North American Oil Pollution: Who is Liable for a Canadian/Ameri-can Catastrophe?

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North American Oil Pollution: Who is Liable for a Canadian/American Catastrophe?

INTRODUCTION

In recent history, the United States and Canada have taken decidedly different approaches to resolving oil pollution problems.\(^1\) The United States and Canada have revised their statutory regimes in the wake of such oil catastrophes as the Torrey Canyon incident,\(^2\) the Amoco Cadiz spill\(^3\) and the Exxon Valdez spill.\(^4\) The

1. The United States enacted the Oil Pollution Act of 1990 in the wake of the Exxon Valdez oil spill. Canada follows the provisions of the Canada Shipping Act as amended in 1989, which has implemented many of the provisions on the 1969 International Convention on Civil Liability for Oil Pollution Damage.

2. The Torrey Canyon tanker crashed off the coast of England in 1967, resulting in a spill of over 29 million gallons of oil. This spill devastated the coastlines of England and France. Walter B. Jones, Oil Spill Compensation and Liability Legislation: When Good Things Don’t Happen to Good Bills, 19 Envtl. L. Rep. 10333, 10334 (1989). The clean up costs for this oil spill were estimated to be in excess of fifteen million dollars, which does not include the number of lawsuits that ensued shortly thereafter. These lawsuits were settled for nearly seven million dollars, but that amount represented only a fraction of the actual damage caused to these two nations. See id. “The awakening of public concern over oil pollution began with the Torrey Canyon disaster off the southwest coast of England on March 18, 1967. The cleanup problems and costs associated with that pollution incident aroused previously indifferent public opinion to the hazards posed by the mass transportation of oil.” Thomas J. Wagner, The Oil Pollution Act of 1990: An Analysis, 21 J. Mar. L. & Com. 569, 570 (1990). The response to this incident led to an early divergence in the United States’s domestic approach to oil-pollution legislation and the approach taken by international conventions.

3. Concern over the international limits was brought into sharp focus by the Amoco Cadiz spill off the coast of France in March 1978. This incident, which involved the loss of 68 million gallons (six times the amount of the Exxon Valdez spill), sharpened worldwide recognition that the international regime needed to be updated and the limits of liability increased to meet the requirements of a major catastrophe. Wagner, supra note 2, at 572. For a detailed look at the problems associated with the international conventions, see Douglas A. Jacobsen & James D. Yellen, Oil Pollution: The 1984 London Protocols and the AMOCO CADIZ, 15 J. Mar. L. & Com. 467 (1984). Due to the severity of the crash, the Amoco Cadiz vessel was not salvageable. See Jones, supra note 2, at 10337. The vessel was eventually blown up and the entire sixty million gallons of oil were lost. The amount of damage
United States has rejected the provisions of the International Convention on Civil Liability for Oil Pollution Damage\textsuperscript{5} because the claims that initiated after the spill totaled an estimated two billion dollars. See id. As was the case after the Torrey Canyon spill, many of these claims were settled for far less than was necessary to adequately clean the spill.

Two years prior to the devastation of the Amoco Cadiz, the Liberian tanker Argo Merchant crashed approximately twenty seven miles off the coast of Nantucket Island. While grounded, the vessel leaked nearly nine million gallons of oil. See id. at 10337. With two such severe oil spills happening in such a close time span, and the wake of the Torrey Canyon incident, suspicions had arisen as to the overall safety of oil transportation. See id.


5. In 1969 and 1971, the international community responded to the Amoco Cadiz oil spill by creating what was the initial international oil spill laws. See supra note 3; see also Beth Van Hanswyk, 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, 320-21 (1988) (addressing the various changes that the Protocols would institute into the existing Convention and Fund). These laws established international agreements through the International Maritime Organization (IMO). See Melissa Kness Cooney, Comment, The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?, 16 Hous. J. Int'l L. 343, 353 (1993). At this time the IMO agreed upon the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC), International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, reprinted in 9 I.L.M. 45, and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund), Dec. 18, 1971, 1110 U.N.T.S. 57, reprinted in 11 I.L.M. 284. The international convention involves the rights of coastal nations to take legal action when a "maritime casualty outside of its territorial waters threatens oil pollution damage to the state." Van Hanswyk, supra at 321. The international convention was designed to incorporate "... uniform international rules and procedures for determining questions of liability and providing adequate compensation' for vessel source oil pollution." Id. (quoting the CLC preamble). The CLC provided for liability to shipowners in case of "tanker spills," in which cleanup, natural resource damage, and third party claims were covered for up to a maximum of eighteen million dollars. See Jones, supra note 2, at 10335. "The Fund Convention is a companion to the CLC Convention and is financed by oil-receivers bringing the total maximum compensation available to $78 million. Contributions from member countries are based on the annual amount of oil received." Id. To be a member of the Fund Convention, every country is required first to ratify the CLC Convention. The Fund provides compensation in the event that the oil pollution damages
legislation inadequately satisfies the potential monetary sum involved in the clean up and compensation for a spill of great magnitude. The United States responded to this inadequacy by enacting the Oil Pollution Act of 1990 (OPA). Through this Act, the United States attempted to incorporate an all encompassing oil pollution legislation.

The 1989 amendments to the Canada Shipping Act represent the most recent Canadian response to the oil pollution scare. These amendments altered the existing legislation by incorporating many provisions of the Civil Liability Convention. Canada did not ratify the Civil Liability Convention, but did use the language of many of the provisions.

Canada adopted these changes to take on an international approach to the problem of oil pollution, whereas the United States has decided to test the waters with a unilateral approach to the problem. The goal of this comment is to analyze the current leg-

exceed those compensable under the CLC, and the CLC would provide compensation to victims not covered by the CLC. See id. (citing the CLC art. IV and V(1)).

6. See generally Millard, supra note 4 (describing the effects that the Exxon Valdez spill had on the environment, and the introduction of the Oil Pollution Act). If the U.S. Congress had implemented the conventions, then the international agreements would have preempted state law. See Cooney supra note 5, at 353. The preemption of state law was not the lone factor in Congress's decision not to ratify the conventions. The main reason that the United States did not ratify the conventions of 1969 (CLC) and 1971 (Fund) was because of the fear that the liability limits were too low. See id. at 353-54; Van Hanswyk supra note 5, at 323; infra text accompanying note 45; see also George J. Mitchell, Preservation of State and Federal Authority Under the Oil Pollution Act of 1990, 21 Envtl. L. 237, 324 (1991) (stating that the IMO adopted the CLC and Fund Protocols in an attempt to address the reservations that the United States and any other nation may have concerning the “low” liability limits and other “inadequacies” with the 1969 CLC and Fund Protocols).

9. See supra note 5. The new liability provisions are in Part XVI of the Canada Shipping Act. See id. The amendments were enforced starting on April 24, 1989, the same date that Canada introduced the International Convention on Civil Liability for Oil Pollution Damage (the Civil Liability Convention) and the International Fund for Compensation for Oil Pollution Damage (the Fund Convention). See A.H.E. Popp, Q.C., A North American Perspective on Liability and Compensation for Oil Pollution Caused by Ships, in Liability for Damage to the Marine Environment 109, 113 n.17 (Colin M. De La Rue ed., 1993).
islation of these neighboring nations, and illustrate why a uniform plan would be more efficient.

This comment will compare and contrast the differences in liability regimes between these neighboring countries. Part I will illustrate the history of oil pollution legislation in both the United States and Canada. Part II will involve a detailed look at both countries' standards of liability, their defenses to liability and their limits on liability. Part III will present a hypothetical approach to an oil spill that causes damage to both Canada and the United States. Illustrating the routes currently taken by both countries, Part IV will look at how these countries need to revise their approach to oil pollution problems.

I. History

A. History of the United States Oil Pollution Legislation

The United States has enacted legislation regulating oil pollution for approximately one hundred years, and has enacted several statutes in an attempt to cure inefficiencies in already existing legislation. In 1851, the United States Congress enacted the Shipowner’s Limitation of Liability Act. In enacting this statute, Congress sought to promote the shipping industry by allowing shipowners to limit their liability in the event of an oil spill. The purpose of this statute was to allow a shipper and certain charterers to limit their liability to the 'post-accident' value of a vessel and its freight, in

11. See The Rivers and Harbors Appropriations Act, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C.A. §§ 401-467 (1986)). This legislation was one of the earliest statutory enactments to regulate oil pollution in the United States.
14. See id. § 183(a). Section 183(a) of the statute states in relevant part: (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id.
the hopes that this would encourage the growth of the shipping industry. The Shipowner's Limitation of Liability Act of 1851 has forced proceeding legislation to preempt the Act as the standard for liability. Because nations of the world have made environmental protection a priority, the fault based liability regime of the 1851 Act has proved inadequate to remedy these needs. Consequently, the United States has moved from a "fault based" liability to a strict liability regime. The changes in society's priorities have caused a shift from a concentration on commerce incentives toward overall environmental protection.

The present day oil pollution legislation began with the enactment of the Federal Water Quality Improvement Act of 1970 (WQIA). The WQIA allowed for a broader recovery than previ-

18. This U.S. position has resulted from reaction or, possibly, overreaction, to the Exxon Valdez disaster, one of the most serious and spectacular marine accidents in recent history, which occurred in U.S. waters and caused serious damage to U.S. coastal and marine environment. Direct results of this reaction were the wholesale condemnation of the U.S. and international shipping industries, especially tanker operations, the discarding of international agreements, which the U.S. had been instrumental in establishing, and a new piece of draconian legislation in the form of the Oil Pollution Act of 1990.


What the Nation needs is a package of complementary international, national, and State laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, minimize damage to fisheries, wildlife and other natural resources and internalize those costs within the oil industry and its transportation sector. Instead, there is a fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries—such as legal defenses, statutes of limitation, the corporate form, and the burdens of proof that favor those responsible for the spill. S. Rep. No. 101-94, at 2 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 723.

ously afforded from common law causes of action, and also limited
the use of the Limitation of Liability Act by creating strict liability
for oil pollution damages. In 1972, Congress enacted what was
viewed at the time as a further improvement to oil pollution legis-
lation, the Federal Water Pollution Control Act (FWPCA), which
in effect superseded the WQIA. The FWPCA (also known as the
Clean Water Act) forbade disposing oil into the navigable waters of
the United States, awarding civil compensation for any dis-
charges. By providing for the cleanup of oil spills and authoriz-
ing the government to remove the spilled oil, after establishing
that the owner or operator of the vessel was not going to proceed
with clean up, the FWPCA continued the United States's trend
toward strict liability for discharging oil into the navigable waters
of the United States. Although the FWPCA addressed the recovery
costs that the Federal government would incur, it failed to address
the individual citizens' recovery costs. The FWPCA did not
make the responsible party liable to anyone other than the United
States, and, even then, it was only liable for removal costs. The

20. See Meiklejohn, supra note 19, at 974-75.
to have a comprehensive and extensive plan to combat the inevitable problems
that accompany a significant oil spill. "The objective of this chapter is to restore
and maintain the chemical, physical, and biological integrity of the Nation's wa-
ters." Id. § 1251(a).
22. The FWPCA has had changes made to it, such as the Clean Water Act. See
creased liability for vessels per tonnage, from $100 to $150 per ton, and also im-
24. The President may require the United States attorney of the district in
which the threat occurs to secure such relief as may be necessary to abate such
threat; the district courts of the United States shall have jurisdiction to grant such
relief as the public interest and the equities of the case may require. See id.
§ 1321(e). It appears from the language of the statute that individual citizens do
not have a cause of action against the liable party. Section 1321(e) states that if
there is actual or threatened discharge of oil from a vessel then it is the duty of the
Attorney General to secure relief, and not the duty of the individual citizens. See
id. Individual citizens could lose their opportunity to recover if the Fund is dried
up through the recovery claims of the government, or if the Attorney General fails
to secure funds for the individual citizens. See id.
25. See 33 U.S.C. § 1321(f), (g) (1994). The Act reads in relevant part:
(f)(1) Except where an owner or operator can prove that the discharge
was caused solely by (A) an act of God, (B) an act of war, (C) negligence on
the part of the United States Government, or (D) an act or omission of a
third party without regard to whether any such act or omission was or
was not negligent, or any combination of the foregoing clauses, such
FWPCA did provide limitation for oil spill liability, but the liability provisions were considered far too lenient, and provided inadequate recovery for oil pollution damages.26

To compensate for the inadequacies left by the FWPCA, Congress enacted geographically specific statutes to cover the potential monetary and damage-related costs that would accompany an oil spill. For example, in 1973, Congress enacted the Trans-Alaska Pipeline Authorization Act (TAPAA).27 TAPAA has jurisdiction over spills that occur from vessels carrying oil from the Trans-Alaska Pipeline to ports or facilities in the United States.28 TAPAA imposes liability beyond that imposed by the FWPCA.29

Two more examples of present day oil-pollution legislation include the Deepwater Port Act (DWPA) and the Outer Continental Shelf Lands Act Amendments (OCSLA). The Deepwater Port Act (DWPA)30 was implemented in 1974 to incorporate oil spills from offshore oil facilities.31 The DWPA imposes strict liability upon the

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28. See id. TAPAA imposes strict liability upon the owner and operator of any vessel under the Act, and affords some limited defenses. See id. § 1653(c)(1), (2), (7). The defenses are act of war, negligence on the part of the United States or another governmental agency, or if the claim is brought by a damaged party and the negligence was caused by the damaged party. See id. § 1653(c)(2).

