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# TULANE MARITIME LAW JOURNAL

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# Waning Conventions: Remedying Natural Resource Damages Caused by Vessel-Source Oil Pollution Under the Existing Regimes and the Need To Reconvene

S. Eric Lee\*

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I. INTRODUCTION

Shortly after World War II, the nations of the world began to take a more active role in harmonizing global efforts directed at a panoply of domestic and international issues. One such issue was the treatment of oil pollution by vessels. With the collective efforts of countries focused on vessel-source oil pollution, the United Nations mustered the support to implement the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (1954 Convention).<sup>1</sup> The 1954 Convention marked one of the first such international Conventions, specifically targeting the discharge of oil into the sea. Thus, the 1954 Convention began the long and contentious debate regarding the regulation of vessels and their subsequent liability for the release of pollutants into the world’s oceans. The debate over liability, remediation, and financing has been influenced by competing interests among the developed world, the developing world, the coastal states, and the vessel owners; however, the debate has also been influenced by pollution accidents and the angry reaction of populations.

Arguably, each accident has served as a cause for modification of existing regimes and many changes denote the effect of a pollution accident. The effect, what might be characterized as the measurable harm stemming from the cause, is typically manifested as natural resource damages. Quantifying the damages generates a debate unto itself. There are complex formulas and processes for calculating the otherwise intangible values of seemingly insignificant biota and other natural resources. Nonetheless, the debate includes the methodology as to how to best remedy the harm caused to the public, be it restitution, rehabilitation, compensation, or some other remedy. There have been a variety of quantitative methods and remediation ideas discussed. This Comment, however, seeks to highlight only one of the differences concerning oil pollution regimes. In particular, the Comment will

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1. International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3.

discuss differences in the treatment of natural resource damages between the United States, the Conventions, and the European Union. It will discuss the cause and effect that led to the United States' Oil Pollution Act of 1990,<sup>2</sup> the various Conventions arising under the auspices of the International Maritime Organization (IMO),<sup>3</sup> the shifting policy of the European Union, and two of the most recent oil pollution incidents. The conclusion will offer a recommendation for the maritime community and world leaders.

## II. CAUSE AND EFFECT: VESSEL-SOURCE OIL POLLUTION REGIMES

As global industrialization began to crave the fuels to feed its demanding appetite, the oceans, already the highways of commerce between nations, took on the additional role of fuel lines for the mega-industrial complexes of the western world.<sup>4</sup> This meant that goods, at times, gave way to petroleum and that the volume of petroleum transiting the Earth's oceans grew drastically.<sup>5</sup> In the course of ocean passage, Mother Nature tends to rock the boat, which sometimes breaks boats as they ply the waters towards their destinations. Inevitably, coastal nations bear the brunt of oil pollution when the seas gorge themselves on doomed vessels. Following several environmental near misses and direct hits, world powers began a rapid move to legislate the movement of oil across the world's oceans.<sup>6</sup> There are several important incidents that have guided the development of international law concerning vessel source marine pollution; for the purposes of this Comment, this Part will discuss a few of the most influential incidents and the subsequent treatment of natural resource damages.

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2. 33 U.S.C. § 2701 (2006) [hereinafter OPA 90].

3. Namely, this Comment will focus on the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter 1969 CLC] and its amendments; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 58 [hereinafter 1971 Fund]; and the International Convention on Civil Liability for Bunker Oil Pollution Damage, Mar. 23, 2001, *reprinted in* 6A-VI BENEDICT ON ADMIRALTY Doc. No. 6-36, at 6-430 [hereinafter Bunkers Convention].

4. The IMO notes that the world first saw a tanker in the nineteenth century, and the demand for petroleum fueled tremendous expansion in the cargo capacity of such tankers. *See Prevention of Pollution by Oil*, INT'L MARITIME ORG., [http://www.imo.org/Environment/mainframe.asp?topic\\_id=231](http://www.imo.org/Environment/mainframe.asp?topic_id=231) (last visited Oct. 16, 2010). Notably, the size of tankers grew almost 85,000 deadweight tons from post-World War II to 1959. *Id.* Again, the tankers doubled in size from 1959 to the mid-1960s. *Id.* This drastically increased the amount of crude traversing the oceans.

5. *See supra* note 4 and accompanying text.

6. ALAN KHEE-JIN TAN, *VESSEL-SOURCE MARINE POLLUTION* 120 (2006).

A. *The TORREY CANYON*

One of the first such monumental incidents involved the TORREY CANYON, a 60,000-ton supertanker built in the United States and modified to 120,000 tons in Japan.<sup>7</sup> Steaming from Kuwait to Milford Haven, she struck a reef off the Cornish coast and spilled 119,000 tons of her crude into the ocean.<sup>8</sup> The oil slick washed along the beaches, polluting 50 miles of French coastline and 120 miles of Cornish coast, while killing thousands of trapped animals in the process. This environmental disaster marked one of the first such oil spills the world faced, and the response was, at best, quite poor.<sup>9</sup> Moreover, no real efforts were undertaken to assess the damage done to the environment and how best to rectify the extensive damage.<sup>10</sup> As expected, the United Kingdom pushed for change.

B. *The TORREY CANYON's Shove: The International Convention on Civil Liability for Oil Pollution Damage*

The initial legislative response set forth by the United Kingdom and other interested parties manifested itself in the form of the International Convention on Civil Liability for Oil Pollution Damage of 1969 (1969 CLC).<sup>11</sup> There have been subsequent protocol changes to the convention, with the most substantial coming in 1992.<sup>12</sup> For the purposes of this Comment, it is only important to focus on the 1969 CLC with the 1992 amendments, which addresses, for the most part, the same core methodologies for defining natural resource damages as the previous versions.<sup>13</sup>

Article II, section 3 of the 1992 CLC describes natural resource damages in terms of “pollution damage,” which it defines as:

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7. *Id.*

8. Patrick Barkham, *Oil Spills: Legacy of the Torrey Canyon*, GUARDIAN, June 24, 2010, <http://www.guardian.co.uk/environment/2010/jun/24/torrey-canyon-oil-spill-deepwater-bp/>.

9. See *Torrey Canyon 'Lessons Learned'*, BBC NEWS ONLINE, Mar. 19, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/England/devon/6469059.stm](http://news.bbc.co.uk/2/hi/uk_news/England/devon/6469059.stm).

