

MARINE OIL TRANSPORT IN CANADIAN WATERS: WHO IS PAYING ACCIDENT COSTS FROM OIL TANKER SPILLS?

A S T R I D K A L K B R E N N E R *

INTRODUCTION

Canada's marine shipping industry is long established. Over 82 million tonnes of various petroleum and fuel products are shipped off the East and West coasts annually, where the vast majority of shipments occur on the East coast. The majority of oil from the West coast is shipped from the Vancouver, Prince Rupert and Kitimat ports. If the plan to build the Enbridge Northern Gateway Pipeline (ENGP) goes ahead, oil tanker transport will increase on the West coast.¹ The ENGP would allow for conveying an average of 83,400 cubic metres (525,000 barrels) per day of oil products from Bruderheim (Alberta) to Kitimat (British Columbia). The oil is then shipped via tankers to new economic markets, such as the Pacific Rim region. According to Enbridge's forecast, the Kitimat terminal will have the capacity to serve approximately 220 ship calls per year. Projects, such as the ENGP, will increase the marine transport of oil in Canadian waters including the

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¹ For more information on the Enbridge Northern Gateway Pipeline project see Northern Gateway, online: <www.gatewayfacts.ca>.

Exclusive Economic Zone.

Marine oil transport always involves the risk of oil spills with potentially catastrophic outcomes for society and the environment, as demonstrated by the 1989 *Exxon Valdez* oil spill. Canada and the majority of countries that are exposed to potential oil spills have domestic legislation in place that address oil spill prevention through regulatory oversight, inspections and enforcement.

An important part of the oil spill prevention framework is the assignment of liability for oil tanker accidents. Canada's civil liability for marine oil tanker spills is based on international conventions and domestic maritime legislation. The aim of civil liability is not only to achieve prevention but also to provide compensation to oil spill victims. One essential aspect of civil liability and the goal of prevention is that the person who is liable should pay for the accident costs. This aspect of civil liability is also reflected in the polluter-pays principle (PPP) and the principle of cost internalisation. The international framework for civil liability for marine oil tanker spills accommodates both principles. Although Canada incorporated the international framework in its domestic laws, for now it does not follow the PPP and the principle of cost internalisation to the same extent as the international framework suggests. As a consequence, the majority of marine oil tanker accidents costs would not be borne by the responsible party - the tanker owner, but by the State and thus Canadian taxpayers.

This paper addresses civil liability for marine oil tanker spills in Canadian waters and who is paying for the costs arising from marine oil tanker accidents under consideration of the PPP and cost internalisation. The paper argues that the international oil tanker pollution regime accommodates the PPP, provides the basis for cost internalisation and does not distort incentives to prevent accidents. However, Canada's current approach to the financing of oil tanker pollution must be criticised because it appears that it distorts preventive incentives, runs contrary to the PPP, cost internalisation and could potentially subsidize the oil industry.

The paper proceeds as follows. Part I discusses potential goals of civil liability regimes. Part II gives a brief introduction of the international oil tanker pollution regime as part of the Canadian regime and Canadian special design features. Part III comments and criticises Canada's special compensation fund, which will be followed by the conclusion.

I. POTENTIAL GOALS OF CIVIL LIABILITY REGIMES

In general, legislators may seek many policy goals for civil liability regimes. There is no consensus about which liability goals are paramount. Over time, new functions or goals of liability evolved, such as prevention, compensation, distributive justice and, recently, cost internalisation and the PPP.

a. Prevention

There is a broad consensus among scholars that deterrence and prevention are important objectives in a liability system.² A liability system must give incentives to potential injurers to take due care and reduce the risks of their activities: “[d]eterrence prevents damage and reduces cost by increasing the degree of care people take when engaging in an activity, or by decreasing the level at which the activity is conducted.”³ Another tool to achieve prevention are (safety) regulations.⁴

b. Polluter-Pays Principle

Another potential goal of a civil liability regime is the PPP. The PPP recently developed significance especially as an environmental policy goal. Indeed, the global trend shows that legislators have implemented the PPP into domestic laws.⁵ The PPP has evolved rapidly since first used in 1972 and

² Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004) at 268; Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 6th ed (London, Edinburgh, Dublin: Butterworths, 1999) at 361, 362; Véronique Bruggeman, *Compensating Catastrophe Victims: A Comparative Law and Economics Approach* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010) at 42; Brian Jones & Neil Parpworth, *Environmental Liabilities* (Crayford, UK: Shaw & Sons Limited, 2004) at 16; Muhammad Masum Billah, “The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: the Case of the International Oil Pollution Liability Regime” (2011) 29:1 *Pace Envtl L Rev* 42 at 44 (most important goal comparing compensation and deterrence).

³ Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (The Hague, The Netherlands: Kluwer Law International, 2001) at 86, 87.

⁴ For the relationship between liability and regulations see e.g. Steven Shavell, “Liability for Harm versus Regulation of Safety” (1984) 13:1 *J Leg Stud* 357 at 357, 358; Kenneth Abraham, “The Relation between Civil Liability and Environmental Regulation: An Analytical Overview” (2002) 41:3 *Washburn LJ* 379 at 391 [Abraham 2002]; Charles D Kolstad, Thomas S Ulen & Gary V Johnson, “Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?” (1990) 80:4 *American Economic Review* 888 at 889; Susan Rose-Ackerman, “Public Law versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States Experience” (1995) 4:4 *RECIEL* 312 at 313.

⁵ Examples are *Oil Pollution Act of 1990*, 33 USC §§ 2701-2761 [OPA]; *Comprehensive Environmental*

is difficult to capture in precise terms.

The PPP originated from the Organization for Economic Co-operation and Development (OECD) as an economic recommendation to governments not to subsidize polluters or pollution costs.⁶ The PPP was initially aimed at avoiding economically irrational distortions of the market rather than as a principle aimed at curbing environmental harm to the environment.⁷ Its objective was to ensure that companies would pay the full costs of complying with pollution control laws, instead of being subsidized by the state and victims. The intention was to encourage rational use of scarce resources and to avoid distortions in international trade and investment. Since 1972, the PPP has gained increasing acceptance and expanded its scope to include all costs associated with pollution. The principle may have different meanings in different contexts. The generic idea of the PPP is that polluters, instead of the public, should bear the costs of restoring the environment to an acceptable condition.⁸ All costs associated with products or specific services, such as clean-up costs, or costs derived from production and consumption, have to be reflected in the price of the product or service. Today, the common meaning of the PPP is that governments should demand internalization of costs by polluters to achieve the optimal level of pollution. Liability rules informed by the PPP are a powerful incentive for prevention, because the polluter or contributor to that harm is compelled to compensate for damage.⁹ The fundamental assumption is that if a polluter is held liable for the damage caused, “they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided.”¹⁰ Then,

Response, Compensation, and Liability Act, 42 USC §§ 9601-9675 (1980); *Canadian Environmental Protection Act*, SC 1999, c 33, preamble, s 287(c).

⁶ OECD, *Guiding Principles concerning International Economic Aspects of Environmental Policies*, 1972, 11:5 ILM 1172; OECD, *The Polluter Pays Principle: Definition, Analysis, Implementation* (Paris: OECD, 1975); Marcin Stoczkiewicz, “The Polluter Pays Principle and State Aid for Environmental Protection” (2009) 6:2 JEEPL171 at 174-178.

⁷ Ole W Pedersen, “Environmental Principles and Environmental Justice” (2010) 12:1 *Envtl L Rev* 26 at 39; Eric Thomas Larson, “Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the polluter-pays principle” (2005) 38:2 *Vand J Transnat’l L* 541 at 548.

⁸ Larson, *ibid* at 544.

⁹ See e.g. EC, *White Paper on Environmental Liability* (Luxembourg: Office for Official Publications of the European Communities, 2000) at 11, online: EC <ec.europa.eu/environment/legal/liability/pdf/el_full.pdf > [White Paper]; Jones & Parpworth, *supra* note 2 at 12.