29. See Antonio J. Rodriguez & Paul A.C. Jaffe, The Oil Pollution Act of 1990, 15 Tul. Mar. L.J. 1, 9 (1990). The Trans Alaska Pipeline Authorization Act (TAPAA), the Deepwater Port Act (DWPA), and the Outer Continental Shelf Lands Act (OCSLA) were all enacted by Congress to provide injured parties with oil pollution compensation beyond the amount of compensation that is provided by the Federal Water Pollution Control Act (FWPCA). See Glen Fjermedal, Comment, Federal Oil Spill Fund Legislation: A Future Standard, 53 Alb. L. Rev. 161, 177-80 (1988). TAPAA allows for recovery beyond the clean up cost of governmental clean up costs. See id. at 178-79. “The FWPCA does not pre-empt OCSLA or DWPA, specifically stating that ‘[n]othing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability’ under OCSLA and DWPA.” Id. at 180 (quoting 33 U.S.C. § 1321(r) (1982)).


31. Deepwater ports are defined as “any fixed or floating manmade structures other than a vessel . . . located beyond the territorial sea and off the coast of the United States . . . used or intended for use as a port or a terminal for the loading or
owner and operator of vessels and offshore facilities. The DWPA applies to those facilities off the coast of the United States, but not those facilities that are producing oil from the "Outer Continental Shelf." The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA) regulate the discharge of oil from offshore facilities or vessels that transport oil from an offshore facility on the Outer Continental Shelf. Liability under OCSLA is strict, limited only by the amount of oil carried by the vessel. Congress amended OCSLA in 1978, primarily to encourage more rapid development of the United States's "oil and gas resources and to protect against the increased risks to marine and coastal environments posed by increased development." However, there are still inadequacies which Congress attempted to remedy.

Congress's attempt to fix the inadequacies left by the enactment of these various statutes created considerable confusion. Each statute had its own separate liability provisions, limits on liability, and established funds. In 1980, Congress tried to remedy this confusion by enacting the Comprehensive Environmental Re-

unloading and further handling of oil for transportation to any State . . . . " Id. § 1502(10).

32. See id. § 1517(d) (1988) (repealed 1990) (holding the owners and operators of vessels strictly, jointly, and severally liable). The owner or operator is afforded the defenses of act of war or negligence of the United States government in establishing and maintaining aids in navigation, also the owner or the operator may escape liability to a damaged party where he can show that the damage was caused solely by the negligence of that party. See id. § 1517(g).


35. See 43 U.S.C. § 1814(a), (c) (1988) (repealed 1990). The liability limits under the Act are for vessels, $300 per gross ton, or $250,000 whichever is greater, "except whenever the owner or operator . . . fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities . . . ." Id. § 1814(b).

response, Compensation and Liability Act (CERCLA). CERCLA governs the discharge of hazardous substances other than petroleum, natural gas and any related products. CERCLA imposes strict liability on the owner or operator of a vessel that transports hazardous substances to a treatment facility in the United States. CERCLA provides for a wide range of recoverable damages to damaged parties, such as removal and remedial costs to the United States, a state, or any other person, and including the recovery of damages for injury or destruction to natural resources. CERCLA limits the liability of vessels based on the type of vessel, nature of the cargo, and the vessel’s tonnage. Although Congress accomplished its goal of uniformity when dealing with hazardous substances, it failed to consolidate the gaps left in oil-pollution legislation.

37. 42 U.S.C. §§ 9601-9675 (1994). This legislation created the Superfund, to provide a comprehensive fund for the recovery costs of any environmental incident from the discharge of hazardous substances other than petroleum, natural gas, and related products. See id. § 9601(14)(F). The provisions of the FWPCA and the Oil Pollution Act that are inconsistent with CERCLA are preempted by the corresponding provisions in CERCLA. See id. § 9607(a) (declaring, under Section 9607(a)(4)(C), that CERCLA extends the governmental recovery provisions for a discharge of hazardous substances beyond those found in other legislation).

38. See id. § 9601(14)(F). CERCLA also preempts any parts of the Clean Water Act and the Oil Pollution Act to the extent that they are inconsistent. See id. §9607(a).

39. See id. § 9607(a). CERCLA makes explicit that the owner or operator of a vessel may not use the Limitation of Liability Act to limit its liability for any spill in CERCLA jurisdiction or under maritime tort law. See id. § 9607(h). The drafted legislation for the Act contained language that encompassed oil spills, but any oil spill references were excluded from the final text of CERCLA. "Oil Pollution Desk Book," the Environmental Law Reporter, Environmental Law Institute, Washington, D.C. at 3.


41. See id. § 9607(c). This section states in pertinent part: "(1) Vessel carrying a hazardous substance as cargo or residue—$300 per gross ton or $5,000,000 whichever is greater.

(2) Other vessels—$300 per gross ton or $500,000 which is greater.

(3) Incineration vessels or facilities—total of all response costs plus $50,000,000 limit for damages."

Id.

42. See David Ashley Bagwell, Hazardous and Noxious Substances, 62 Tul. L. Rev. 433 (1988). "CERCLA, however, does not elbow FWPCA out of the petroleum business because CERCLA expressly defines the term 'hazardous substance' to exclude 'petroleum . . . .'

Id. at 444 (citing 42 U.S.C. § 9601(14) (1982)); see also Wallace & Ratcliffe, supra note 36, at 1350 (discussing CERCLA).
Congress ceased its efforts to create a uniform and comprehensive approach to oil pollution from 1970 to 1984, when much of the international community adopted the 1984 Protocols to the Civil Liability Convention (CLC) and the Fund Convention.\textsuperscript{43} The primary goals of these international agreements were to consolidate existing statutory regimes and to adopt an international scheme. To accomplish these goals, the international community decided that a change was needed. By targeting those areas labeled inadequate by the United States,\textsuperscript{44} the international community decided to make changes to the 1969 International Convention on Civil Liability for Oil Pollution Damage as well as the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage.\textsuperscript{45} The result of the efforts is the 1984 Protocols to the CLC.


\textsuperscript{44} See infra note 49 and accompanying text.

\textsuperscript{45} In 1969 and 1971, the Intergovernmental Maritime Consultative Organization (IMO), adopted two conventions that addressed the problem of marine oil pollution. See supra note 5 and accompanying text. These conventions are the International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention), International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, 970 U.N.T.S. 211; and the Convention on Civil Liability for Oil Pollution Damage (CLC), International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, \textit{reprinted in} 9 I.L.M. 45 (1970). In 1984, the international community headed by the IMO held a conference to revise the 1969 CLC and 1971 Fund Conventions. These revisions were to come in the form of amendments or protocols that would eventually raise the amount of compensation available under the conventions. The CLC Protocol of 1984 significantly raised the liability limits for shipowners. "The limits . . . were raised to three million units of account (approximately U.S. $4.06 million) for vessels up to 5000 gross tons, with an additional 420 units of account (approximately U.S. $568) liability for each additional ton." Van Hanswyk, supra note 5, at 324 (citing the CLC Protocol art. VI). "Maximum liability under the CLC Protocol is 59.7 million units of account (approximately U.S. $80.8 million). The shipowner's liability will be unlimited if it is shown that the damage resulted from the shipowner's personal act done intentionally or recklessly." Id. at 324 (citing the CLC Protocol art. VI(2)); see also Cooney, supra note 5, at 353-54 (discussing the International Maritime Organization which established international agreements).

Additional changes were made to the 1984 Fund Protocol to provide for a greater amount of compensation per accident. The 1984 Fund Protocol raised the
The United States was a driving force behind the drafting of the Protocols. The United States believed that an international approach to oil pollution was necessary, but demanded changes to the 1969 CLC and 1971 Fund conventions before it would ratify them. The other members to the 1984 Protocols understood that the changes to the existing conventions would only be successful if the United States were to ratify the 1984 Protocols. The United States had one of the largest shipping fleets in the world, and without ratification by the United States, the Protocols would not be complete.

maximum of compensation to approximately $182.6 million per accident. See Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, reprinted in 15 J. Mar. L. & Com. 613, 615 (1984). Also the amount of compensation will be increased to $270.5 million at any time when three member states are involved, and these three member states' combined annual oil receipts exceed 600 million tons. See id. at 616. “United States ratification would supply approximately 450 million tons of this required yearly tonnage and would virtually ensure this increased coverage.” Van Hanswyck, supra note 5, at 325 n. 45.

46. See Van Hanswyk, supra note 5, at 324. The United States was an active participant in the Protocols, and was extremely influential in the hearings that affected the Protocol's provisions. See id. One of the apparent influences that the United States had on the proceedings was that states that were not a party to either the CLC Convention or the Fund Convention would still be entitled to participate in the Protocols. See id. at 324 n.33; see also Jones, supra note 2, at 10333 (discussing why the United States should have ratified the 1969 CLC Convention and 1971 Fund Convention, as well as the 1984 Protocols to the CLC and Fund Convention). See generally Mitchell, supra note 6, at 237 (discussing why the United States was proper in not ratifying the 1984 CLC and Fund Protocols).

47. See infra note 49 and accompanying text.

48. Countries that ratified the 1969 International Convention On Civil Liability for Oil Pollution Damage are as follows: Algeria, Australia, Bahamas, Belgium, Benin, Brazil, Chile, China, Denmark, Dominican Republic, Ecuador, Fiji, Finland, France, Gabon GDR, GFR, Ghana, Greece, Guatemala, Iceland, Indonesia, Italy, Ivory Coast, Japan, South Korea, Kuwait, Lebanon, Liberia, Maldives, Monaco, Morocco, Netherlands, New Zealand, Nigeria, Norway, Oman, Panama, Papua, Poland, Portugal, Senegal, Singapore, South Africa, Spain, Sri Lanka, Sweden, Syria, Tunisia, UAE, USSR, UK, Vanuatu, Yemen, and Yugoslavia. See Van Hanswyk, supra note 5, at 343 (citing Multilateral Treaties: Index and Current Status: United States Department, Office on Treaties).

Countries that ratified the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage are as follows: Algeria, Bahamas, Benin, Cameroon, Denmark, Fiji, Finland, France, Gabon, GFR, Ghana, Monaco, Netherlands, Norway, Oman, Papua, Poland, Portugal, Sri Lanka, Spain, Sweden, Syria, Tunisia, Tuvalu, UAE, UK, and Yugoslavia. See id.

Many of the countries that ratified the previous international conventions for oil pollution damage were present at the 1984 Protocols. See id at 341-42.
The United States required specific changes, such as an increase in liability standards, an increase in the standards for limitation of liability and a broader geographic scope.\textsuperscript{49} Because the international community failed to make these changes, the United States did not ratify the 1984 Protocols.

The concern of the United States was the direct result of a devastating oil spill. Prior to the United States agreeing to ratify the 1984 Protocols, one of the most extensive and devastating oil spills had ravaged Prince William Sound, Alaska. The catastrophic spill from the EXXON VALDEZ led the United States to reevaluate its oil-pollution legislation as well as evaluate whether the changes made by the 1984 Protocols would adequately remedy a spill of such magnitude.\textsuperscript{50} The United States decided that the changes made by the 1984 Protocols would not adequately deal with a catastrophic oil spill, and, therefore, did not ratify them.