10. *Id.*

11. See 1969 CLC, *supra* note 3.

12. Protocol of 1992 To Amend the International Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 255 [hereinafter 1992 CLC]. See INT'L MARITIME ORG. [IMO], *International Convention on Civil Liability for Oil Pollution Damage [CLC] 1969*, available at [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=256&doc\\_id=660](http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=660) (last visited Oct. 16, 2010). For the sake of simplicity, the Comment will refer to the “1992 CLC” and mean the CLC 1969 with the 1992 protocols incorporated.

13. See TAN, *supra* note 6.

[L]oss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken[.]<sup>14</sup>

Quite cursory, this statement comprises the entirety of the 1992 CLC's commentary regarding natural resource damages.<sup>15</sup> At best, this definition makes for a meager point of reference. Moreover, the definition only permits "costs of . . . reinstatement."<sup>16</sup> As will be discussed below, this definition is a rather narrow one and pales in comparison to the United States' more comprehensive approach.

In an effort to form a coalition comprised of as many nations as possible within the purview of the 1969 CLC and its progeny, several changes and limits were discussed.<sup>17</sup> In particular, much effort was dedicated to attracting the United States as a signatory and participant.<sup>18</sup> The United States entertained the idea of participating in the CLC and domestic debate ensued with contemplation of joining the convention.<sup>19</sup> However, fate was not to be so benevolent to the United States and, in hindsight, perhaps not so benevolent to the other members of the CLC.<sup>20</sup>

### C. *The CLC Is Not Enough: The 1971 Fund Convention*

Shortly after enacting the 1969 CLC, the participants realized that the means of funding the damages covered by the convention were inadequate in light of the actual clean-up costs associated with a spill.<sup>21</sup> Thus, in 1971 at Brussels, several of the parties to the 1969 CLC came

14. 1992 CLC, *supra* note 12, art. 2, ¶ 3 (amending art. I, para. 6(a)).

15. *See* 1992 CLC, *supra* note 12.

16. *See id.* art. 2, ¶ 3 (amending art. I, para. 6(a)). It is important to note for later discussion that the 1992 CLC is quite limited in its scope of remediation.

17. This would include the changes brought about by the sinking of the AMOCO CADIZ, which, in 1978, was the largest pollution to date and covered the Brittany coast.

18. This is largely attributable to the method of financing the 1971 Fund Convention—a tax on oil imports. *See* 1971 Fund, *supra* note 3, arts. 10-15, describing the method of contribution to the fund by the signatories. With the United States being the largest importer of oil (at the time) in the world, it was only logical to make efforts to incorporate them into the convention's regime.

19. The 1984 IMO conference was held at the request of the United States.

20. The United States, a maritime and oil heavyweight, was not a party to the convention(s), which left the 1971 Fund short of what would have been the largest contributor. *See supra* note 18 and accompanying text.

21. 1971 Fund, *supra* note 3, pmb. Additionally, the parties thought, rightfully or wrongfully, that the liability scheme of the 1969 CLC may be too burdensome on the shipowners. *Id.*

together to work out a means of providing an excess and additional coverage, of sorts, for the damages covered under the CLC. This development perhaps constituted yet another measure to entice the United States into participating in the CLC and the International Convention on the Establishment of an International Fund for Oil Pollution Damage (1971 Fund) regimes, but the United States still refrained from signing and ratifying the Conventions. Regardless, the 1971 Fund incorporated many of the same definitions from the CLC; in particular, damages under the 1971 Fund are specifically limited to “pollution damages” pursuant to the definition contained in the CLC.<sup>22</sup> Additionally, like the 1969 CLC, the 1971 Fund was modified by the 1992 Protocols.<sup>23</sup>

*D. Alaska’s Dirty Doorstep: The EXXON VALDEZ*

Unable to escape a major environmental disaster, the United States paid for its failure to contract to the CLC and the 1971 Fund and failure to develop its own regime by absorbing the tragedy of the EXXON VALDEZ. While resulting in less than a third of the oil spilled by the TORREY CANYON, the EXXON VALDEZ disaster grabbed the attention of the American voters with its pollution of the otherwise unadulterated Alaskan coast.<sup>24</sup> Compounding this tragedy, the rise of environmental protection groups and their organizational efforts permitted a near nonstop focus on the resulting pollution (complete with live video of dying waterfowl and oily waves slopping onto shore).<sup>25</sup> Though some twenty years after the TORREY CANYON, the United States remained relatively unprepared in terms of assessing and remedying the damages, and it did not have the legislation to reconcile the damage assessment with the polluting party fully. Comparatively,

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22. *Id.* art. 1, ¶ 2. This restriction, then, means that the 1971 Fund limits its coverage to actual costs of reinstatement. *See* 1992 CLC, *supra* note 12, art. II, ¶ 3. Also noteworthy, the 1971 Fund makes payment subject to an approval process by the 1971 Fund, which can create problems of economics and politics. *See* 1971 Fund, *supra* note 3, arts. 4-9.

23. Protocol of 1992 To Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, Nov. 27, 1992, 1953 U.N.T.S. 373 [hereinafter 1992 Fund]. For the remainder of this Comment, “Fund” shall refer to both the 1971 Fund and the 1992 Fund, unless specified.

24. The EXXON VALDEX spilled 240,500 barrels of oil, roughly a fourth of over 800,000 barrels spilled by the TORREY CANYON. NOAA HAZARDOUS MATERIALS RESPONSE & ASSESSMENT DIV., REPORT NO. HMRAD 92-11, OIL SPILL CASE HISTORIES, 1967-1991: SUMMARIES OF SIGNIFICANT U.S. AND INTERNATIONAL SPILLS (1992) [hereinafter NOAA SPILL SUMMARY]. Even so, the spill constituted the largest spill to date in U.S. waters. *Id.*

25. A quick search on today’s Internet search engines will still yield video of the EXXON VALDEZ leaking oil, the clean-up process, and more. *Exxon-Valdez Revisited*, CBSNEWS.COM, May 4, 2010, <http://www.cbsnews.com/video/watch/?id=6461225n>.

looking to the 1969 CLC, the Convention was grossly inadequate relative to U.S. popular sentiment.<sup>26</sup> Today, over twenty years after the spill and forty years after the TORREY CANYON, the EXXON VALDEZ disaster is still in need of oversight in attempts to remedy the pollution fully.<sup>27</sup> At the time of its occurrence, the catastrophe thwarted efforts to get the United States to sign onto the CLC, and it propelled the United States to develop its own comprehensive oil pollution regime.<sup>28</sup>

