed to set forth comprehensive uniform law as it had planned to do).

272. See CHAO, *supra* note 18, at 261 (stating that non-preemption calls validity of OPA into question).

273. See Randle, *supra* note 168 at 10119 (referring to OPA regional provisions pertinent to Prince William Sound); Kopec & Peterson, *supra* note 141, at 629 (noting that Congress has dealt with geographical areas with special needs in Pipeline Act, and OPA provisions for North Carolina and Alaska).

274. See CHAO, *supra* note 18, at 273 (noting that in order to meet requirement, freight rates will increase and insurance premiums will rise; burden will ultimately fall on U.S. consumer); see also Kopec & Peterson, *supra* note 141, at 626 (arguing that large companies with many assets will be unable to obtain adequate insurance).

275. See *Shell Halts Call*, *supra* note 256 (describing Shell's boycott of ships in U.S. waters); *Elf To Follow Shell in US Port Boycott*, LLOYDS LIST, June 22, 1990; see also Morgan, *supra* note 253, at 6 (predicting that, having little to lose, tanker owners without resources to cover cleanup costs or satisfy damage claims would be attracted to U.S. waters).

276. See CHAO, *supra* note 18, at 272 (remarking that result is cyclical pattern, where single-shipped companies will not be as diligent in preventing pollution as larger companies with more to lose would be). Because smaller companies will be less concerned with the environment, the ultimate result could be more consequential, actually raising the risk of accidents. *Id.*; *Shell Halts Call*, *supra* note 256 (describing lack of money of single ship companies). But see Kopec & Peterson, *supra* note 141, at 627 (arguing that OPA requirement of showing evidence of financial responsibility to satisfy financial liability may prevent smaller ships from entering).

amount determined by oil transport companies.²⁷⁷

Some authors argue that OPA is insufficient, allowing shipowners from other nations to avoid liability because it only applies to those shipowners subject to U.S. jurisdiction.²⁷⁸ To the contrary, the CLC specifically provides for international recognition of jurisdiction over all member nation's tankers.²⁷⁹ If shipowners from other nations are allowed to escape liability, then the aggrieved parties will not be compensated at all.²⁸⁰

III. *THE UNITED STATES SHOULD JOIN THE CONVENTION ON CIVIL LIABILITY*

U.S. treatment of oil spills, since OPA's enactment, demonstrates the inadequacy of the current liability scheme.²⁸¹ While OPA improved existing laws, it failed to provide the most efficient solution to the problem of liability for a major maritime oil spill. To attain the most adequate level of compensation for spills and to insure recovery from shipowners from other nations, the United States should become a member of the CLC.

A. International Reasons

Oil transport is an international industry. Many countries depend on maritime oil transportation to meet their oil de-

277. See CHAO, *supra* note 18, at 272 (noting that result is that larger shipowners retreat to form single ship companies).

278. See Smith, *supra* note 54, at 143 (remarking that many tanker owners from other countries do not have attachable property in United States and even if shipowner agrees to jurisdiction, problem then lies in enforcement in courts of other nations); see also CHAO, *supra* note 18, at 273 (asserting that claimants may not obtain judgment even if they know responsible party).

279. CLC, *supra* note 12. Article X(1) states:

Any judgment given by a court with jurisdiction in accordance with Article IX which is enforceable in the state of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

- (a) where the judgment was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

Id.

280. See CHAO, *supra* note 18, at 273 (arguing that one consequence of OPA may be no compensation); see also Smith, *supra* note 54, at 32 (asserting that United States would have problem in enforcing judgments in foreign courts).

281. See *supra* notes 1-11 and accompanying text (describing grounding of New Carissa off coast of Oregon and problems with funding cleanup).

mands.²⁸² Since numerous countries are involved in oil transport, a unified scheme of determining liability in the case of a spill is necessary. When large amounts of oil are transported across oceans, it is possible, and in fact probable, that some of this oil will be spilled. Because spills can affect more than one nation, an international system of apportioning liability is necessary.²⁸³ By joining the CLC, the United States will move towards minimizing environmental damage caused by spills and maximizing compensation.²⁸⁴

The CLC is international in scope and allows for greater spill prevention and broader compensation than OPA.²⁸⁵ The CLC joins many nations together in pursuit of common goals: minimizing damage and compensating for clean-up.²⁸⁶ By forming a fund that is available to all member nations and regulations that are applicable in all member nations, the CLC allows for recovery that is greater in amount and more accessible to claimants.