Faced with some of the most extravagant clean up costs in oil-pollution history, and faced with a patchwork statutory system, the United States was all but forced to enact appropriate legislation to cure the inadequacies of both the domestic and international regimes.\textsuperscript{51} In response, the United States enacted the Oil Pollution Act of 1990 (OPA).\textsuperscript{52} OPA substantially alters the pollu-

\begin{itemize}
\item \textsuperscript{49} See generally, Gold, supra note 18, at 423 (criticizing the haste in which the United States Congress disregarded an international approach in favor of a unilateral approach).
\item \textsuperscript{50} The clean up costs associated with the EXXON VALDEZ are in excess of $2.5 billion dollars. Payson R. Peabody, Comment, Taming CERCLA: A Proposal to Resolve the Trustee "Owner" Liability Quandary, 8 Admin. L.J. Am. U. 405, 421 n.62 (1996).
\item \textsuperscript{51} See Benjamin H. Grumbles & Joan M. Manley, The Oil Pollution Act of 1990: Legislation in the Wake of Crisis, 10 Nat. Resources & Env't 35 (1995); see also Gold, supra note 18, at 424-25 (discussing the United States's reaction to the Exxon Valdez disaster); Mitchell, supra note 6 (looking at the United States's perceived inadequacies relating to the international scheme).

\begin{quote}
[t]here is a fragmented collection of Federal and States laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries such as legal defenses, statutes of limitations, the corporate form, and the burdens of proof that favor those responsible for the spill.
\end{quote}
tion liabilities imposed on the "responsible party," who is engaged in exploration, production and transportation of oil within the territorial seas and the "exclusive economic zone" of the United States.

Today, the statutes enacted from 1851 to 1990 make up the United States's oil-pollution statutory regime. OPA does not preempt any of the aforementioned regional statutes or any individual state law; rather, it is a supplement to each of them individually. OPA imposes strict liability on the "responsible party" unless such party can prove that the oil spill can be attributed to one of a limited number of defenses. Thus, the United States's approach to oil-pollution legislation has been incorporated into one statute, the Oil Pollution Act of 1990. With the advent of the Oil Pollution Act, together with the several geographically specific statutes, the United States has effectively, but not efficiently, legislated oil pollution.

B. History of Canadian Oil-Pollution Legislation

Canada's history of oil-pollution legislation has not been as extensive as that of the United States. The statutory provisions dealing with oil-pollution discharge from vessels were limited to a few provisions of the Canada Shipping Act.

In 1954, Canada implemented oil-pollution legislation using several provisions of the 1954 Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). In implementing these

53. 33 U.S.C. § 2701(32)(A) (defining a Responsible Party as "any person owning, operating, or demise chartering the vessel").

54. Id. § 2701(8) ("[E]xclusive economic zone' means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as 'eastern special areas' in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary . . . ").

55. See id. § 2703 (illustrating the limited number of defenses afforded the responsible party under OPA. The complete defenses under OPA are an act of God, an act of war, or an act or omission of a third party (other than an employee or agent of the responsible party)).

56. See Popp, supra note 9, at 110 (citing Part IX, ch. S-9, Revised Statutes of Canada (R.S.C.), 1970). "[E]xcept for some provisions in the Canada Shipping Act implementing the 1954 Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), aimed at controlling operational discharges of oil from ships, there was no statutory law dealing with the legal consequences of discharges." Id. at 110.

provisions, Canada hoped to control oil discharges from vessels. The Canada Shipping Act did not adopt all of the liability provisions of the 1954 Convention because only a few provisions had “real teeth.” Existing statutory provisions were ambiguous as to an individual’s right to recover damages, and, therefore, people who were harmed by oil pollution caused by ships relied on the basic recoveries from tort law.

In 1967, the Torrey Canyon disaster stirred up legislative action in Canada. At that time, the Canadian Government realized that existing legislation was inadequate to handle a spill of such

see also Edgar Gold, Pollution of the Sea and International Law: A Canadian Perspective, 3 J. Mar. L. & Com. 13, 18-19 (1971) (discussing that, in 1954, the international community converged on London, for what was to be the first internationally recognized approach to tackle oil pollution. The result of the conference was the 1954 International Convention for the Prevention of Pollution of the Sea by Oil).

58. See Gold, supra note 57, at 18-19.
59. See id.
60. Id.
61. See id.
63. See supra note 2 and accompanying text. Approximately 80,000 tons of oil were spilled into the ocean as a result of the Torrey Canyon spill. See Gold, supra note 57, at 22 (citing Ved P. Nanda, The 'Torrey Canyon' Disaster: Some Legal Aspects, 44 Deny. L.J. 400, 404 (1967)). However, alternate estimates had the total number of gallons spilled in excess of 115,000 gallons. See Kopec & Peterson, supra note 10, at 598 (citing Van Hanswyk, supra note 5, at 319). The spill caused damage as far as two hundred and twenty five miles away. The majority of oil was released after the ship had grounded, and up until the point where the ship was ordered to be bombed. See Gold, supra, at 22 (citing Nanda, supra). The British Government ordered the ship to be bombed because it was decided that there was no other feasible way to deal with the wreck. See id. “Over 2.5 million gallons of various chemical dispersants were used, often with more disastrous results on the marine environment than the crude oil itself.” Id. (citing Dr. Molly Spooner of the Marine Biological Association of the United Kingdom before the ‘Arrow’ Royal Commission, Pollution of Canadian Waters by Oil, Transcript Vol. 14, at 2094). See generally Linda Rosenthal & Carol Raper, Note, Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions, 5 Va. J. Nat. Resources L. 259 (1985) (discussing the broad reaching legal issues raised by the Torrey Canyon oil spill); see also Nanda, supra note 63, at 400 (same). The 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) addressed the deliberate discharge of oil by ocean vessels, but did not address the oil pollution caused by accident. See 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 (1954).
great magnitude and its devastating after effects. Because Canada has such an extensive coastline, potential oil-pollution destruction could be extremely far reaching and devastating. The Canadian government decided that it needed a more effective form of oil-pollution legislation to cope with a catastrophe comparable to Torrey Canyon.

In December of 1968, Canada implemented legislation that amended the Canada Shipping Act and gave the government powers over ships causing pollution. This legislation imposed strict liability on the owners of the vessels. When this legislation, Bill S-23, finally became an amendment to the Canada Shipping Act, the government had basically no cost-recovery powers. Outside influences negated these cost-recovery powers during the legislation's infant stages. Bill S-23 received the most opposition and pressure in reference to clause 24, which gave the Minister of Transport certain powers. Resistance came from outside sources, who provided evidence to the Senate Committee that the

64. See Gold, supra note 57, at 21-23 (stating that for many conservationists and any others concerned with pollution the Torrey Canyon oil spill was undoubtedly a "blessing in disguise").

65. Both Canada and the United States have extensive coastlines that could potentially be the victim of a very serious oil spill. Canada has one of the world's most extensive coastlines, with 36,356 miles. These figures include provincial Canada, as well as the Yukon and the Northern Territories. The World Almanac 749 (1998). The United States does not have nearly as much coastline as Canada, with 12,383 miles. See id. at 541. With such extensive coastlines, both countries are subject to all that comes with the sea, including oil spills.

66. See Gold, supra note 57, at 25. "There is no question that for those concerned with pollution the Torrey Canyon disaster was a "blessing in disguise."" Id. at 22.

67. See Bill S-23 to amend the Canada Shipping Act, 115 Sen. Deb. 781 (Can. 1968-1969). Bill S-23 gave the Minister of Transport power to order the removal or destruction of a wrecked polluting vessel, to use the proceeds from the sale of such a vessel or cargo towards removal expenses, and to allocate total liability of all cleanup expenses to the vessel's owners, charterers or operators. Gold, supra note 57, at 26 (citing Bill S-23 to amend the Canada Shipping Act, 115 Sen. Deb. 781 (Can. 1968-1969)).

68. See Gold, supra note 57, at 26.

69. See id. (citing An Act to Amend the Canada Shipping Act, 17-18 Eliz. 2, ch. 53, ss.23-24 (July 9, 1969)).

70. See id.

71. See id. at 26. Clause 24 of Bill S-23 consisted of the following powers given to the Minister of Transport:

(1) Order the removal or destruction of a wrecked polluting vessel;
(2) Use the proceeds from the sale of such a vessel or cargo towards removal expenses;
"total liability" provision of subsection (3) of clause 24 should be deleted. The clause would impose all clean-up costs to the vessel's owners, charterers, or operators. This clause was not looked upon favorably by the members of the shipping industry because of the negative impact it would have had on the shipping industry. Inevitably, the overwhelming influence from the shipping industry succeeded and subsection (3) of clause 24 was deleted from the final version of the amendment to the Canada Shipping Act.

Canada's attempt to improve oil-pollution legislation fell short of what was actually expected. The Canadian Government viewed Bill S-23 as a temporary revision, subject to inevitable amendment in the near future. Thus, the Canadian government knew that its 'interim' legislation could not adequately handle an oil spill of great magnitude.

In 1969, the international community was assembling in Brussels for a conference to devise an international scheme for oil-pollution legislation. This conference addressed two proposed conventions on the subject of maritime oil pollution: the International Convention on Civil Liability for Oil Pollution Damage (CLC), and the International Convention Relating to Intervention on the High Seas in the Cases of Oil Pollution Casualties (In-

(3) Allocate total liability of all clean-up expenses to the vessel's owners, charterers or operators.

Id. (citing Bill S-23 to amend the Canada Shipping Act, 115 Sen. Deb. 781 (Can. 1968-1969)).

72. Gold, supra note 57, at 26 (citing Bill S-23 to amend the Canada Shipping Act, 115 Sen. Deb. 781 (Can. 1968-1969)).

73. See id.

74. See id. at 25.

75. See supra notes 5 and 6 and accompanying text.


The CLC was drafted to "adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation" for oil pollution from ships. The most difficult resolution facing the conference at Brussels was determining who should be the "liable party." The conference decided to channel all liability to the registered owner of the vessel, eliminating the need for any party, other than the shipowner, to insure against claims for damage caused by oil pollution. 

Canada disagreed with this approach. Canada refused to endorse any law that did not protect the victim and the marine environment, including the rights of coast nations most endangered by the transport of oil in bulk. "The Canadian position was simply that the responsibility for the costs of spills and damages to third parties should rest with the collective industry, whether ship-owner, charterer, operator, cargo-owner, and that innocent parties should not be damaged even by a mistake." The international community, however, agreed that the Canadian ideas diverged drastically from the much accepted "old concepts of absolutely unqualified freedom of the seas." The result of the conference, as seen from the Canadian viewpoint, was much more of a slow mov-

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78. CLC, supra note 45, preamble. See generally Healy, supra note 76, at 321 (discussing limitations of liability). "The Canadian position was simply that the responsibility for the costs of the spills and damages to third parties should rest with the collective industry, whether ship-owner, charterer, operator or cargo-owner, and that innocent parties should not be damaged even by a mistake." Gold, supra note 57, at 27.

79. The conference at Brussels decided to classify the registered owner as the liable party. This simple solution of labeling the registered owner as the liable party was an easy way of channeling liability, but was less than adequate at addressing the inherent problems that would arise in the contractual and management arrangements involved in ocean going oil transport. See Popp, supra note 9, at 118-19 (discussing the channeling of liability by the conference); see also Healy, supra note 76, at 319 (same).

80. See Popp, supra note 9, at 120. This classification was also believed to favor the adoption of higher limitations on liability for the registered owner.

81. See Gold, supra note 57, at 27.

82. Id.

83. Id. at 27. Canada viewed the unqualified freedom of the seas approach as more or less a "license to pollute." This approach continued to protect the rights of the shipping industry, but failed to address the interests of the coastal states. See id.
ing process and reluctance by the shipping nations to adopt laws benefitting the marine environment. Canada did agree that, although a disappointing result, the result of the Brussels Conference was a step in the right direction.  

However, the conference's slow moving tactics, over-conservatism and deep-rooted involvement in old concepts deterred several nations, not just Canada, from ratifying the international scheme. "In establishing a statutory regime the question was whether Canada should follow and ratify the Civil Liability Convention or develop its own 'made in Canada' regime." Neither Canada nor the United States ratified the 1969 CLC Convention nor the 1971 Fund Convention. Dissatisfied with the Brussels Conference, the Canadian Government proceeded to formulate its own oil-pollution legislation.

The Canadian government decided to forge ahead with its own legislation. This legislation, which amended the Canada Shipping Act, resembled the newly invoked international scheme, but had some obvious differences. For example, the liability provisions in the 'new' Part XX of the Canada Shipping Act closely resembled the related provisions in the CLC pertaining to basis of liability and limits on liability. At the time, observers viewed Canadian legislation as ahead of its time, but it did not take long for Parliament to recognize the remaining inadequacies of its oil-pollution

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84. See id. at 29.
85. See id. at 28.
86. Popp, supra note 9, at 110-11.
87. Shortly proceeding the conference at Brussels the Prime Minister of Canada made a statement concerning Canada's reaction:

[T]he way international law exists now, it is definitely biased in favour of shipping in the high seas and in the various parts of the globe. And in the past this has probably been to the benefit of the states of the world because there has been, because of the bias of international law, a great deal of the development of commerce in all parts of the globe. . . . [T]his was fine in the past, but now with the advance of technology and the importance which is coming forth to us all in all parts of the world—of not only thinking of commerce, but also of quality of life.