*E. Democracy Responds: The Oil Pollution Act of 1990*

In response to the EXXON VALDEZ, the United States no longer entertained participation in the CLC as an acceptable approach to dealing with oil pollution. While the justifications for marking its own unilateral trail towards oil pollution remedies may be debated, the most significant justifications stem from political pressure fueled by enduring media coverage and the astounding actual costs to clean up the oil.<sup>29</sup> Calculating the actual costs of cleaning up the spill quickly demonstrated to the concerned parties in the United States that participation in the CLC, even with amendments to raise the limits, would still fall dramatically short of the actual costs, not to mention rehabilitation costs.<sup>30</sup> The U.S. tort system seemed much more capable of providing a remedy, especially if additional legislation tailored to oil pollution damage were passed. Thus, The Oil Pollution Act of 1990, or OPA 90, was born and the U.S. oil pollution regime began to take a more comprehensive approach.<sup>31</sup>

OPA 90, combined with the U.S. tort structure, provides for an ostensibly comprehensive means of addressing oil pollution. It accomplishes its comprehensiveness by permitting flexibility in its application, as the breadth of its definitions has suggested. Foremost, section 2701(20) defines natural resources as including:

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26. This difference is best witnessed by the differences between the 1969 CLC and OPA 90.

27. The EXXON VALDEZ Oil Spill Trustee Council has detailed an account of the lingering oil present in Prince William Sound and surrounding areas. *Oil Remains: The Persistence, Toxicity, and Impact of Exxon Valdez Oil*, EXXON VALDEZ OIL SPILL TR. COUNCIL, <http://www.evostc.state.ak.us/recovery/lingeringoil.cfm> (last visited Oct. 16, 2010).

28. See S. REP. NO. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722.

29. See *generally id.* (providing ample evidence of the public pressure exhibited onto Congress while also commenting on the expense of remediation).

30. In light of the cost to clean up 240,500 barrels of oil under the former U.S. law or, alternatively, the CLC, claimants would still have received a fraction of their OPA 90 damages. Compare 33 U.S.C. § 2701 with 1992 CLC, *supra* note 12, art. 2, ¶ 3. See *generally* S. REP. NO. 101-94.

31. 33 U.S.C. § 2701 (2006).

land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.<sup>32</sup>

This broad, indeed practically all-encompassing, definition of “natural resources” permits OPA 90’s application in virtually any situation involving oil spills, which invokes the additional provisions pertaining to damages and liability.<sup>33</sup>

A key difference between OPA 90 and its international counterparts (the CLC and the other oil pollution Conventions) arises in the measurement of damages to natural resources. OPA 90 utilizes a much more inclusive definition initially in determining liability, specifically including:

- (A) Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.  
. . . .
- (C) Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
- (D) Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of . . . natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
- (E) Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of . . . natural resources, which shall be recoverable by any claimant.<sup>34</sup>

From the outset, OPA 90’s liability included measures of recompense beyond costs incurred in fixing the immediately polluted site. At times, simply fixing the site may prove to be impractical or even harmful to the long-term natural recovery process.<sup>35</sup>

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32. *Id.* § 2701(20).

33. This was certainly the intent of the United States Senate. *See* S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723.

34. 33 U.S.C. § 2702(b)(2)(A), (C)-(E).

35. This broad coverage stands in sharp contrast to the limited approach of the CLC. *Compare id.* § 2702(b)(2) *with* 1992 CLC, *supra* note 12, art. 2, ¶ 3. The OPA 90 definition reflects less compromise with industry and more consideration for compensating the public.

Subsequently, § 2706, OPA 90's "Natural Resources" section, defines the measure of damages available under § 2702(b)(2)(A), the subsection pertaining to liability for natural resources as mentioned above, as:

- (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- (B) the diminution in value of those natural resources pending restoration; plus
- (C) the reasonable cost of assessing those damages.<sup>36</sup>

Thus, OPA 90 not only cuts a wide wake with liability, but it also carries a view of damages that matches the far-reach of liability for natural resource damages. For this reason and similar concerns, the United States faced much criticism for introducing and enacting OPA 90's unilateral approach.<sup>37</sup> Indeed, many industry insiders suggested that tankers would not even enter U.S. waters.<sup>38</sup> This stance, however, underestimated the stronger impetus of the United States' energy needs, which translated to oil profits too lucrative to boycott. Thus, in spite of the OPA 90 requirements and attendant liabilities, tankers, laden with crude, continued to enter the United States to discharge their cargo.

*F. Oil on the Face of Europe: The ERIKA and the PRESTIGE*

Roughly ten years after the EXXON VALDEZ, the ERIKA, a single-hull tanker laden with 20,000 tons of oil, sailed from Dunkerque towards Livorno. As she entered the Bay of Biscay, the fateful ship encountered severe weather, which stressed her lightweight hull to the breaking point. On December 12, 1999, the ERIKA broke in two, spilling her oil into the waters off the coast of France. The ERIKA spill marked one of the worst disasters the French coastline had experienced to date.<sup>39</sup> In its wake, thousands of marine and avian wildlife perished, with miles of coastline covered in crude.<sup>40</sup> At present, some ten years after the initial spill, litigation is still pending.

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36. 33 U.S.C. § 2706(d)(1).

37. After the United States initiated the 1984 conference, it seemed counterproductive, internationally speaking, for the United States to now shift to a unilateral approach; the United States, potentially, could have used the EXXON VALDEZ incident as justification to enact OPA 90-like provisions for the rest of the international community.

38. In light of the expanded liability, some interested parties expressed concern that oil tanker owners would not want to risk such liability, which would force them to avoid U.S. waters.

39. See Angelique Chrisafis, *The Polluter Pays: 30,000 Tonne Oil Disaster Costs French Firm €200m*, GUARDIAN, Jan. 17, 2008, <http://www.guardian.co.uk/environment/2008/jan/17/oilspills.pollution>.