¹⁰ Nicolas de Sadeleer, “Polluter Pays, Precautionary Principles and Liability” in Gerrit Betlem & Edward Brans, eds, *Environmental Liability in the EU – The 2004 Directive compared with US and Member State Law* (London: Cameron May, 2006) 89 at 91.

liability will result in prevention and internalisation of costs.¹¹ Thus, the PPP intersects with the goal of prevention.

Although a noble idea and a meaningful policy goal, the PPP lacks precise contours and clear content.¹² This lack of clarity is evident in contemplating issues of trying to determine who the polluter is; what is the pollution; how much must the polluter pay; and which link in a chain of polluters should justly bear the cost.¹³

c. Cost internalisation

The principle of cost internalisation requires that externalities that result from industrial activities, are imposed on such activities.¹⁴ “Externality” is an economic term that means “a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent.”¹⁵ There are different ways to internalize externalities, such as command and control regulation, liability rules, a combination of regulatory and liability rules, taxes, and cap and trade systems.¹⁶ The effects of cost internalization are to improve safety (prevention) and to create economically equal playing fields for competitors in the same industry.¹⁷ The difficulties with the principle of cost internalisation are similar to that of the PPP. For example, what costs and to whom the costs should be assigned, is a challenge that may be faced when using either principle.¹⁸ Further, the goal itself does

¹¹ Internalization of environmental costs is explained to mean “that the costs of preventing and restoring environmental pollution will be paid directly by the parties responsible for the damage rather than being financed by society in general.” White Paper, *supra* note 9 at 14; de Sadeleer, *ibid* at 92.

¹² See e.g. Nickie Vlavianos, “Creating Liability Regimes for the Clean-up of Environmental Damage: The Literature” (1999) 9:1 J Envtl L & Prac 145 at 150, 152.

¹³ Youri Mossoux, “Causation in the Polluter Pays Principle” (2010) 19:6 European Energy & Environmental Law Review 279; de Sadeleer, *supra* note 11 at 92, 93.

¹⁴ Sanford E Gaines, “The Polluter-Pays Principle: From Economic Equity to Environmental Ethos” (1991) 26:3 Tex Intl LJ 463 at 468.

¹⁵ Robert Cooter & Thomas Ulen, *Law & Economics*, 5th ed (Boston: Pearson Education Inc, 2008) at 45. In the environmental context Chertow & Esty explain: “Pollution represents what economists call an *externality* – a cost that can be pushed out a smokestack or effluent pipe, or otherwise unfairly dumped onto others. Unless government acts to *internalize* such harms – requiring polluters to control their emissions or pay for the harm they cause – market failure and diminished welfare will result.” Marian R Chertow & Daniel C Esty, “Thinking Ecologically: An Introduction” in Marian R Chertow & Daniel C Esty, eds, *Thinking Ecologically: The Next Generation of Environmental Policy* (New Haven: Yale University Press, 1997) 1 at 7. See also Carl J Dahlman, “The Problem of Externality” (1979) 22:1 JL & Econ 141.

¹⁶ Bergkamp, *supra* note 43 at 73, 209.

¹⁷ See e.g. Michael Trebilcock & Ralph A Winter, “The Economics of Nuclear Accident Law” (1997) 17:2 Intl Rev L & Econ 215 at 225.

¹⁸ Bergkamp, *supra* note 3 at 74. There is no absolute answer to which extent costs should be internalized.

not clarify the extent to which cost internalisation should be achieved. The literature does not comment on what level is desirable, whether full or partial cost internalisation. In real life, full cost internalisation most probably will be ideal but not attainable.

The difference between the PPP and cost internalisation is that the PPP's scope is broader. The PPP has an economic component that is based on internalisation of externalities. But the PPP also has a legal component that assigns liability to the pollution source.¹⁹ Cost internalisation is a cost allocation principle.²⁰ Abraham points out that it is not a goal of liability or tort law but rather "a means of optimizing accident costs"²¹ and a means to achieve or promote prevention and deterrence.