Gold, supra note 57, at 28 (citing 9 Int'l Leg. Matls. 600, 602-03 (1970)).
88. See Popp, supra note 9, at 111 (citing R.S.C., 1970, 2nd Supp., ch. 27).
89. See R.S.C., 1970, 2d Supp., ch. 27, § 735(2); CLC, supra note 45, at Art. III (2). The Canadian government tried to keep in line with the legislative acts of the CLC by establishing its own fund to compensate for oil pollution from vessels called the Maritime Pollution Claims Fund (MPCF). See R.S.C., 1970, 2d. Supp., ch. 27, § 748(1).
legislation.\textsuperscript{90} In the following years, Canada, as well as the international community, realized not only that a large scale oil spill was inevitable, but that the existing international and domestic schemes could not handle a catastrophic spill.\textsuperscript{91}

In 1984, the members of the CLC and a number of other nations gathered to address the inefficiencies of the existing CLC.\textsuperscript{92} At the conference, the members enacted protocols for the CLC (Protocol CLC) and IOPC Fund (Protocol Fund).\textsuperscript{93} Parties present at the Protocol agreed that there was a need to amend the existing convention. The parties were "[c]onvinced that the economic consequences of pollution damage resulting from the carriage of oil in bulk at sea by ships should continue to be shared by the shipping industry and by the oil cargo interests . . . ."\textsuperscript{94} Although a participant in the formation of the Protocol, Canada did not ratify it.\textsuperscript{95} Although the 1984 Protocols seemed to be the international community's best method for dealing with marine oil pollution, Canada, with its extensive coastline, still feared a catastrophic spill and the Protocols' inability to compensate for it.\textsuperscript{96} However, Canada did implement a number of the existing CLC and the Fund

\textsuperscript{90} For an analysis of some of the apparent inadequacies, see Popp, \textit{supra} note 9, at 112-113.

\textsuperscript{91} \textit{See} generally Van Hanswyk, \textit{supra} note 5, at 319 (illustrating the ways in which the international community had developed to handle an oil spill of catastrophic proportions).


\textsuperscript{95} \textit{See} Gold, \textit{supra} note 18.

\textsuperscript{96} \textit{Id.} at 432-33.
provisions. In 1987, Canada evaluated its own position on oil-pollution legislation, introducing several amendments to the Canada Shipping Act.

These new amendments became effective in 1989, and are basically a rewrite of the liability provisions of the Canada Shipping Act (CSA). These provisions implement many of the same liability provisions that exist in the CLC, even though Canada did not ratify either the CLC Protocols or the Fund Protocols of 1984. The adoption of an international scheme has, however, afforded Canada access to the International Oil Pollution Compensation Fund (IOPC Fund).

The new Canadian regime, unlike prior legislation, is now exclusively concerned with oil pollution. The CSA adopted the international approach to oil pollution prevention and compensation, but has not entirely adopted the international conventions. The liability provisions apply to all ships that cause oil pollution, but some provisions provide special rules when the spill is caused by a "convention ship." Convention ships are the ships, whether registered or unregistered, that are owned by a Contracting State or

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97. The CLC Protocol of 1984 continued to have strict liability and the defenses to strict liability also remained in tact. The geographical scope of the CLC was to be expanded to include the exclusive economic zone of any contracting state. The Protocol also enlarged the classes of parties that would not be found liable, and also raised the maximum level of compensation available for oil pollution damage. The Protocol also increased the liability limits of both the CLC and the Fund. See Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, supra note 92, at 613-22; Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, supra note 92, at 623-33.

98. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, §§ 673-728 (1985) (Can.). These amendments were invoked on the same date as the Civil Liability Convention and the Fund Convention were in Canada.

99. See id.

100. Canada Shipping Act, R.S.C., 3d Supp., ch. 6, §§ 680-695 (1985) (Can.). Section 673 states in part: "'Convention ship' means a sea-going ship, wherever registered, carrying, in bulk as cargo, crude oil, fuel oil, heavy diesel oil, lubricating oil, whale oil or any other persistent oil." Id. The CLC has defined ship as follows: "Ship' means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo." International Convention on Civil Liability for Oil Pollution Damage, Art. I(1), reprinted in 1 J. Mar. L. & Com. 373, 374 (1970). The CLC Protocol has defined ship as follows:

"Ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adopted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo.
any "Person"101 who is an "owner"102 of a ship. It appears by the language of both the CSA and CLC that if a ship is from a Contracting State, whether by registration or by ownership, it will be treated as a "convention ship" for purposes of liability.

Canada has implemented a statutory regime that incorporates a "quasi-international approach" without fully utilizing the international scheme. Due to its lenient approach to the shipping industry, however, Canada's efforts to create oil-pollution legislation adequate to deal with a large-scale oil spill have noticeably fallen short.

II. COMPARISON OF THE LIABILITY REGIMES

A. Liability

1. Liability Under OPA

The Oil Pollution Act of 1990 (OPA), like the international scheme, includes broad liability provisions, and establishes a fund to respond in the event of a large scale oil spill.103 OPA has established a liability regime that invokes strict, joint and several liability,104 against the responsible party,105 encompassing all parties responsible in any way for the discharge, or threatened discharge,

and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.


101. International Convention on Civil Liability for Oil Pollution Damage, Art. I(2), supra note 100, at 374. The CLC defines person as follows: "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions." Id.

102. Id. at 374. The CLC defines owner as follows: "Owner" means the person or persons registered as the owner of the ship, or in the absence of the registration, the person or persons owning the ship. However, in the case of the 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. Under the CLC, the term "registration" does not seem to have a real significance if the ship is from a Contracting State. The "State of the ship's registry" means in relation to registered ships or the State of registration of the ship, and in relation to unregistered ships the State whose flag the ship is flying." Id.

103. See 33 U.S.C. § 2702 (1994) (discussing the elements of liability such as removal costs; damages (natural, real and personal property, subsistence use, revenues, profits and earning capacity, public services); excluded discharges; and liability of third parties); supra note 52 and accompanying text; see also § 2712 (discussing the uses of the Oil Spill Liability Trust Fund).

of oil from tank vessels into the navigable waters of the United States. Thus, OPA provides that each responsible party is strictly liable under the Act for the discharge of oil or for the substantial threat of the discharge of oil, and is liable for removal costs and damages.

The use of the term “responsible party” by the provisions of OPA provides potential recovery benefits from a seemingly endless array of defendants. The array of defendants could include owners and operators of vessels, owners and operators of facilities in navigable waters, owners and operators of pipelines and even the licensees of deepwater ports. The legislators implemented a no fault liability regime because oil transport is potentially of such a risk to the environment and because legislators believed that the parties involved in such a lucrative business must assume the responsibility for a catastrophic spill. The use of such a broad definition for the liable party reflects the underlying theme of OPA and its goal of making the actual oil polluter pay for his acts. This

105. See id. § 2701(32)(A) (“[R]esponsible party’ means . . . . In the case of a vessel, any person owning, operating, or demise chartering the vessel.”).
106. See id. § 2701(23) (“[O]il’ means oil of any kind or in any form.”).
107. See id. § 2701(34) (“[T]ank vessel’ means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—
(A) is a vessel of the United States;
(B) operates on the navigable waters; or
(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States.”).
For the purposes of this comment, the term vessel is to be defined strictly as vessels constructed or adapted for the transport of oil, and do not include the description of any watercraft or other type of machinery used, as defined in 33 U.S.C. § 2702(37).
108. See id. § 2701(21) (“[N]avigable waters’ means the waters of the United States, including the territorial sea.”).
109. See id. § 2702(a). The removal costs and damages covered by OPA include all removal costs, damages to natural resources, real or personal property, damages for the loss of subsistence use of natural resources, revenues, loss of profits or impairment of earning capacity, and the net costs for providing public services. Id. § 2702(b)(2)(A)-(F).
110. See Wagner, supra note 2, at 574. For a look at some of the criticisms of the Oil Pollution Act of 1990, see Gold, supra note 18, at 423. “[T]he OPA 1990 specifically does not preempt state laws, which may impose additional or other, heavier liabilities on shipowners, unlimited liability appears to be the name of the new U.S. game!” Id. at 436 (emphasis added); see also 33 U.S.C. § 2718 (preserving state law claims against the responsible party).
111. See id.
also reflects the theme of oil-pollution prevention, creating an incentive to transport bulk oil safely.\textsuperscript{113}

Under the Act, the treatment of third parties has been addressed in two provisions—one for third party liability and another for use as a defense. A third party will be treated as a "responsible party" when the initial "responsible party" can show that the discharge was caused solely by the act or omission of the third party.\textsuperscript{114} If the responsible party can prove these circumstances, the third party will, in effect, become the responsible party, thus subject to the provisions of the Act. Therefore, the responsible party's liability for the spill transfers to the third party if the spill was caused solely by the act or omission of the third party.\textsuperscript{115} However, if the responsible party could not show the third party was solely responsible for the discharge,\textsuperscript{116} a third party could potentially escape liability.

Under OPA, a claimant can pursue claims against all responsible parties, an idea which is in stark contrast to the provisions adopted by the Canada Shipping Act.\textsuperscript{117} This expansive approach

\textsuperscript{113} The legislative history of OPA stressed the need for oil pollution prevention. Senate Report No. 101-94 stated:

The oil spills over the past five months clearly show that we are not using—or have not yet developed—technology capable of containing spills of less than a million gallons, let alone the spills the size of the Exxon Valdez. The spills of less than one million gallons also demonstrated that any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequentially, preventing oil spills is more important than containing them and cleaning them up quickly.

Moreover, four major oil spills within a three-month period suggest that spills are still too much of an accepted cost of doing business for the oil shipping industry. At the present time, the costs of spilling and paying for its clean-up and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them.

\textit{Id.} at 724 (emphasis added).

\textsuperscript{114} See 33 U.S.C. § 2702(d)(1)(A) (1994) (allowing a responsible party to prove that a spill was caused solely by the act or omission of one or more third parties, thus, re-designating a third party as the responsible party).

\textsuperscript{115} See \textit{id.} § 2703 (a)(3) (allowing the responsible party a complete defense to all claims, if it can be proven that a third party was solely the cause of the oil damage).

\textsuperscript{116} See \textit{id.}

\textsuperscript{117} Under the Canada Shipping Act, the owner of the ship is the liable party. Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(4) (1985) (Can.). Therefore, it appears that all claimants must bring their respective claims against the owner of
to liability stresses the need for all parties involved in the transport of oil to follow appropriate regulations and guidelines because the long arm of OPA will cover even those remotely responsible for oil-pollution damage.

2. Liability Under the Canada Shipping Act

Canada, like the United States, has implemented oil-pollution legislation with a strict liability regime. Canada has also developed a fund to compensate for costs and damages. Unlike the United States, however, Canada narrowed its liability regime by incorporating the definition of "owner" as the liable party. Under the CSA, the liable party will be either the registered owner, when dealing with a convention ship, or when referring to all other ships, the person having the rights of owner. The CSA governs the discharge of oil, establishing separate provisions to encompass "ships" and "convention ships." When discharged from the ship. See id. Section 677(5) states that no provision of the CSA prohibits the owner of a ship from bringing any claim against any other person. See id. The strict liability of the owner requires the claimants to bring actions against the owner, and in turn the owner will have to bring claims against any other party.

118. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(1-3) (1985) (Can.) (discussing the Ship-source Oil Pollution Fund); see also id. § 720 (requiring those contributing to the Oil Pollution Fund to record contributions made).

119. Id. § 673 (stating that an "owner" of a ship means (a) in relation to a Convention ship, the person registered as the owner of the ship or, in the absence of registration, the person owning the ship, or (b) in relation to any other ship, the person having for the time being, either by law or by contract, the rights of the owner of the ship as regards the possession and use thereof).

120. See id. § 677(1). This simple classification leaves no room for argument as to who the liable party is. There can only be one registered owner. This seems to follow the persistent theme of the international society to channel liability in the most 'simple' of classifications. See supra note 78.

121. Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 675. Section 675 states:

(1) For ships other than Convention ships, this Part applies in respect of actual or anticipated oil pollution damage
(a) in any place in Canada,
(b) in Canadian waters, and
(c) in any fishing zone of Canada prescribed pursuant to the Territorial Sea and Fishing Zones Act, except where the Arctic Waters Pollution Prevention Act applies, irrespective of the location of the actual or expected discharge of the pollutant and irrespective of the location where any preventive measures are taken.
(2) For Convention ships, this Part applies, subject to subsection (3), in respect of actual or anticipated oil pollution damage
(a) in any place in Canada,
(b) in Canadian waters, and
a "non-convention ship," oil is defined as "oil of any kind or of any form." 122 The term "oil" only refers to persistent oil when the discharge has taken place from a convention ship. 123 Most oil pollution is caused by "persistent" oil, because that it is the classification of oil used in most modern ship engines and the type that is most abundantly transported by vessels.