40. See *id.*

A mere three years after the sinking of the ERIKA, in 2002, the PRESTIGE plied the waters off the coast of Spain. Caught in a storm and in desperate need of assistance, the Greek master requested entry into ports of Spain, Portugal, and France, but authorities in each country denied him access.<sup>41</sup> Subsequently, the master took the vessel out to sea.<sup>42</sup> Forced out to sea, the PRESTIGE continued to suffer the onslaught of the storm. Eventually, her hull broke and she sank in waters off the coast of Spain. With a cargo of almost 80,000 metric tons, it is estimated that around eighty percent of her petroleum-based cargo reached the surface and polluted Spain's coastline and fishing grounds, creating the worst environmental disaster in Spanish history.<sup>43</sup> The most recent of the notable disasters, the PRESTIGE litigation started within the Kingdom of Spain and the European Union and later spread around the world.<sup>44</sup> Additionally, these two accidents have spurred the debate within the international community regarding the adequacy of the 1992 CLC.

Had these same accidents occurred within U.S. waters, OPA 90 would have applied and a more comprehensive approach would have resolved the issue quite differently. But Spain and France are both members of the 1992 CLC, with its much more limited degree of remediation, as described *supra*. This limitation becomes difficult for a state to accept when faced with oil slopping along its own coast. In particular, the restrictions the CLC inherently places upon participants' judiciaries makes for a political tug-of-war.<sup>45</sup> Moreover, the limitations highlight a principal difference between OPA 90 and the CLC. Unlike the CLC and its progeny, OPA 90 closely follows the logic—and generally adheres to it—that doing something is better than doing nothing, which ensures that the polluter will always pay something.<sup>46</sup>

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41. Emma Young, *Battered Oil Tanker Breaks in Two*, NEW SCIENTIST, Nov. 19, 2002, <http://www.newscientist.com/article/dn3076>.

42. Emma Young, *Stricken Oil Tanker Towed from Spanish Shore*, NEW SCIENTIST, Nov. 14, 2002, <http://www.newscientist.com/article/dn3064>.

43. Gaia Vince, *Prestige Oil Spill Far Worse Than Thought*, NEW SCIENTIST, Aug. 27, 2003, <http://www.newscientist.com/article/dn4100>.

44. The Kingdom of Spain pursued the American Bureau of Shipping under the assertion that the classification society was to blame for permitting the PRESTIGE to remain in class. See *Reino de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573LTSRLE, 2005 WL 1813017, 2005 AMC 2257 (S.D.N.Y. Aug. 1, 2005).

45. On the one side, you will have the extremes of environmentalists, while the other side will have the shipping interests; somewhere in the middle, or canted to a side, depending on the circumstances, will be public opinion.

46. Within the founding articles of the European Union, it was of a paramount concern that the environment be well protected, and as a part of that protection, the Member States desired that the polluter should pay for the harm done to the environment. The United States, via OPA 90

In any event, these two recent accidents along the European coast provide examples of how the CLC and its progeny do not rise to the same level of comprehensiveness as that of OPA 90. Furthermore, they are examples of how participants in the CLC regime (and former critics of the U.S. unilateral approach) may not consider the CLC to be an adequate approach to oil pollution.<sup>47</sup> Despite developing trends concerning the treatment of oil spills, the aforementioned accidents and legislation constitute the core international vessel-source oil pollution regimes within the United States and the United Nations. The CLC, however, is not the only international protocol addressing vessel-source oil pollution; the United Nations has another convention relevant to this Comment: The 2001 Bunkers Convention.<sup>48</sup>

*G. Big Bunkers Make for Big Spills*

With the realization that many nontanker cargo vessels carry as much or more oil as bunker than do some tankers, the IMO endeavored to develop a civil liability convention to address the issue. The product of the conference was the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention).<sup>49</sup> The Bunkers Convention covers larger, nontanker vessels and permits accountability to parties to the convention. Relevant to this Comment, the Bunkers Convention uses the same description of “pollution damages” as the CLC and defines it as:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.<sup>50</sup>

As do the CLCs and the 1971 Fund, the Bunkers Convention limits the remedy to reinstatement of the natural resources. Thus, the entirety of the international regime for vessel-source oil pollution limits the

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(and other environmental legislation), follows the same premise, though the United States has more uniformly implemented this policy with the single legislative act.

47. Stated differently, the Member States may believe that neither the 1992 CLC nor the Fund nor the Bunkers Convention adequately provide for remediation that adheres to the European Union policy to require the polluter to pay.

48. Bunkers Convention, *supra* note 3.

49. *Id.*

50. *Id.* art. I, § 9(a)-(b).

recovery of states to the actual replacement of the natural resources, no matter how ineffective or inappropriate such replacement might be.

### III. NATURAL RESOURCE DAMAGES UNDER OPA 90 AND THE CONVENTIONS COMPARED

All four of the aforementioned shipping accidents clearly qualified as environmental disasters. In response to being confronted by these disasters, the international community reacted, rather than planning for an enduring regime, by stating the obvious conclusion that the polluter should pay. The response was a reactive one, not a proactive one. Logically, as with any injury, a measure or assessment should be undertaken to determine what exactly was harmed and how best to remedy the situation. The initial assessment, a guidepost for recompense or recovery from the demonstrated harm, can be quite difficult to develop. Such an assessment naturally involves scientific considerations, which must be wrought into legal terms for adjudication by a judicial body. In developing a methodology for managing future threats from oil pollution that addresses the scientific considerations and expressing the remedy in a legally cognizable manner, the international community undertook to draft several Conventions, the most prominent of which followed the TORREY CANYON disaster. Each subsequent incident has influenced the defining of appropriate remedies available for natural resource damages, as well as influencing states' desire to participate in an international regime. For the remainder of this Comment, the ATHOS I accident will serve as an example for a brief comparison of the Conventions and the U.S. regime.

#### A. *The ATHOS I*

In the fall of 2004, the ATHOS I, a single-hulled, double-sided tanker, departed its Venezuelan port of laden with thirteen million gallons of crude.<sup>51</sup> Arriving with the assistance of tugs on November 26, 2004, the ATHOS I commenced docking maneuvers. While assisting her, tug operators noticed that oil was leaking from the tanker and notified the United States Coast Guard.<sup>52</sup> In the course of maneuvering through an anchorage to her berthing, the tanker struck several submerged objects,<sup>53</sup>

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51. NAT'L OCEANIC & ATMOSPHERIC ADMIN., FINAL RESTORATION PLAN AND ENVIRONMENTAL ASSESSMENT 1 (Sept. 2009) [hereinafter NOAA REPORT].