B. *Better Mechanism*

While the CLC is not perfect, it is a uniform law, providing shipowners with a consistent set of rules, regardless of their location. On the contrary, OPA allows for individual states to set their own liability laws.²⁸⁷ Non-preemption has proven confusing to shipowners and has resulted in non-compliance. By joining the CLC, the United States will encourage shipowners to follow a uniform set of guidelines. Instead of searching for loopholes to circumvent the rules, shipowners will likely work together in an attempt to conform. If the United States is a party to the CLC, then major shipping nations will comply with CLC

282. See *supra* notes 43-45 and accompanying text (accounting current oil consumption rate and where oil originates and where it is consumed).

283. See *supra* notes 237-39 (concluding that oil spills are international because the resulting damages affect more than one country).

284. See *supra* notes 240-42 and accompanying text (describing limits of OPA and greater possibility of recovery under CLC).

285. See *supra* notes 241-42 and accompanying text (explaining that international schemes are inherently broader because of involvement of more nations and subsequently more money).

286. See *supra* notes 122-31 and accompanying text (describing initial goals of CLC).

287. See *supra* notes 270-73 and accompanying text (describing individual state laws regarding oil spills).

guidelines because there will be no uncertainty as to what the steadfast rules are.²⁸⁸

The CLC provides more expansive remedies for U.S. claimants than are currently available under OPA. With current liability law, shipowners without property that is attachable under U.S. jurisdiction may be judgment-proof.²⁸⁹ Under the CLC, however, if a shipowner spills oil in U.S. waters without assets subject to U.S. jurisdiction, then injured parties will still be able to recover.²⁹⁰ This provision greatly broadens the possibility of rapid compensation to parties injured by a spill. By joining the CLC, the United States will also forego problems with enforcement of U.S. judgments in other nations.²⁹¹

The CLC provides compensation to injured parties quickly and then looks to the IOPC fund for reimbursement. This has proven to be more efficient than OPA's approach to compensation because the spill is cleaned up quickly and environmental damage is minimized. Even though all parties were not compensated in the Braer spill, the CLC worked towards finding the best solution possible while providing some money to fund the clean-up so that the cost did not fall on the public.

By joining the CLC, the United States will alleviate the cost to the U.S. taxpayer when a spill occurs. Under the current domestic regime, money available for clean-up is limited; the excess costs frequently fall on the public, and is often not reimbursed.²⁹² The CLC efficiently spreads the cost of clean-up among the numerous member nations. By taxing barrels of oil, the IOPC also provides for some contribution from shipowners and cargo owners, thereby holding them to some level of responsibility for the spill.

The United States is a source of guidance for many smaller nations in determining which international conventions to join.

288. See *supra* notes 243-45 and accompanying text (describing oil transport as international industry and U.S. role in that industry).

289. See *supra* notes 278-80 and accompanying text (describing OPA provision that limits scope to U.S. jurisdiction).

290. See *supra* notes 232-34 and accompanying text (describing greater possibility of recovery under OPA because all shipowners assets that are in any member nation can be taken).

291. See *supra* notes 240-42 (providing that judgments are more likely to be carried out under CLC because numerous nations are members).

292. See *supra* notes 7-11 and accompanying text (describing New Carissa spill and public spending without reimbursement).

If the United States becomes a member of the CLC then other nations would be encouraged to join. The result would be a truly unified system for determining liability for maritime oil spills.²⁹³

CONCLUSION

The U.S. refusal to join the CLC has forced parties injured by maritime oil spills to fund the clean-up themselves. OPA is inadequate in providing relief to aggrieved parties. OPA is confusing to shipowners because it applies different standards in different areas. Before another large spill occurs, the United States must reformulate its current oil spill liability law. In order to provide a uniform scheme upon which both shipowners and injured parties can rely, the United States must become a member of the CLC.

293. See *supra* note 247 and accompanying text (describing U.S. influential role in international legislation).