Under the CSA, there are variant schemes for liability, depending on the type or classification of the "ship." 124 For instance, if a convention ship discharges oil, under section 681 of the Canada Shipping Act, the owner is not liable for the damages if sustained by Canada or any member of the Civil Liability Convention. 125 However, the ordinary ship owner is held strictly liable for the discharge of oil, notwithstanding certain defenses and third party issues.

The CSA, like OPA, allows the vessel's owner to alleviate the amount of liability if attributable to the act or omission of a third party. 126 The owner's liability will be "reduced or nullified" in proportion to the degree of fault attributable to the third party. 127 These differences in liability between the CSA's fault and privity standard and OPA's strict liability can create confusion in the

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122. *Id.* § 673 (stating that "‘oil,’ except in sections 716 to 721, means oil of any kind or in any form and, without limiting the generality of the foregoing, includes petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes but does not include dredged spoil").

123. *See supra* note 99 and accompanying text. Oil can be divided into two categories—"persistent" and "non-persistent." "Non-persistent" oils are highly volatile, evaporate quickly, and leave relatively no residue (e.g. gasoline). "Persistent" oils include crude oils transported in bulk for refining (e.g. diesel and lubricating oils or heavy oils). Unlike "non-persistent" oils, if "persistent" oils are spilled, in a very short time they will cover a great distance and cause severe damage. *See* Gold, *supra* note 57, at 16.

124. *See supra* note 121.

125. *See id.* § 681 (referring to the damages caused in situations illustrated in § 677); *see also supra* note 62 (discussing common law recovery of damages for oil pollution from ships).

126. *See id.* § 677(4)(a), (b) (allowing the owner of a ship to prove that the damage resulted wholly or partially by the act or omission of the person who suffered the damage with intent to cause the damage, or that the person acted negligently, thus, reducing or nullifying his liability accordingly).

127. *See id.* § 677(4)(b).
event of a trans-territorial spill. Furthermore, these provisions create the potential for inconsistent judgments, therefore lending to the added inefficiency of both systems.

3. **Comparison of the OPA and CSA Liability Regimes**

The difference between the designation of the liable party as "owner" in Canada and "responsible party" in the United States could obviously create extensive confusion when assigning liability for a trans-territorial oil spill.\(^{128}\) OPA reaches past the narrow threshold of the registered owner and holds liable each and every party responsible for the discharge of the oil. The CSA, on the other hand, adopts strict liability, holding only the registered owner liable in the case of convention ships,\(^{129}\) and in the case of all other ships, holding liable that "person having for the time being, either by law or by contract, the right of the owner of the ship as regards the possession and use thereof."\(^{130}\) This provision of the CSA narrows the potential liable parties when a convention ship is involved, but applies a broader label, like OPA, when referring to all other ships. However, the CSA designation of the liable party still does not have the broad sweeping grasp as does OPA's "responsible party" designation. This distinction is an attempt by the Canadian government to implement an international approach toward oil-pollution legislation,\(^{131}\) but has resulted in an inadequate provision that may inequitably hold the ship owner liable.\(^{132}\) Be-

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\(^{128}\) Compare 33 U.S.C. § 2701(32)(A), and § 2702(a) (defining "responsible party" and his liability), with Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 673 (1985) (Can.) (defining "owner" and his liability), and § 677. The comparison of the two provisions will illustrate that there is a greater number of possible parties who could be held liable under the Oil Pollution Act.

\(^{129}\) See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 673 (1985) (Can.).

\(^{130}\) Id.; see also Popp, supra note 9, at 117 (discussing the different definitions of liability in the competing regimes). There is the possibility that if a trans-territorial spill occurs, the operator or charterer could be liable in the United States, but not in Canada.

\(^{131}\) The definition of the liable party as the "owner" is much narrower than the definition of "responsible party," thus, remaining consistent with the definition of owner used in the CLC. See International Convention on Civil Liability for Oil Pollution Damage, Art. 1(3), reprinted in 1 J. Mar. L. & Com. 373, 374 (1970).

\(^{132}\) The subject of ownership will be a paramount issue for debate in OPA litigation. Because the CSA and the CLC have decided "simply" to characterize the liable party as the registered owner, there will not be the extensive debates that could become apparent under OPA. The Canadian and the International regimes, attempting to make a "simple" designation of the liable party, have far too
cause the potential for unlimited liability exists under OPA, there may be a real debate as to who is the responsible party. There is more of an incentive for a party to litigate the issue of "responsible party," because of OPA's broad reach. Whereas, under the CSA, there is no such debate because the liable party is the "owner."

Furthermore, the different definitions of "oil" between OPA and CSA make it difficult to determine how each country would react in the event of a trans-territorial spill. OPA applies to oil in any form, but the CSA applies differently in the cases of convention ships and all other ships. It appears that the intent of the Canadian scheme is to benefit those members of the Civil Liability Convention. The Canadian move toward a uniform oil pollution narrowly channeled the liability, thus, excluding many necessary parties. See Popp, supra note 9, at 113-14.


134. Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 673 (1985) (Can.). Section 681 of the Canada Shipping Act states in relevant part:

(1) The owner of a Convention ship is not liable for the matters referred to in subsection 677(1) otherwise than as provided by this Part.

(2) No servant or agent of the owner of a Convention ship nor any person performing salvage operations with the agreement of the owner shall be liable for the matters referred to in subsection 677(1).

Id. § 681.

Section 677(1). Civil Liability for Pollution of the Canada Shipping Act illustrates the liability of the owner of the ship for pollution, and states in relevant part:

(1) Subject to this Part, the owner of a ship is liable
   (a) for oil pollution damage from the ship;
   (b) for costs and expenses incurred by
      (i) a public authority in Canada, or
      (ii) a public authority in a state other than Canada that is a party to the Civil Liability Convention, in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from the ship, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures; and
   (c) for costs and expenses incurred by the Minister in respect of measures taken pursuant to subsection 678
      (1) to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures.

Id. § 677(1).

135. Diplomatic representatives of some 49 countries gathered at Brussels November 10-28, 1969 to attend the International Legal Conference convened by the Inter-Governmental Maritime Consultative Organization (IMCO). The purpose of the Conference was to consider two draft conventions on the subject of maritime oil pollution—the International Conven-
legislation has been lost in the country's struggle between adequate domestic legislation and the most effective international legislation. Additionally, Canada's attempt to provide the most adequate oil pollution laws has failed to make that goal coincide with the interests of Canada's closest neighbor, the United States.

Although both OPA and the CSA subscribe to what is referred to as strict liability, the differences in the regimes' liability structures make it hard to assess what would happen in the event of a potential trans-territorial spill. The all encompassing goal of having adequate oil-pollution legislation has led these neighboring nations down diverging paths, diminishing the underlying hope for uniformity in the near future.  

B. Defenses to Liability

1. Defenses to Liability Under OPA

OPA provides complete defenses to the responsible party if the discharge or the substantial threat of discharge of oil was "caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party . . . ." The word "solely" has been incorporated to

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...
limit the availability of the defense to the responsible party.\textsuperscript{138} This standard is a significantly high hurdle for the responsible party to clear. The responsible party must prove that the discharge was caused entirely through the fault of a third party. In the case of the third party defense, the responsible party must establish that they exercised due care and took any necessary precautions against the foreseeable acts or omissions of third parties.\textsuperscript{139}

OPA also allows the responsible party a complete defense against a particular claimant, if the responsible party can show that the incident was caused by the "gross negligence or willful of the responsible party, or a third party whose act or omission occurred in any connection with a contractual relationship with the responsible party. See id. § 2703(a)(3). Legislative history provides the congressional intent to restrict cases in which a responsible party could defend its liability for an oil spill. As one of the advocates for the restriction of liability defenses stated:

\textit{[u]nder my amendment, the owner or operator of the tanker will have an obligation to co-operate in responding to the spill, no matter what the circumstances might be. Even if the spill results entirely from an act of God, or from the action of some third party, I believe—and my amendment requires—that the tanker or facility owner help to respond to the spill, and that he obeys instructions from the appropriate Federal or State official pursuant to the National Contingency Plan. The purpose of the amendment is to make certain that, whenever there is an oil spill, there is an incentive for those who are on the scene to do everything possible, as quickly as possible, to respond to the spill, to limit the damage, to protect natural resources and to obey the orders of the government officials who are in charge.}


138. See 33 U.S.C. § 2703(a) (referring to the complete defenses offered under OPA).

139. See id. § 2703(a)(3)(A), (B). In the event that the responsible party shows that they are not liable, the responsible party may still have to pay the removal costs and damages to the claimant, if the third party refuses to do so. Section 2702(d)(1)(B) states in relevant part:

(B) Subrogation of responsible party

If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party—

(i) in accordance with section 2713 of this title, shall pay removal costs and damages to any claimant; and

(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

\textit{Id. § 2702(d)(1)(B).}
misconduct of the claimant."140 This defense will lower liability to the extent that the gross negligence or willful misconduct of the third party caused the incident. At one time the responsible party was also given the complete defense of governmental negligence, which meant that if the government failed to perform any of its duties, such as the maintenance of channel buoys, then the responsible party would be free from liability.141 Thus, OPA removed the defense of governmental negligence, which had previously existed in the FWPCA.142

To access these defenses to liability, the responsible party must satisfy significant requirements. The responsible party will not be entitled to any of the aforementioned complete defenses if he fails to report the oil spill as required by law and knows or has reason to know of the spill; fails to provide reasonable cooperation and assistance requested by and in connection with the removal activities; or fails to comply with an order regarding removal activities.143

The United States began drafting these defenses during a time of overall consensus that the transporters of oil in bulk comprise an industry that should bear the burden itself.144 By drafting these defenses, the United States has more firmly established a hard-line approach to domestic oil-pollution legislation. As a result, the United States has put more pressure on those involved in the business of oil transportation to take all preventative measures, providing defenses only in instances when the outside acts are too remote in nature to be expected.

140. Id. § 2703(b) (referring to the responsible party’s ability to negate an asserted claim if it can be proven that the incident was caused by the gross negligence or willful misconduct of the claimant).
142. See id. § 2703; cf. 33 U.S.C. § 1321(f)(2) (stating that negligence on the part of the United States was a viable defense).
143. See id. § 2703(c)(1), (2), (3). The orders requiring compliance referred to in subsection (3) are the Federal Removal Authority and Civil Enforcement subsections of the Clean Water Act. See 33 U.S.C. § 1321(c), (e).
144. See Gold, supra note 18, at 436-37 (discussing some of the reasons why the United States decided to enact the Oil Pollution Act of 1990).
2. **Defenses Under the CSA**

The Canada Shipping Act also affords certain defenses to the owner of the vessel for oil-pollution damage,\(^{145}\) including defense provisions taken exclusively from the 1969 International Convention on Civil Liability for Oil Pollution Damage.\(^{146}\) Under the CSA, the owner will not be held liable if he establishes that the occurrence:

resulted from an act of war, hostilities, civil war or insurrection or from a natural phenomenon of an exceptional, inevitable and irresistible character; was wholly caused by an act or omission of a third party with intent to cause damage; or was wholly caused by the 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.\(^{147}\)

The term "third party" is not defined in the CSA, leaving any party involved in an oil spill open to potential liability. The CSA governmental defense protects the Canadian Government and any other government that is responsible for maintenance of navigational assistance devices.\(^{148}\) The CSA, like OPA, also has a defense applicable against a particular claimant or damaged party.\(^{149}\) The owner of a ship may reduce or nullify liability in proportion to the degree that the incident resulted "wholly or partially" from an act or omission by the person actually suffering the damage. For the

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145. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(3) (1985) (Can.) (listing the owner's available defenses).


No liability for 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 the 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.

147. Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(3)(1)(a), (b), and (c) (1985) (Can.).

148. See id. § 677(3)(1)(c).

149. See id. § 677(4)(a), (b).
liability of the owner to be "reduced or nullified" in proportion to the degree that the occurrence resulted from the acts of that person, the party that suffered the damage must have the intent to cause damage or act negligently. Thus, the owner asserting the third party defense and the actual claimant defense has a lower standard to achieve under the CSA than that established by OPA because the preventive measures do not have to be taken under the CSA. Overall, the defenses available under the CSA and the CLC are broader and more available than those under OPA.

3. Comparison of the Defenses of OPA and CSA

The CSA provides more defenses than OPA and is far less stringent as to when these defenses are available to the liable party. There are some very obvious differences between the two statutes, and some less evident subtleties that would effect the consistency of judgments in a trans-territorial incident.