52. *Id.*

53. The United States Coast Guard discovered several submerged objects in the anchorage, including an 18,000-pound anchor, large concrete blocks, and parts of a pump casing. *Id.*

and, within minutes of the leak's discovery, the tanker lost power and listed eight degrees to port.<sup>54</sup> The damaged tanker leaked approximately 263,371 gallons<sup>55</sup> of the Venezuelan crude into the Delaware River in spite of mitigation efforts.

A flood tide pushed the crude six miles upriver, while the ebb and flood tides during the following weeks spread the sludge along 280 miles of shoreline.<sup>56</sup> In total, the disaster threatened 115 miles of the river, its tributaries, and the natural resources within those areas.<sup>57</sup> Pursuant to the authority of OPA 90, the relevant agencies commenced with the preassessment process and instituted cleanup efforts. At the close of cleanup, the efforts recovered 221,910 gallons of oil and 17,761 tons of oily solids, with restoration assessment and planning ending in September 2009.<sup>58</sup>

#### *B. ATHOS I Natural Resource Damage Restoration*

As suggested previously, there are times when a one-for-one environmental replacement is implausible or unnecessary.<sup>59</sup> The damage done to the Delaware River and its tributaries presented such an occasion to the Trustees. The ATHOS I Trustees thus elected to allow for the natural recovery alternative as the primary restoration effort.<sup>60</sup> At first, this would seem to permit the responsible party to avoid paying for the harm done. However, OPA 90 also permits compensatory payments for the damages done to natural resources.<sup>61</sup> In other words, having actually damaged natural resources, the responsible party was not permitted to simply allow nature to take its course and avoid compensating the public. Instead, “[t]he Trustees identified and evaluated a wide range of project alternatives capable of compensating the public for” the damages done to

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54. *Id.*

55. *Id.* For the sake of comparison, this would equate to 6271 barrels.

56. *Id.*

57. *Id.*

58. *Id.* at 4.

59. As stated by the Trustees:

In this instance, response actions undertaken following the discharge are expected to protect natural resources from further or future harm and to allow resources to return to pre-injury or baseline conditions within a reasonable period of time. Under these circumstances, it is unnecessary for the Trustees to consider or plan for primary restoration actions. Accordingly, this final Plan focuses only on defining appropriate compensatory restoration actions.

*Id.* at 42.

60. *Id.* at 5.

61. 33 U.S.C. §§ 2702(b)(2)(A), 2706(d)(1) (2006).

natural resources.<sup>62</sup> Moreover, “[r]estoration ideas and alternatives were evaluated, with the preferred restoration projects scaled to ensure that their size appropriately compensates for the injuries resulting from the spill.”<sup>63</sup> This process ensures that the polluter pays for the damage done to the natural resources, which effectuates a national policy to hold the polluting party responsible while compensating the public for its loss.<sup>64</sup>

As compensation for the damage caused by the spill, the responsible party, through the Trustees, undertook several projects beyond the immediate area of the spill. Initially, the Trustees accepted several proposals for compensatory projects. Through a process of evaluation and comparison, the Trustees reduced the projects twice, once to those deserving further analysis and again to those preferred, final projects. The Final Plan consists of thirteen projects in the surrounding and immediate areas of the spill, all of which are designed and scaled to compensate the public for the damage done to natural resources.<sup>65</sup> In the end, the cost for implementing these projects will be over \$26 million, with the Trustees responsible for implementation and continued oversight.<sup>66</sup>

### C. *The Conventions Applied to the ATHOS I*

Assuming that the 1992 CLC applied to the ATHOS I oil spill, the result would be quite different. Specifically, the CLC’s definition of pollution damages drastically reduces the latitude of remediation within which participating states may maneuver. With the ATHOS I, scientists who reported to the Trustees determined that a natural process would be the best remediation for the spill, while prevention was maintained to mitigate continuing and future harm. For this mitigation, or preventive effort, the CLC regime, with or without the 1992 Protocols, would permit recovery. This limited recovery, though, would be the extent to which the public is compensated for harm to natural resources under the CLC regime. Quite explicitly, the 1992 CLC limits recovery only to monies actually spent for the reinstatement of natural resources, not

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62. NOAA REPORT, *supra* note 51, at 5.

63. *Id.*

64. This is in contrast to the difficulty of ensuring that the polluter pays under the CLC such that E.U. policy is effectuated. See *supra* note 35 and accompanying text. *But see infra* Part IV.B.

65. NOAA REPORT, *supra* note 51, at 131-32.

66. *Id.* at 131, 134.

compensation for the natural resources damaged.<sup>67</sup> Thus, the 1992 CLC would have left the public without adequate recourse for the disaster.

Likewise, even under the 1971 Fund Convention, the public would not receive the compensation for natural resource damages that are provided for under OPA 90. To begin with, the scope of the 1971 Fund is limited to the contracting states and the applicability of the CLC regime. Thus, by its terms, the 1971 Fund would only cover the ATHOS I to the extent that actual reinstatement costs or mitigation efforts exceeded the financial protocol of the CLCs. In light of the restricted definition of “pollution damages” under the CLC, the alternative measures<sup>68</sup> set forth by OPA 90 would never come into play under the 1971 Fund. Similarly, the Bunkers Convention, assuming ATHOS I was covered,<sup>69</sup> would not provide the compensatory recovery that OPA 90 would. The Bunkers Convention, too, contains the restricted definition of “pollution damage” that hobbles the application of the other Conventions.<sup>70</sup>

#### *D. Observations with ATHOS I*

Mindful of the restrictive definition of “pollution damages” pursuant to the Conventions, the damage plan set forth by the ATHOS I Trustees under the auspices of OPA 90 provides a much more comprehensive and thoughtful approach to remedying vessel-source natural resource damages caused by oil.<sup>71</sup> While it is true that OPA 90 was reactionary in its passing, history has proved its implementation as one of the more prescient moments of U.S. congressional history. This comprehensive thoughtfulness of Congress manifests itself most clearly with the flexibility afforded the Trustees during the assessment and planning of natural resource damages, which results in a logical, comprehensive solution.<sup>72</sup>

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67. 1992 CLC modified definition of “pollution damages” found in 1992 CLC, *supra* note 12, art. 2, ¶ 3.