The following part provides an introduction to the international civil liability regime for oil tanker pollution and demonstrates that the regime accommodates the PPP, cost internalisation and indirectly, prevention.

II. CANADA'S CIVIL LIABILITY REGIME FOR OIL TANKER POLLUTION

a. Introduction

Canada's *Marine Liability Act*²² (*the Act*) in Parts 6 and 7 deals with marine oil tanker pollution. Sections 48, 57 and 63 of the Act stipulate that the Articles of the international regime have force of law in Canada. The international oil tanker pollution compensation system is based on: the *International Convention on Civil Liability for Oil Pollution Damage 1969*²³ (1969 CLC) and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971*²⁴ (1971 FC). These two conventions were modified and supplemented by the following protocols and conventions: *Protocol of 1992 to amend the International Convention on Civil*

¹⁹ See Gaines, *supra* note 14 at 468, 469 for a detailed analysis.

²⁰ *Ibid* at 468.

²¹ Kenneth S Abraham, "Cost Internalization, Insurance, and Toxic Tort Compensation Funds" (1982) 2:2 *Virginia Journal of Natural Resources Law* 123 at 126, n 18 [Abraham 1982].

²² *Marine Liability Act*, SC 2001, c 6, ss 91-125.

²³ *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 3, 64 ILM 481 (entered into force 19 June 1975) [1969 CLC].

²⁴ *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 UNTS 57 (entered into force on 16 October 1978) [1971 FC]; cessation of the convention on 24 May 2002.

Liability for Oil Pollution Damage, 1969 (1992 CLC);²⁵ the *Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (1992 FC)²⁶ and the *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* (SFP).²⁷ The governing Conventions are now known as the 1992 CLC, 1992 FC and SFP.²⁸

The international regime has been amended several times over the last decades, but its key features remain: strict liability of the shipowner, channelling of liability to the registered shipowner, limitation of the shipowner's liability and compulsory financial security. The CLC stipulates the preconditions for the civil liability of the responsible party. The 1992 FC and SFP, which establish the International Oil Pollution Compensation Fund (IOPCF) and the Supplementary Fund (SF) provide additional compensation for oil pollution victims. In addition to the liability and compensation regime as established by the CLC, FC and SFP Canada implemented an additional layer of compensation through a third compensation fund called the Ship-source Oil Pollution Fund (SOPF). This part first provides a brief overview of the international oil tanker pollution regime as part of Canadian law followed by the provisions dealing with the SOPF.

b. 1992 CLC

The goal of the 1992 CLC is to ensure adequate compensation of oil pollution victims.²⁹ Another aim is the adoption of harmonized rules and

²⁵ *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 27 November 1992, 1956 UNTS 255 (entered into force 30 May 1996) [1992 CLC].

²⁶ *Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, 27 November 1992, 1953 UNTS 330 (entered into force 30 May 1996) [1992 FC].

²⁷ *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, 16 May 2003, LEG/CONF 14/20 (entry into force 3 March 2005), online: IOPCF <www.iopcfunds.org/uploads/tx_iopcpublishations/Text_of_Conventions_e.pdf> [SFP].

²⁸ Canada accessed the: 1992 CLC on 29 May 1998 (entry into force on 29 May 1999); 1992 FC on 29 May 1998 (entry into force on 29 May 1999); SFP on 2 October 2009 (entry into force on 2 January 2010). This paper does not elaborate on STOPIA and TOPIA. IOPCF, *STOPIA and TOPIA*, 92FUND/A.ES.10/13, SUPPFUND/A/ES.2/7 (1 February 2006).