First, and most evident, is the difference between the third party defenses. OPA requires that the responsible party show by a preponderance of the evidence that the third party is solely responsible for the incident. First, however, the responsible party must show, by a preponderance of the evidence, that he exercised due care and took reasonable and foreseeable precautions against acts or omissions by the third party. In contrast, the CSA allows an owner to defend liability by showing that the act or omission of a third party was wholly or partially the reason for the occurrence. Under the CSA, the owner does not have to show

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150. Id. The CLC has a corresponding provision where the owner can show that the damage was actually the result of negligence on the part of the claimant. Article III paragraph 3 states in relevant part:

3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.


151. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(4) (1985) (Can.); cf. Oil Pollution Act, 33 U.S.C. § 2703(a)(3) (1994) (stating that the third party cannot be an employee or agent under OPA; there is no such distinction made under the CSA).


153. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(3)(1)(b) (stating that if the occurrence is "wholly" caused by an act or omission of a third party, and
evidence of due care or the taking of precautions for foreseeable acts or omissions before asserting the defense. Under OPA, the third party defense cannot be used if the act or omission was caused by an agent or employee of the responsible party.154 The CSA, however, does not have a corresponding limiting provision to the third party defense. By using the term "solely," OPA provides the defense as an all-or-nothing provision; but the CSA uses the words "wholly" or "partially" and allows for proportional lowering of the owner's liability. Both statutes allow for a third party defense to liability, but it is clear from the language of the statutes that OPA has a much higher standard to meet.155 These differing provisions show OPA's tendency to give far less leeway when it comes to asserting defenses, making the United States's oil pollution regime the strictest thus far.

The second difference is that the governmental defense does not exist under OPA, but is available under the CSA. Under the CSA, the owner of a ship can assert the governmental negligence defense if the incident is wholly caused by the negligence of the government or other authority responsible for maintaining navigational instruments used by ships.156 This means that if the incident is not the direct result of governmental negligence, then the owner of the ship will be liable. Although the CSA requires the owner to meet a stringent standard for this defense, in contrast, it does not emphasize the hard line legislative stance taken by the United States in the pursuit of adequate oil-pollution laws.

that third party intended to cause the occurrence, then the owner will be relieved from liability).

154. See 33 U.S.C. § 2703(a)(3) (providing that the responsible party will not be held liable if the oil spill was caused by an act or omission of a third party whose act or omission is due to a contractual connection with the responsible party, notwithstanding the fact that the responsible party have exercised due care and took all reasonable precautions).

155. Compare 33 U.S.C. § 2703(a)(3) with R.S.C., 3d Supp., ch. 6, § 677(3)(b). Both statutes allow for the third party defense, although OPA requires the responsible party to exercise due care and take foreseeable precautions. See 33 U.S.C. § 2703(a)(3)(A), (B). The CSA does not require the owner of the ship to show that he exercised due care, or that he took precautions against foreseeable acts on the part of any third party. See R.S.C., 3d Supp., ch. 6, § 677(3).

156. See R.S.C., 3d Supp., ch. 6, § 677(3)(1)(c) (allowing the owner to escape liability for an oil spill if the incident was caused "wholly" by the negligence of the Canadian government or an authority responsible for any sea going-navigational devices).
The third difference in the defenses to liability is that OPA provides the responsible party with a defense for cases where the claimant caused the incident by gross negligence or willful misconduct. This defense will lower the liability to the extent that the gross negligence or willful misconduct of the third party caused the incident. Under the CSA, the owner of the ship must simply show negligence on the part of the claimant, not gross negligence or willful misconduct. Even in the area of the defense against the actual claimant, OPA has a more difficult standard for the responsible party to meet.

The fourth difference in the defenses to liability is the existence of a contingency, a "takeaway" provision, that the responsible party, under OPA, must meet before being afforded any of the complete defenses. If this contingency is not met, then the responsible party's defenses and limits to liability are taken away. The CSA does not include a corresponding "takeaway" provision. Under OPA, if a responsible party fails to report the incident, fails to provide all reasonable cooperation and assistance, or refuses to comply with safety standards, he will lose all of the complete defenses provided in section 2703(a). This provision implies that regardless of whether the "responsible party" can show that a third party was the actual responsible party, or even that the cause of the spill was from the gross negligence or willful misconduct of the claimant, the prevention and most efficient clean up of the spills is

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157. See 33 U.S.C. § 2703(b) (negating liability of the responsible party if the oil spill was caused by the gross negligence or willful misconduct of particular claimants).

158. See R.S.C., 3d Supp., ch. 6, § 677(4)(a), (b) (stating that if the oil spill was the result of an act or omission or the negligence of those who suffered the injury, then the owner will be held liable proportionately to his fault).

159. See 33 U.S.C. § 2703(b). § 2703 states in relevant part that: "A responsible party is not liable under section 2702 of this title to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant." Id. The CSA has no corresponding requirement. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 677(3) (1985) (Can.).


161. See id.

162. See R.S.C., 3d Supp., ch. 6, § 677(3). The lack of the CSA's attention to the prevention of oil pollution is in stark contrast to the provisions of OPA. Because there is no specific language in the CSA addressing prevention of oil pollution, one can infer that prevention of oil spills is not one of the government's main concerns.

163. See 33 U.S.C. § 2703(c)(1), (2), and (3) (illustrating that the responsible party is required to meet the most basic of precautionary measures to be afforded the complete defenses).
OPA's main priority. Although the CSA has followed a more uniform international approach, it seems to allow leniency in an area of maritime oil pollution that should require the most stringent standards. The governmental defense, lesser standards in the area of third party liability and the lack of preventive requirements make the CSA a far less stringent legal regime than that enacted by the United States.

C. Limits to Liability

1. Limits to Liability Under OPA

OPA has enacted a provision, section 2704, to limit the liability amount of the responsible party. This provision dramatically increased the limitation values from preceding legislation.

164. See id. § 2704(a). Section 2704(a) states in relevant part:
(a) General rule
Except as otherwise provided in this section . . . [total liability] with re-
spect to each incident shall not exceed —
(1) for a tank vessel, [except a tank vessel on which the only oil carried as
cargo is an animal fat or vegetable oil, as those terms are used in § 2720 of
this title] the greater of —
(A) $1,200 per gross ton; or
(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or
(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;
(2) for any other vessel, $600 per gross ton or $500,000, whichever is
greater;
(3) for an offshore facility except a deepwater port, the total of all removal
costs plus $75,000,000; and
(4) for any onshore facility and a deepwater port, $350,000,000.

Id.

Under OPA, a 150,000 ton tank vessel would have a limit of liability of
$180,000,000 ($1,200 x 150,000=$180 million). A 2,500 ton tank vessel would have
a limit of liability of $3,000,000 ($1,200 x 2,500=$3 million). For a 20,000 ton non-
tank vessel, the limit of liability would be $12,000,000 ($600 x 20,000=$12 million).
Congress devised different limits of liability for non-tank vessels because they are
less likely to cause an oil spill of a disastrous magnitude. See id; see also Millard,
supra note 4, at 331 (discussing the Oil Pollution Act of 1990 and some of the
reasons behind its enactment).

(2), and (3) state in relevant part that:
(f) Liability for actual costs of removal
(1) Except where an owner or operator can prove that a discharge was
caused solely by (A) an act of God, (B) an act of war, (C) negligence on the
part of the United States Government, or (D) an act or omission of a third
party without regard to whether any such act or omission was or was not
negligent, or any combination of the foregoing clauses, such owner or op-
erator of any vessel from which oil or a hazardous substance is discharged
The limits on liability were increased because of the apparent inadequacies that were in place at the time of OPA's enactment.\textsuperscript{166} Thus, the increased limits on liability do nothing but benefit the responsible party, especially in light of a large-scale oil spill like the Exxon Valdez. Liability limits are necessary in this type of industry because of the potential for a large-scale oil spill. To benefit from these limitations, the responsible party must meet limitation requirements. However, as long as limits, whether increased or not, are in place, the responsible party will never be liable for the full amount of damages.\textsuperscript{167}

\begin{verbatim}
\begin{quote} in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs . . .
\end{quote}
\begin{quote} (2) . . . Such owner or operator [of an onshore facility] . . . shall . . . be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs . . .
\end{quote}
\begin{quote} (3) . . . Such owner or operator [of an offshore facility] . . . shall . . . be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.
\end{quote}
\textit{Id.}
\end{verbatim}


\textsuperscript{167} See 33 \textit{U.S.C.} § 2704(c)(1), (2).
In all likelihood, an oil spill will occur, and the effect will be that OPA will make the responsible party pay more money than the owner under the CSA. The only time a responsible party will not be able to limit liability is if it has not followed the safety procedures, or if the spill was caused by an intentional act or omission.\textsuperscript{168} The responsible party does pay more than under past regimes, but he still will save tremendous amounts of money in the event of a catastrophic oil spill.

Accompanying OPA's rising liability limits were some exceptions that could defeat the responsible party's ability to limit liability. The limits on liability do not apply if the "incident was proximately caused by [the] gross negligence or willful misconduct of [the responsible party], or 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 . . . ."\textsuperscript{169} These precautionary measures are the same potential acts that could prevent a responsible party from accessing the complete defenses to liability.\textsuperscript{170} Thus, a responsible party could lose a complete defense and his ability to limit liability. These defense restrictions, coupled with the added restrictions to the limitations on liability, make OPA potentially the most costly and domineering of all existing oil-pollution legislations. OPA requires that the oil shipping industry take necessary precautions to avoid a catastrophic spill. If these precautions are not taken, then the responsible party will see OPA's costly outcome.

While a responsible party's acts could prevent him from limiting liability, so too can the responsible party's refusal to act. If a responsible party

fails or refuses (A) to report the incident as required by law and the responsible party knows or has reason to know of the incident; (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or (C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title[,]\textsuperscript{171}

\textsuperscript{168} See id.
\textsuperscript{169} Id. § 2704(c)(1)(A), (B).
\textsuperscript{170} See supra note 140.
\textsuperscript{171} Id. § 2704(c)(2)(A), (B), and (C). 33 U.S.C. § 1321(c) and (e) state in relevant part:
(c) Federal Removal Authority

(1) General Removal Requirement

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance —

(i) into or on the navigable waters;
(ii) on the water adjoining shorelines to the navigable waters;
(iii) into or on the waters of the exclusive economic zone; or
(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

(B) In carrying out this paragraph, the President may —

(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;
(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and
(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

(2) Discharge Posing Substantial Threat To Public Health Or Welfare

(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government —

(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and
(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

Id. § 1321(c)

(e) Civil Enforcement

(1) Orders Protecting Public Health

In addition to any action taken by a State or local government, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States, because of an actual or threatened discharge of oil or a hazardous substance from a vessel or facility in violation of subsection (b) of this section, the President may—

(A) require the Attorney General to secure any relief from any person, including the owner or operator of the vessel or facility, as may be necessary to abate such endangerment; or
(B) after notice to the affected State, take any other action under this section, including issuing administrative orders, that may be necessary to protect the public health and welfare.
then he will be unable to limit his liability. Additionally, section 1321 (c) and (e) refer to the President’s post accident orders;\textsuperscript{172} if the responsible party fails to comply with these orders, then he will also be unable to limit liability. Section 2704(c) adds to the heightened congressional awareness of the need to prevent oil pollution, thus attacking the acts of the responsible party prior to the oil spill and taking away any privileges that were at one time available.\textsuperscript{173} With such rigorous standards, Congress will accomplish its plan of eliminating oil spills without serious regard to who is in the way.\textsuperscript{174}

As a result of this legislation and the United States’s failure to ratify the Protocols, the concern arose that the oil industry would evolve into a small-ship fleet industry. President George Bush expressed his concern prior to his signing into law H.R. 1465 (The Oil Pollution Act of 1990). President Bush stated:

I am concerned about another consequence of the failure to ratify the Protocols. We must work to ensure that, in response to the provisions of this Act, a situation is not created in which larger oil shippers seeking to avoid risk are replaced by smaller companies with limited assets and reduced ability to pay for the cleanup of oil spills. We will need to monitor developments in order to protect against such undesirable consequences.

The oil industry faces many new requirements as a result of this legislation. These requirements include substantially increased financial responsibility; preparation of contingency plans; and the replacement of fleets with safer oil tankers. A

\textsuperscript{(2) Jurisdiction of district courts}
The district courts of the United States shall have jurisdiction to grant any relief under this subsection that the public interest and the equities of the case may require.

\textit{Id.} § 1321(e).
\textsuperscript{172} \textit{See id.} § 1321(e).
\textsuperscript{173} \textit{See} Chao, \textit{supra} note 137, at 240.