68. For example, the compensatory methods of remediation. *See* 33 U.S.C. §§ 2702(b)(2)(A), 2706(d)(1) (2006).

69. Assuming, moreover, that the issue at hand had been one of the bunkers leaking from a covered nontanker vessel.

70. *See* Bunkers Convention, *supra* note 3, art. 1, ¶ 9.

71. OPA 90 avoids the ridiculous paradox where the pollution had obliterated the natural resource such that reinstatement is impossible, or where reinstating an organism will only cause the newly introduced organisms to die in the still polluted—though marginally—marine environment.

72. Ideally, the methodology of a convention should contemplate alternative measures to prevent the mooring of the convention’s intended goals.

## IV. EUROPEAN UNION NATURAL RESOURCE DAMAGES

A. *Member States and the Conventions*

With regards to the European Union, the Conventions are national law in some Member States and are thus subject to the interpretations of each country's judiciary.<sup>73</sup> Even so, many of the Member States are participants with the Conventions.<sup>74</sup> Therefore, in those states, the national law reflects the country's adoption of the Convention. As seen following the ERIKA and PRESTIGE disasters, the affected Member States applied (and will continue to apply with similar incidents) their national law, including the relevant incorporated Conventions. For now, the Conventions continue to operate, for the most part, unimpeded by the Member States who have adopted them. Likewise, a disaster like the ERIKA or the PRESTIGE would still invoke the Conventions.

B. *A Mirror to OPA 90: The New E.U. Approach to Remediation*

The European Union, through the European Community, has a parallel policy to that of the United States. In article 174 of the Treaty Establishing the European Community, the founding Member States set forth an environmental policy that would focus on prevention, but require the polluter to pay. Specifically, section 2 of the article states:

Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.<sup>75</sup>

This brief section of this vast treaty has, and will continue to have, a profound impact on the development of natural resource damages within the European Union.

In addressing the development of Community legislation relevant to article 174, Community working papers were drafted, commented, and revised. Of particular note, the Green Paper on Remedying Environmental Damage (1993 Green Paper) was first circulated in

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73. The current E.U. approach, as expressed in Directive 2004/35/CE, is discussed below. This Part will address the Conventions as they applied to the Member States prior to the Directive.

74. Of particular relevance, the states who bore the brunt of both the ERIKA and PRESTIGE were participants in the CLC and the Fund.

75. Consolidated Version of the Treaty Establishing the European Community, art. 174(2), Dec. 24, 2002, 2002 O.J. (C 325) 108.

1993.<sup>76</sup> In its introduction, the 1993 Green Paper led with the names of five vessels, each of which qualified as an environmental disaster in its own right.<sup>77</sup> The 1993 Green Paper served its self-described goal of provoking the discussion as to how the European Community would address pollution no matter the source. Subsequently, the parliamentary process percolated, more papers were drafted, and more comments were provided as parties debated positions. Additionally, vessel-source marine pollution continued to occur. For example, in 1999, the ERIKA met her fate and polluted the European coastline in the process, which spurred the debate within the European Union along even further.

In 2000, the European Commission presented the White Paper on Environmental Liability (2000 White Paper).<sup>78</sup> The 2000 White Paper was, to a limited extent, a response to the ERIKA disaster and reflected much ambition. In the broader sense, the Paper provided a summary of the long, internal debate within the European Union regarding the remedying of environmental damage caused by pollution. Notably, the 2000 White Paper defined the aim of environmental liability as “making the causer of environmental damage (the polluter) pay for remedying the damage that he has caused.”<sup>79</sup> While this seems obvious when compared to the expressed goals of the founding treaty,<sup>80</sup> it marked an important step in the evolution of the E.U. policy regarding natural resource damages. The 2000 White Paper formed the basis upon which Directive 2004/35/CE (2004 Directive), the primary Directive regarding environmental liability, would be formed.<sup>81</sup>

The 2004 Directive essentially set forth the E.U. framework for environmental liability within the union.<sup>82</sup> From the outset, the 2004 Directive revolves around a “polluter-pays” preference.<sup>83</sup> Additionally, the 2004 Directive seems to incorporate OPA 90-styled recovery for natural resource damages. Annex II, the portion detailing remediation under the Directive, articulates three methods of remediation: “Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the

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76. *Green Paper on Remedying Environmental Damage*, COM (1993) 47 final (May 14, 1993).

77. *Id.* at 4.

78. *White Paper on Environmental Liability*, COM (2000) 66 final (Feb. 9, 2000).

79. *Id.* at 13.

80. Since its inception, the European Union has held environmental protection to be a paramount goal.

81. 2004 O.J. (L 143) 56.

82. *Id.* at 59.

83. *Id.*

environment to its baseline condition by way of primary, complementary and compensatory remediation. . . .”<sup>84</sup> This articulation of remediation follows the same basic approach as OPA 90, which was initially ridiculed by some international counterparts.<sup>85</sup> Nonetheless, it is a new approach to remedying natural resource damages that surpasses the Conventions; moreover, this approach places the largest maritime union in the world alongside the United States in its remediation of pollution damages to natural resources.

### C. *The Apparently Convenient Conventional Exclusions*

For whatever reason, the 2004 Directive excludes from its coverage all incidents currently covered by the CLC, the Fund, or the Bunkers Convention.<sup>86</sup> Thus, the ERIKA, the PRESTIGE, and similar incidents will not afford the public the comprehensiveness articulated in the 2004 Directive. Instead, the Commission asserts a strong policy for the European Union’s future but leaves the resolution of vessel-source pollution damages to natural resources in the near future under the Convention’s framework.

Regardless of the 2004 Directive’s exclusion of the Conventions from its purview, national judiciaries have made reference to the European Union’s “polluter-pays” approach to remediation. Particularly noteworthy, the French authorities, in adjudicating the ERIKA disaster, argued that the spilled oil constituted “waste.” The French described the spilled oil as oil mixed with water and sediment and washing along the coast, thus qualifying as waste under the E.U. Waste Liability Directive.<sup>87</sup> This, then, would mean that the producer of the waste would be responsible for removal and disposal of the waste.<sup>88</sup> Accordingly, the logic goes that the owner and producer of the oil that leaks from a vessel after a shipwreck would be liable for the recovery and disposal of that oil. This paradigm operates despite the exclusions under the 2004 Directive and despite a Member State’s participation in a Convention. The primary defense a holder or producer of the waste may rely upon comes in the

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84. *Id.* at 67.