²⁹ 1992 CLC, *supra* note 25, Preamble 3, 4. The now famous polluter-pays principle (PPP) was not explicitly mentioned in the conventions. However some authors suggest that the PPP is a guiding principle in the tanker regime (e.g. Klaus Töpfer, "Beyond the Marketplace: the IOPC Funds and the Environment" in *International Oil Pollution Compensation Funds, The IOPC Funds' 25 Years of Compensating Victims of Oil Pollution Incidents* (Kent, UK: Impact PR & Design Limited, 2003) 37 at 38; Chao Wu, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (London: Kluwer Law International, 1996) at 111 [Wu].

procedures in the Contracting States.³⁰

The 1992 CLC, FC and SFP apply only to pollution caused by a Convention ship,³¹ and the spill of oil as cargo as opposed to bunkers oil spills.³² Briefly summarized, the international oil tanker spill regime is based on several key design features which are of importance for the question who is paying oil tanker spill accident costs: channelling of liability, strict liability, limited liability and compulsory financial assurance.

The ship/tanker owner³³ is liable for any pollution damage³⁴ caused

Without explicitly mentioning the PPP, the 1969 CLC and 1971 FC were built on the liability of the shipowner and the oil receiving companies who were considered to be the polluters. Thus the IMO tanker regime applied the PPP even before the PPP was developed by the OECD in 1974 (Hans Corell, "The Law of the Sea and the IOPC Funds" in the International Oil Pollution Compensation Funds, *The IOPC Funds' 25 Years of Compensating Victims of Oil Pollution Incidents* (Kent, UK: Impact PR & Design Limited, 2003) 33 at 34).

³⁰ 1992 CLC, *ibid*, Preamble 4. Uniform rules have not always led to uniform interpretation of the conventions by the courts in various Member States. See e.g. Harrison describing conflicting interpretations in the Slops incident. James Harrison, "Conflicting Interpretations - The Slops Incident and the Application of the International Oil Pollution Liability and Compensation Regime to Offshore Storage and Transfer Operations" (2008) 20:3 J Envtl L 455 at 461-464. If the international oil pollution regime is applicable to an oil spill incident then it renders the respective national tort system inapplicable (Hui Wang, "Shifts in Governance in the International Regime of Marine Oil Pollution Compensation: A Legal History Perspective", in Michael Faure & Albert Verheij, eds, *Shifts in Compensation for Environmental Damage* (Vienna: Springer-Verlag, 2007) 197 at para 613 [Wang]).

³¹ The 1992 CLC, *ibid*, Art I(1), refers to a specific definition of "ship" as "any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted 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 and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard." In that sense, the term ship is misleading since it does not refer to any ship but only to tankers.

³² "Oil" is defined as any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship. 1992 CLC, *ibid*, Art I(5). "Examples of persistent mineral oil are crude oil, fuel oil, heavy diesel oil and lubricating oil. Such oils are usually slow to dissipate naturally when spilled into the sea and are therefore likely to spread and require cleaning up. Damage caused by spills of non-persistent mineral oil, such as gasoline, light diesel oil and kerosene, is not compensated under the Conventions. Such oils tend to evaporate quickly when spilled and do not normally require cleaning up." IOPC Funds, *Claims Manual October 2013 Edition* (Kent: Impact PR and Design Limited, 2013) at 13 [IOPC Funds, Claims Manual], online: IOPC Funds <www.iopcfunds.org/uploads/tx_iopcpublishations/claims_manual_e.pdf>. For bunker oil spills see the *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 23 March 2001 UKTS 8 (2005), [2009] ATS 14 (entered into force 21 November 2008).

³³ 1992 CLC, *ibid*, Art I(3) <shipowner> and defines owner as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, 'owner' shall mean such company."