The legislators believed that very high limits would serve to avoid pollution incidents, since in their eyes, ‘Many in the industry seem to have decided that it is cheaper to spill and pay for its clean up than it is to prevent spill(s) and develop effective techniques to contain them.’ They therefore increased the limits of liability in a spectacular way in the OPA.

\textit{Id.} (quoting 136 Cong. Rec. S.11537 (August 2, 1990)).

balance has been sought to give the industry the flexibility to meet the requirements of the Act without incurring excessive costs.175

If the oil industry decides to change its shipping tactics by incorporating smaller ships, it will not be liable for as large of a spill, because smaller ships cannot spill a larger ship's quantity of oil. The ships and their owners will still have to meet the pre-transport requirements and the post-spill requirements in order to limit liability. Therefore, using smaller ships will not effectively avoid liability. Rather, that result will only be accomplished when shipowners take the appropriate precautionary measures prior to oil transport.

On its face OPA does not appear to represent an unlimited statutory regime, but the few provisions allowing for unlimited liability create a very real likelihood that unlimited liability can become a reality. If the responsible party does not follow the requirements in the Act, it will most surely have unlimited liability. By not following the requisite safety measures, the responsible party will lose its ability to limit liability.

2. Limits of Liability Under the CSA

Section 679 of the CSA, unlike OPA, still follows the fault and privity test for the limitation of liability.176 The CSA uses the fault and privity test and assesses the fault percentages to the aggregate amount of liability.177 The owner will be liable for the amount that he was at fault and any other party will be liable for the amount that they were at fault. However, if the owner's liability occurs without the owner's actual fault or privity, then the owner gets the lesser of two amounts assessed as liability.178 The CSA

175. Id.
176. See Canada Shipping Act, R.S.C., 3d Supp., ch. 6, § 679 (1985) (Can.).
177. See id.
178. See id. Section 679 states in relevant part:
(1) Where an occurrence giving rise to liability of an owner of a ship under section 677 occurs without actual fault or privity of the owner, the owner's maximum aggregate liability under that section in respect of that occurrence is the lesser of
(a) one hundred and thirty-three Special Drawing Rights for each
   (i) ton of the ship's tonnage, where paragraph (2)(a) applies, or
   (ii) tonne of the Convention ship's tonnage, where paragraph (2)(b) applies, and
and the CLC\textsuperscript{179} both apply the fault and privity standard, thus

(b) fourteen million Special Drawing Rights, and section 575 does not apply in respect of the owner's liability for the matters referred to in subsection 677(1).

(2) For the purposes of subparagraphs (1)(a)(i) and (ii),
(a) a ship's tonnage is the aggregate of
(i) its net tonnage, and
(ii) the amount deducted from its gross tonnage in respect of engine room space for the purpose of ascertaining the net tonnage; or
(b) where a Convention ship's tonnage cannot be measured in accordance with paragraph
(a), it shall be deemed to be 39.368 per cent of the weight in tonnes of oil that the Convention ship is capable of carrying.

(3) In subsection (2), “net tonnage” means register tonnage.

(4) In paragraphs (1)(a) and (b), “Special Drawing Rights” means special drawing rights issued by the International Monetary Fund.

\textit{Id.}

Under the Canada Shipping Act, a 150,000 ton ship would have a limit of liability of 19,950,000 Special Drawing Rights (133 Special Drawing Rights \times 150,000=19,950,000 Special Drawing Rights). A 2,500 ton ship would have a limit of liability of 332,500 Special Drawing Rights (133 Special Drawing Rights \times 2,500=332,500 Special Drawing Rights). These numbers are the same for a “ship” and a “Convention ship.” \textit{See id.; supra note 151 and accompanying text.}

179. The corresponding provision of the 1969 Civil Liability Convention is Article V which has been amended by Article 6 of the 1984 Protocol to the Civil Liability Convention which states:

1. The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
(a) 3 million units of account for a ship not exceeding 5,000 units of tonnage;
(b) 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 (a);
provided, however, that this aggregate amount shall not in any event exceed 59.7 million units of account.

2. The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

3. For the purpose of availing himself of the benefit of the limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum constituting the limit of his liability with the Court or other competent authority of any one of the Contracting States which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority.
providing uniformity in the limitations available to the owner of a convention ship or any other ship. The CSA and the CLC both have similar provisions where the negligence of the ship owner will prevent the ability to limit liability.\textsuperscript{180} There is no other method of restricting the ship owner's limitation on liability other than the fault and privity standard,\textsuperscript{181} because there are no other methods listed in the CSA.

Section 679 of the CSA seems more dismissive than any of the previous sections. Unlike OPA, section 679 does not require the owner of a ship, whether it be a "ship" or a "Convention ship," to meet any of the safety standards prior to an oil spill. Also, the owner does not have to show that he took precautions from foreseeable risk. CSA section 679 fails to address the area of prevention or implement specific guidelines that ship owners must follow prior to carrying oil. The CSA appears to dismiss the idea of oil-spill prevention altogether.

3. \textit{Comparison of the Limits on Liability Between OPA and the CSA}

Both the Oil Pollution Act and the Canada Shipping Act provide for the limitation of liability for vessel owners and responsible parties involved in oil-pollution damage. Both statutes contain provisions that can either take away, entirely or partially, the possibility of limitation, if certain criteria are not met. OPA, however, has taken a much more aggressive stance than the CSA when addressing the area of liability limitation.

Under OPA, the responsible party's acts are much more closely scrutinized and can have a significant effect on whether the responsible party will be afforded liability limitation. If the responsible party engages in conduct classified as gross negligence or

\textsuperscript{4} The fund shall be distributed among the claimants in proportion to the amounts of their established claims.
\textsuperscript{5} If before the fund is distributed the owner or any of his servants or agents or any person providing him insurance or other financial security has, as a result of the incident in question, paid compensation for pollution damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

\textit{Id.}

\textsuperscript{181} See R.S.C., 3d Supp., ch. 6, § 679 (1985) (Can.).
willful misconduct, then he will not be afforded the right to limitation. Under the CSA and the CLC, it appears that the acts of
the registered owner are the main concern of the statute; the fault
and privity standard, when applied to these actions, will only de-
feat liability limitation if the registered owner's acts were negli-
gent. Both statutes have placed a premium on the acts of the liable
party surrounding an oil spill, as well they should.

OPA continues with its theme of strictness toward the bulk
transport of oil by vessels, having additional provisions forfeiting
the limitations of liability if the responsible party does not perform
certain duties. For example, if the responsible party fails to
comply with the applicable federal standards for construction,
safety and operation, then such party loses the ability to limit lia-

bility. Another provision that exists under OPA, but not in
either the CSA or the CLC, concerns the possibility that the re-
sponsible party will lose the chance to limit liability for failing to
report the spill of oil, or failing to provide reasonable cooperation
and assistance regarding cleanup. None of these areas of oil pol-
lution prevention are addressed in either the CSA or the CLC. The
OPA provisions further illustrate that the United States's purpose
in enacting oil-pollution legislation was to have adequate laws to
cope with a devastating oil spill, as well as an incentive to all in the
oil-carriage business to take the necessary precautions to avoid a
spill of great magnitude.

Through OPA, the United States, in theory, has enacted a 'uni-
form' law for oil pollution damage, rendering OPA's section 2718

183. See id. § 2704(c)(1), (2).
184. See id. § 2704(c)(1)(B). The strictness of this provision becomes extremely
apparent because the responsible party can forfeit the possibility of limiting liability.
The actions of an agent or employee of the responsible party can also thwart
the ability to limit liability. A responsible party can forfeit limited liability due to
the conduct of a person acting pursuant to a contractual relationship with the re-
sponsible party. See id.
185. See id. § 2704(c)(2)(A), (B). Under the CSA and the CLC, it appears that a
ship owner could actually fail to report a spill or assist in the cleanup, and still be
able to have a number defenses available. Furthermore, the shipowner may still
be able to limit liability. Even failing to meet the proper regulations and safety
standards is not addressed in the CSA and the CLC. One can imply that the owner
would still be able to limit liability if the omission or act of violating these stan-
dards did not cause the damage.
somewhat confusing. Section 2718 allows the individual states to enact their own oil-pollution liability, destroying OPA’s uniform-

186. Potentially one of the most notable, and without doubt one of the most financially eye catching provisions of OPA is § 2718. Section 2718 states in relevant part:

Section 2718. Relationship to other law
(a) Preservation of State authorities; Solid Waste Disposal Act.
Nothing in this Act or the Act of March 3, 1851 [The Limitation of Liability Act] shall—
(1) affect, or be construed or interpreted as preempts, 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 discharge; or
(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.) or State law, including common law.
(b) Preservation of State funds.
Nothing in this Act or in section 9509 of title 26 shall in any way affect, or be construed to affect, the authority of any State—
(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or
(2) to require any person to contribute to such a fund.

Id. § 2718.

This section illustrates that individual states that share coastline with Canada and are affected by a trans-coastal oil spill, also have enacted legislation that will affect the outcome of liability and any possible limitations on liability. It becomes clear after reading this provision that if a responsible party is successful in his ability to limit liability according to § 2704, § 2718 allows the individual states to impose their individual liability standards and are not preempted by either OPA or federal authority. 33 U.S.C. § 2718.

Several states have enacted liability regimes that apply to vessels involved in the carriage of oil. A few of the states that have enacted legislation that would affect both the United States and Canada are New York, Washington, Maine, and Alaska. Washington, Maine and Alaska have not invoked limitation of liability provisions, creating an even greater incentive for bulk oil carriers to insure the safe transport of the oil. New York has adopted a strict liability regime for all cleanup and removal costs no matter who sustains them. See N.Y. Nav. Law § 181.1 (McKinney 1997). New York does place limits on liability for damage caused by an oil spill, but “[t]he liability limits established . . . shall not be considered to increase the liability above the federal limits for tank vessels or vessels as defined in the Federal Oil Pollution Act of 1990.” Id. § 181.3(b). However, § 181.4 states that “[a]n act or omission caused solely by war, sabotage, or governmental negligence shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this article.” Id. § 181.4. These limitations, although similar, are not as extensive as the limitations afforded by OPA.
It seems difficult to fathom that Congress, while trying to create a uniform law, would actually include a provision such as section 2718. Every state could possibly enact their own oil-pollution legislation, establishing differing standards for liability, thereby increasing the confusion surrounding a trans-territorial spill. Section 2718 more or less does away with the need to have a limitation of liability provision at all, as the states themselves could enact an unlimited-liability provision to protect themselves from potential pollution damage. The responsible party may be able to meet the requirements for limitation under OPA, but then become bootstrapped by a state legislation that, in a sense, creates unlimited liability.

The CSA does not have a provision analogous to OPA's section 2718. Therefore, the "fault and privity" test illustrated in section 679 of the CSA is the governing rule for limitation purposes. The existing differences in the limitation provisions of OPA and the CSA will create havoc in the determination of liability. Inevitably, there will exist a scenario where a vessel owner will be involved in a spill resulting in damage to both of these neighboring countries. Because of the differences in limitation regimes, the owner could be subject to unlimited liability regardless of fault under OPA. Additionally, section 2718 would subject the owner to state-imposed liability. At the same time, in Canada, under the "fault and privity" test his liability will be limited considerably.

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187. See 33 U.S.C. § 2718. For a favorable look at the enactment of OPA, and namely the existence of § 2718, see Mitchell, supra note 6, at 250-51.

The resulting Oil Pollution Act of 1990 offers an effective federal and state liability system to prevent spills by inducing a high standard of care for all persons engaged in the handling and transporting of oil. This system ensures as much as possible that the polluter—not the American taxpayer—pays for the cleanup costs and damages that result from spills.

Id. at 251.

188. The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed . . . . This subsection reinforces the position stated clearly elsewhere that no aspect of State oil spill programs is preempted, including the authority to impose additional requirements or penalties.


189. See R.S.C., 3d Supp., ch. 6, § 679; Popp, supra note 9, at 120 (discussing the difference between OPA § 2718 and the "fault and privity" test incorporated by the CSA).
The conflict between the two regimes creates a sense of urgency as to which forum to choose, if that is a viable option.  

190. Under the current regimes, the claims brought for oil pollution damage cannot be consolidated. OPA seems to apply only to oil spill damages that occur in the United States. There is a question as to whether one would be able to bring claims under OPA for damages caused by a United States vessel on Canadian soil. See 33 U.S.C. § 2707. There is an exception under OPA that states that if the country claiming the oil spill damage has a treaty or executive agreement with the United States providing reciprocal treatment in the event that the United States was damaged, then the damaged party may bring their claim. See id. § 2707(1)(B). However, the United States and Canada, at this time, are not a part of a treaty or executive agreement as stated in OPA.