85. The international community and petroleum players expressed skepticism regarding the implementation of OPA 90. As mentioned before, some of this skepticism manifested to doubts as to whether tankers would even enter U.S. waters while subject to OPA 90.

86. 2004 Directive, *supra* note 81, at 61.

87. Council Directive 75/442/EEC, 1975 O.J. (L 194) 39; *see* Case C-188/07, *Commune de Mesquer v. Total Fr. SA & Total Int’l Ltd.*, 2008 E.C.R. I-4538.

88. *See* Council Directive 75/442, *supra* note 87, art. 8; amended and consolidated in Council Directive 2006/12, 2006 O.J. (L 114) 9.

form of asserting that they did not contribute to the risk.<sup>89</sup> This option, however, is not much comfort for shipowners and the oil industry when the costs of litigation, win or lose, are considered in the overall economics. Lastly, this approach does not, per se, substantially address the remediation of natural resource damages. Thus, the Member States are generally left with the same limited recovery provided for under the Conventions while shipowners and the entire petroleum industry are left with the apprehension of unpredictability.

#### V. CONVENTIONAL ISSUES

To begin, a prominent desire of any international convention is to bring uniformity to an area where multitudes of methodologies exist. More often than not, this involves the reconciliation of seemingly incompatible interests among sometimes-contentious states. With regard to vessel-source oil pollution and the resulting damages to natural resources, the CLCs, the 1971 Fund Convention, and the Bunkers Convention were each negotiated to provide uniformity among ratifying states. This uniformity, quite importantly, translates to the predictability sought by the maritime and other industries.

At present, the United States has an arguably ingenious approach to oil pollution, OPA 90. While other federal and state laws address a range of tangential issues concerning natural resource damages, OPA 90 provides a comprehensive and flexible means by which natural resource damages may be remedied when the damages arise from oil pollution. In light of the three main Conventions' rigidity and tendency to compensate the public inadequately when environmental damages do occur, the United States is not likely to entertain any serious discussion regarding entry into the Conventions anytime soon. Furthermore, any remaining notions may be dispelled by the apparent trend in the European Union, which has modeled its 2004 Directive, in large part, after OPA 90.

With regards to the European Union, the Member States who have signed on to the Conventions are, pursuant to the 2004 Directive, permitted to continue with the application of their national law and the paradigms of the Conventions. Complicating this, however, is the European Union's permitting the application of the peripheral Waste Directive. Additionally, the European Union's founding articles express the desire that the polluter pay, while its 2004 Directive suggests its future treatment of oil pollution should the European Union eventually completely preempt the Member States and remove the Convention

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89. Council Directive 75/442, *supra* note 87.

exclusion. The 2004 Directive represents an OPA 90-like approach to remediating damages, which stands in contrast to the Conventions and, more starkly, it contrasts and even contradicts (assuming the Conventions' exclusion is removed) the participation in the Conventions by the Member States. In sum, it does not seem that the Conventions will comport with the evolving federal impetus of the European Union and its Member States.

#### VI. UGLY APRIL

After years of declining spills, the maritime industry stumbled during April of 2010. It was an ugly April. First, the SHEN NENG I, without any apparent reason or justification, ventured well outside established shipping lanes and into the shallows of the Great Barrier Reef.<sup>90</sup> With a shuddering wave, she ran hard aground on April 3, 2010, on the Douglas Shoal. Grounding at the relative beginning of her voyage, she was still fully laden with her bunkers. Fortunately, she did not break apart and she did not lose all of her coal cargo, though she did leak some of her bunkers. Losing very little of her fuel,<sup>91</sup> the SHEN NENG I incident avoided being the much larger catastrophe that it could have been. Nonetheless, the strike on the Great Barrier Reef raised awareness across the world, with media agencies piping aerial video and photographs to their audiences. A whole host of “hads” comes to mind: had the master and crew not responded to mitigate, had the salvors made a mistake in the refloat, had the seas gone rough, etc., the SHEN NENG I could have spilled her entire bunkers onto the reef. This, then, would have been a tragedy of truly epic proportions with a destruction of a world heritage site. While the criminal liability and Australian national law would try to effectuate a remedy within their own right, the Bunkers Convention would have limited recovery to the reinstatement costs. This again, raises the question of how to reinstate an unquantifiable natural resource. What value do you place on human heritage? In short, the limitations of the Bunkers Convention would permit the SHEN NENG I to avoid compensatory damages for destroying an invaluable piece of world heritage.<sup>92</sup> Fortunately, the damages were relatively minimal in light of the potential for destruction.

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90. See, e.g., AUSTRALIAN TRANSP. SAFETY BUREAU, GROUNDING OF THE BULK CARRIER SHEN NENG I AT DOUGLAS SHOAL, QUEENSLAND, MO-2010-003 (Apr. 3, 2010).

91. Keith Bradsher, *Freighter on Great Barrier Reef Has Punctured Fuel Tank*, N.Y. TIMES, Apr. 7, 2010, <http://www.nytimes.com/2010/04/08/world/asia/08reef.html>.

92. Additionally, this impact says nothing as to the almost certain blowback against the shipping industry that would certainly have come pouring forth. A quick look at the efforts to

Unfortunately, the SHEN NENG I was mere cruel foreshadowing of the looming disaster in the Gulf of Mexico. On April 20, 2010, the mobile-offshore drilling unit DEEPWATER HORIZON exploded and a few days later sank to the abyss.<sup>93</sup> The explosion killed eleven and injured seventeen of the platform's workers, but the explosion was just the opening volley of what turned out to be months of a barrage and a contemplation in "coulda" and "shoulda." In short, the failsafe devices failed to work and the well began spewing oil into the Gulf with little to no restriction.<sup>94</sup> The resulting blowout, at a minimum, places the DEEPWATER HORIZON in the top three of recorded oil disasters and the worst offshore disaster in U.S. history.<sup>95</sup> Moreover, when the ultimate impact on ecology is fully accounted, it may be the worst oil disaster the world has ever known.