The Canada Shipping Act has a similar provision that does not allow claims to be brought when the damage is not caused in Canada by ships however defined. Section 675 of the CSA states in relevant part:

675. (1) For ships other than Convention ships, this Part applies in respect of actual or anticipated pollution damage
(a) in any place in Canada,
(b) in Canadian waters, and
(c) in any fishing zone of Canada prescribed pursuant to the Territorial Sea and Fishing Zones Act, except where the Arctic Waters Pollution Prevention Act applies, irrespective of the location of actual or expected discharge of the pollutant and irrespective of the location where any preventive measures are taken.

(2) For Convention ships, this Part applies, subject to subsection (3), in respect of actual or anticipated oil pollution damage
(a) in any place in Canada,
(b) in Canadian waters, and
(c) on the territory or in the territorial sea of a state other than Canada that is a party to the Civil Liability Convention, irrespective of the location of the actual or expected discharge of the oil and irrespective of the location where any preventive measures are taken.

Id. § 675.

The Canada Shipping Act also has a separate provision, § 680, that addresses the oil spill damage caused by a Convention ship. See id.

Section 680 of the CSA states in relevant part:

680. Where an occurrence giving rise to liability of an owner of a Convention ship under section 677 does not result in any oil pollution damage on the territory of Canada or in Canadian waters and no costs . . . are incurred in respect of actual or anticipated oil pollution damage on the territory of Canada or in Canadian waters, no action may be commenced in any court in Canada in relation to that occurrence in respect of matters referred to in subsection 677(1).

Id. § 680.

This provision allows for claims to be instituted only if the damage was evidenced in Canada. The presence of these corresponding provisions under OPA and the CSA means that the parties involved in the oil pollution damage will be forced to bring claims in multiple jurisdictions, having varying standards, with the possibility of inconsistent judgements for the same oil spill.
NORTH AMERICAN OIL POLLUTION

III. A Trans-Territorial Oil Spill

A. Analysis of the Potential Conflicts Between OPA and the CSA

1. The OPA Claim

A 150,000 ton barge is under tow on the St. Lawrence River. Because of the river’s narrowness, the barge needs maneuvering assistance from a tug boat. The barge crashes into an out-cropping of rock, protruding from one of the thousands of islands along the river. As a result, the barge is severely damaged and begins to leak oil. The crash and the spillage is a result of the tug boat’s negligence. The oil spill caused extensive damage to both the United States and Canada.

The owner of the barge is considered the responsible party for purposes of OPA\(^1\) because the owner was responsible for the vessel at the time the oil was discharged.\(^2\) Under OPA, the responsible party will be susceptible to actions brought by the United States, a State, an Indian Tribe, or any persons damaged by the spill.\(^3\) Also included under the potential guise of responsible party will be the tug, whose negligence caused the oil spill.\(^4\)

In order to escape liability for the damages, the owner of the barge must assert one of the complete defenses.\(^5\) Because the spill was not caused by an act of God or act of war, the only possible remaining complete defense is third party negligence.\(^6\) The responsible party will have to show by a preponderance of the evi-

191. See supra note 104. Although the intent of Congress was to expand the liability for oil pollution damage past the owner and operator of the vessel, section 2701(32)(A) does not expressly do so. See 33 U.S.C. § 2701(32)(A). It seems on the surface that the classification of “responsible party” only expanded the liable party from “owner or operator” to the “owner, operator, or demise charterer.” See id. The idea of trying to have the oil companies be included in the definition of responsible party was lost in the drafting of OPA and section 2701(32)(A). See Kopec & Peterson, supra note 10, at 618 n.130.


193. See id. § 2702(b)(1)(A), (B). Under section 2701, “claimant” means any person or government who presents a claim for compensation under this subchapter.” Id. § 2701(4). The responsible party is liable for removal costs and damages. Damages consist of natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services. See id. § 2702(2)(A)-(F).

194. See id. § 2702(d)(1)(A).

195. See id. § 2703(a) (including defenses of an act of God, act of war, or an act or omission on the part of a third party).

196. See id. § 2703(a)(3).
dence that the acts of the tug boat solely caused the damages that resulted from the oil discharge. At the same time the barge owner is asked to prove by a preponderance of the evidence that he exercised due care with respect to the oil concerned and that he took all precautions against the third party's foreseeable act. If he is unable to do so, the barge owner cannot assert the third party defense.

The responsible party will have difficulty proving the third party defense. Section 2703 contains contractual-relationship language requiring the responsible party to prove that the act or omission was not caused by "an employee or agent of the responsible party or a third party whose act or omission occurs in connection with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail) . . . ." Courts have found that even some tenuous relationships may classify as contractual relationships. In the case of the barge operator and the tug boat, a court would likely find a contractual relationship and deny the use of the third party defense.

The lone remaining defense available to the responsible party is a specific defense against the actual claimant for gross negligence or willful misconduct. This exceptional defense is only applicable to particular claimants. The barge owner/operator can assert this defense if he can show that the tug boat acted in a grossly negligent manner, causing the oil spill. If established, the responsible party escapes liability.

197. See id.
198. See id.
199. Id. § 2703(a)(3).
200. See generally International Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097 (S.D. Tex. 1994) (holding that a contractual relationship existed between an operator of a naval vessel and a fuel terminal where the actual spill occurred, disallowing the operator's assertion of the third party defense).
201. Assume, arguendo, that the court found that the barge and tug did not have a contractual relationship, as classified under OPA. Section 2703(c) limits the responsible party's right to the defense if he fails to report the incident, provide reasonable cooperation, or comply with an order from the proper authorities. See 33 U.S.C. § 2703(c). If our barge owner/operator failed to assist in the cleanup, he would not have any defense for the discharge of the oil.
202. See id. § 2703(b).
203. See id.
204. See id.
If the owner/operator of the barge is unable to prove any of OPA's complete defenses, he is still entitled to limit the amount of liability according to section 2704. Under this provision, however, the owner/operator/responsible party of the barge could see a shift from limited liability to unlimited liability. An act of gross negligence or willful misconduct on his part will force the responsible party to forgo his opportunity to limit liability. Failing to report the discharge of oil, provide reasonable cooperation at cleanup and comply with an order from the proper authorities will also defeat the limitation of liability. Thus, if the responsible party fails to meet these criteria, then the doctrine of unlimited liability will become a reality for the careless barge owner.

In the event that the barge owner can assert a complete defense, the tug boat owner/operator will be liable for the damages caused by the oil spill, barring his application of any of the defenses under OPA. In the event that the court sustains none of the defenses, the owner/operator will be able to limit liability according to the amount in carriage. Even after dealing with the OPA claim, however, the responsible party may suffer further liability. Individual states, which have enacted liability provisions greater than those under OPA, could potentially bring separate claims. Additionally, the responsible party may have to adjudicate any claims brought as a result of damages caused to Canadian soil, due to the fact that OPA does not authorize the consolidation of claims.

2. The CSA Claim

Under the CSA, there is no question that the liable party will be the registered owner of the barge. Because Canada has sustained damage, the claimant can bring suit in a Canadian

205. See supra note 164 and accompanying text.
206. See 33 U.S.C. § 2704(c) (limiting liability).
207. See id.
208. See supra note 164 and accompanying text.
209. See supra note 186.
210. See 33 U.S.C. § 2707 (discussing recovery by foreign claimants); see also R.S.C., 3d Supp., ch. 6, § 680 (restricting suits in Canada to situations involving actual injury to Canadian territories).
211. See R.S.C., 3d Supp., ch. 6, § 673.
212. "[Oil pollution damage' means, in relation to any ship, loss or damage outside the ship caused by the contamination resulting from the discharge of oil
The fact that the spill was partially caused by the negligence of the tug boat will be a factor to consider under the fault and privity standard.

Under the CSA, the owner of the barge is afforded a few more complete defenses to liability than in the subsequent claim brought under OPA. Since an act of war, or a natural phenomenon of an exceptional, inevitable or irresistible character did not cause the spill, the owner cannot use any of these as a defense.

The third party defense is assertable only if the barge owner can prove that the spill was wholly caused by an act or omission of the tug boat with the intent to cause the damage. The fact that the barge and the tug boat are in a contractual relationship does not matter for purposes of the CSA's third party defense. Realistically, the barge owner will have a difficult time proving this defense. First, he must show that the spill was caused wholly by the tug boat driver. Second, the barge owner must prove that the tug boat driver had the intent to cause damage. If these criteria are not met, the third party-complete defense will fail.

The barge owner also has the defense of governmental negligence, in the likelihood that a governmental authority failed in its responsibility to maintain lights or necessary navigational instruments. When asserting the governmental defense, the barge owner must show that the spill was "wholly" caused by the negligence or wrongful act of any governmental authority. Although this defense is available under the CSA, the barge owner cannot use the defense successfully because of the limiting use of the term "wholly."

The CSA, like OPA, also provides a defense against the claimant who was damaged in the oil spill. If the barge owner can prove that the claimant wholly or partially caused the occurrence,
or intentionally or negligently caused the damage, the barge owner can reduce liability proportionally.\textsuperscript{221} This appears to be a very limited defense on the part of the Canadian regime and, in a sense, has changed the statute's standard from strict to a more fault-based liability.\textsuperscript{222} Unless the barge owner can show that the claimant wholly caused the occurrence, this provision seems useless as a complete defense. If the claimant’s acts or omissions only partially cause the occurrence, then the CSA will follow a fault-based comparative negligence standard and not strict liability.\textsuperscript{223} Thus, the CSA provides the barge owner with more of a limitation to liability than an actual complete defense.

The court will subject the barge owner to the fault and privity standard at the point when it will assess the possible limitation of liability.\textsuperscript{224} If the barge owner can show that the spill giving rise to his liability occurred without his actual fault or privity, the owner will be held liable for the lesser of the established statutory amounts.\textsuperscript{225} The barge owner will be able to limit liability regardless of whether he has taken the necessary preventative measures to avoid the occurrence of the oil spill.\textsuperscript{226} Thus, the more lenient CSA provisions regarding oil-pollution prevention diverge from OPA’s more stringent requirements.

In Canada, it appears as if the barge owner will be limited to suit only under the provisions of the CSA. Unlike section 2718 of OPA, nowhere in the CSA does it state that the individual provinces may enact their own oil-spill legislation.\textsuperscript{227} Therefore, the

\begin{itemize}
  \item \textsuperscript{221} See id.
  \item \textsuperscript{222} See id. § 679(3).
  \item \textsuperscript{223} See id. Black's Law Dictionary defines "comparative negligence" as "negligence . . . measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person for whose injury, damage or death recovery is sought." Black's Law Dictionary 282 (6th ed. 1990).
  \item \textsuperscript{224} See R.S.C., 3d Supp., ch. 6, § 679. The fault and privity standard used under the CSA for the assessment of liability limitation is significantly different than the corresponding OPA provision for limiting liability. See supra notes 102 and 108 and accompanying text. These differing provisions could result in different judgments in the different countries, even though the facts may be the same.
  \item \textsuperscript{225} See supra note 176 and accompanying text.
  \item \textsuperscript{226} See supra note 162 and accompanying text.
  \item \textsuperscript{227} Suit, under OPA, could include the possibility of claims brought under the individual states' statutes, as well as claims brought under common law maritime theories.
\end{itemize}
barge owner can expect all Canadian liability to come from one CSA action.

Under the CSA, the standards for liability are lower, the limits on liability are less stringent and there are more defenses available to the liable party. There is no corresponding provision to impose unlimited liability, thus, making the CSA a more lenient regime toward the shipping industry.

IV. CONCLUSION

The Oil Pollution Act of 1990 and the most recent amendments to the Canada Shipping Act have complicated the response to and compensation for a large trans-territorial oil spill. Instead of being the most comprehensive oil pollution legislation enacted, the Oil Pollution Act has done nothing more than add to the confusion of an already existing patchwork of oil pollution legislation. At the same time, the amendments to the Canada Shipping Act fail to cure the inadequacies apparent in the international community’s oil-pollution “solution.” The probability of a single oil spill causing damage to both Canada and the United States is practically inevitable; thus, without more uniform legislation, the response and compensation process will be long and arduous.

The differing liability standards, defenses to liability and limitations to liability reveal that the potential for inconsistent judgments, flowing from these two competing regimes, are inevitable. Since the idea for oil-pollution legislation uniformity is of particular importance to these two countries, it is hard to fathom how these countries cannot come to terms with a consolidated approach to these potential trans-territorial oil spills. As history has shown, these countries are more apt to use the existing legislative regimes until their inadequacies become harsh reality. However, it may not take a catastrophe the size of the Exxon Valdez to confirm that these competing regimes are too irreconcilable to efficiently cope with a trans-territorial oil spill.

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