Pursuant to OPA 90, British Petroleum (BP) was designated the Responsible Party (RP), and thereafter, BP undertook the duties associated with the designation.<sup>96</sup> Furthermore, in order to organize payment of claims, BP has installed a claims process with local operations in cities across the Gulf, while also working to stop the flow and to finance removal operations. Mindful that this Comment focuses on the compensation for natural resources, not the issues regarding private claimants and the like, the RP will also be held liable to the Trustees for natural resources, who will certainly seek compensation for the entire gambit of natural resources damages authorized under OPA 90. Clearly, the damages to natural resources may never be truly understood, but they are certain to be immense, if not absolute in some areas.<sup>97</sup> Even so, the

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remove limitation of liability across the board as a result of the DEEPWATER HORIZON blowout speaks to the potential one catastrophic accident has on otherwise prudent vessel owners.

93. *Oil Slick Spreads from Sunken Rig*, CNN.COM, Apr. 22, 2010, <http://www.cnn.com/2010/US/04/22/oil.rig.explosion/index.html>.

94. Crewmen and various personnel from the involved parties have made many allegations across the table, and understandably so, but one obvious topic that remains in the middle of the discussion is that men died and there was a blowout. This tragedy cannot be intelligently argued to have occurred within the function of a failsafe device. *Deepwater Horizon Blowout Preventer "Faulty"—Congress*, BBC NEWS, May 13, 2010, <http://news.bbc.co.uk/2/hi/americas/8679090.stm>.

95. *See Oil Disaster by the Numbers*, CNN.COM, <http://www.cnn.com/SPECIALS/2010/gulf.coast.oil.spill/interactive/numbers.interactive/index.html> (last visited Oct. 16, 2010); *see also Obama, in Gulf, Pledges To Push on Stopping Leak*, USA TODAY, May 28, 2010, [http://www.usatoday.com/news/nation/2010-05-27-oil-spill-news\\_N.htm](http://www.usatoday.com/news/nation/2010-05-27-oil-spill-news_N.htm).

96. This is not to say that there are not other responsible parties.

97. The debate over the ultimate environmental impact will rage on for a decade or more. In some areas, the impact will not be as harsh, while other areas, animals, people, etc., will realize a different range of harm. *See Leslie Kaufman & Shaila Dewan, Gulf May Avoid Direst Predictions After Oil Spill*, N.Y. TIMES, Sept. 13, 2010, <http://www.nytimes.com/2010/09/14/science/earth/14spill.html>.

RP will pay compensation damages as a part of the environmental assessment and restoration plan, clean-up costs, and reinstatement costs (if so required). Similar to the ATHOS I, this compensation will likely be in a variety of forms, all designed to account for an approximation<sup>98</sup> of the damages done to the environment. Undoubtedly, this will be a quantification of amorphous borders and horrific damage, but it may still be a mere fraction of the ultimate harm. Something from the RP to compensate the public, however, is far better than nothing.

## VII. CONCLUSION

Having highlighted the unilateral approach of the United States, having discussed the uncertainty of the Conventions within the European Union, and having discussed the inadequacy of the Conventions' treatment of natural resource damages, it seems that the Conventions are in need of being reexamined. At present, the United States has no motivation, other than uniformity, to participate in a revised Convention.<sup>99</sup> However, a Convention that mirrors the comprehensive approach of the United States would be a starting point. The European Union appears to be drifting away from the Conventions' remediation methods, while Member States may still apply the Conventions. As they stand, the Conventions are inadequate in their treatment of natural resource damages and uniformity has waned. This apparent shortcoming of the Conventions will be exacerbated by the accumulating damages to natural resources in the Gulf, which is certain to jade U.S. perceptions of remediation and compensation even more than a faded memory of decades-old spills has already done.

The resulting corrections pressed by political pressures, though perhaps warranted in a few scenarios, make for unpredictability and are irrational across the broader operational environment. A certainty, moreover, is that vessel owners do not wish to pay more than they already do for pollution liability, especially unaccounted for risks stemming from politics. We have seen the European Union crafting together a route around the limitations of the Conventions, we have witnessed the edge of atrocity with the SHEN NENG I, and we will

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98. As tacitly mentioned previously, the valuation of natural resources lost during a blowout (or a spill) like this is quite complex. To the native south Louisianan, Mississippian, or Alabamian who has recreationally fished these waters for a lifetime, their loss is unquantifiable. To others, the loss carries much less value. This creates a foray for experts in such things as contingent valuation and its progeny, as well as other methods of valuation.

99. Maybe the DEEPWATER HORIZON disaster will be a motivating factor for uniformity.

continue to witness the devastation of natural resources in and around the Gulf of Mexico. Had the DEEPWATER HORIZON disaster occurred in another location, it is not so certain that the polluter would truly pay for the damages done to natural resources.<sup>100</sup> Additionally, given that science has tended to prefer a natural recovery, the “reinstatement costs” limitation of the Conventions is too limited. Indeed, obsolete may be a better characterization. Furthermore, nations facing angry voters are, quite prudently, likely to craft laws and routes around this limitation in spite of the Conventions. This usurping contradicts the very purpose of convening. In addition, usurping Convention law also increases the burden that the associated maritime, oil and gas, and transportation industries must bear. This is not to say that they should not or cannot bear some of the burden. Surely they can and they will, though providing a uniform and broad framework makes the most sense, as the world consumes oil and demands oil well beyond the hull and machinery of a vessel.

Furthermore, when you cannot reinstate that which you have taken, then you should compensate the owner. This notion should be applied to the Conventions, or else we do a disservice to both the industry and the public. In order to better compensate the public for the harm caused by oil pollution, the world must deliver predictability and clarity to both the vessel owner and the public. Subjecting a vessel owner to unaccounted for and unexpected liability in response to an egregious accident may be a politically savvy move in the short term, but in the long run subjecting the vessel owner to such unpredictability serves no one and inhibits commerce.<sup>101</sup> In closing, a more thoughtful and more comprehensive, OPA 90-styled convention with a broader contribution is deserving of international consideration. Comprehensive liability would provide adequate compensation to the international community for natural resource damages while paying a courtesy to the vessel owners by finally forming a predictable, formulaic, and fair approach to the remediation of natural resource damages that is truly consistent throughout the world. Until such a time, the United States has no real cause or motivation to join the Conventions and nations will continue to craft a remedy in their own right. Indeed, the Gulf blowout and the SHEN NENG I should prod the world to reconvene and to reconsider. Future generations deserve better from industry and from government.

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100. Would other countries receive \$20 billion in commitments to settle claims?

101. For instance, slamming a blanket moratorium on drilling.