³⁴ Pollution damage is defined as "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship...; (b) the costs of preventive measures and further loss or damage caused by preventive measures." 1992 CLC, *ibid*, Art I(6). The definition of pollution damage and its interpretation was and still is one of the major issues in the international regime. Damage types that can

by a Convention ship as a result of an incident in the territory, including the territorial sea of a Contracting State,³⁵ and the Exclusive Economic Zone (EEZ), if established.³⁶ This provision is referred to as channeling and means that liability is exclusively assigned to the registered tanker owner and excludes liability of other parties who could be potentially held liable through tort or contract law such as the crew, charterer of any kind, operators, salvors, persons taking preventive measures etc., unless the damage was caused deliberately, with intent or recklessness.³⁷ The tanker owner is strictly liable with only limited options to defend liability.³⁸

Another important feature is that the liability is limited in amount, which means that oil pollution victims are only compensated for pollution damage up to the applicable limit. Limitation of liability is a common feature of civil liability regimes that deal with (ultra)hazardous activities with potentially catastrophic damage. There are differing opinions on whether limitation of liability is justified. Historically, limitation of liability has contributed to the encouragement of engaging in the respective business and to overcome uninsurability hurdles if the expected magnitude of damage is

be covered are clean-up and preventive measures, property damage, consequential loss, pure economic loss and environmental damage. See in more detail commenting on the coverage of these damage types IOPC Funds, Claims Manual, *supra* note 32 at 11-14; Dramé Ibrahima, "Recovering Damage to the Environment per se following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992" (2005) 14:1 RECIEL 63 at 63; Wu, *supra* note 29 at 147-158.

³⁵ 1992 CLC, *ibid*, Art II(a)(i). The 1992 CLC and the 1992 FC and SFP apply to incidents in the territory of a Contracting State. The territory includes internal waters like inland waters and inland rivers. See, IOPC Fund, "Record of Decisions of the Twenty-Eighth Session of the Executive Committee", decision ID: 001676, *Neftudovoz-57M* incident" (White Sea, Russian Federation) 92FUND/EXC.28/8 (22 March 2005) at para 4.1.1-4.1.18.; IOPC Fund, "Record of Decisions of the Twenty Second Session of the Executive Committee", 92FUND/EXC.22/14 (24 October 2003) at paras 3.8, 3.8.13.

³⁶ 1992 CLC, *ibid*, Art III(1).

³⁷ 1992 CLC, *ibid*, Art III(4). The channeling provisions protect these other parties that may be involved in the incident by exempting them from liability. However, the shipowner has a right of recourse against third parties. 1992 CLC, Art III(5). The shipowner's liability was subject to a fierce debate between the negotiating parties. The main discussion centered around the question whether the cargo owner, the shipowner or the ship operator should be held liable. Holding the cargo owner liable was considered to be impractical. The cargo owner can change often during a voyage. A potential claimant would have difficulty identifying the cargo owner at the moment of the accident. Also, the operator of a ship is a vague term and was therefore dismissed. Finally, the discussions arrived at the conclusion that a potential claimant can more easily identify the registered shipowner. However, the liability of the shipowner was a big burden for them and thus demanded a compromise. The compromise consisted of an agreement to establish a complementary fund financed by the oil companies. Albert Verheij, "Shifts in Governance: Oil Pollution", in Michael Faure & Albert Verheij, eds, *Shifts in Compensation for Environmental Damage* (Vienna: Springer-Verlag, 2007) 133 at 139, 140; R Michael M'Gonigle & Mark W Zacher, *Pollution, Politics, and International Law - Tankers at Sea* (Berkeley, Los Angeles: University of California Press, 1979) at 171, 172.

³⁸ 1992 CLC, *ibid*, Art III(2), (3).

huge.³⁹ Insurers stress that they are more likely to insure high risks if the liability is capped.⁴⁰ The persuasiveness of the alleged uninsurability (respectively the insurers' unwillingness to insure high severity risks such as nuclear liability and oil tanker pollution) is questioned by many scholars. Scholars criticise that limitation of liability is a subsidy to the respective industry, it has negative impacts on prevention and the justification based on the assumption of uninsurability is false.⁴¹

Under the 1992 CLC the responsible party, the owner of a ship, is entitled to limit its liability under the 1992 CLC in respect of any one incident to an aggregate amount calculated as follows.⁴² For a ship not exceeding 5000 units of gross tonnage the CLC limit is 4,510,000 units of account⁴³ (SDR).⁴⁴ For a ship between 5,000 units of tonnage and 140000 units of gross tonnage, the CLC limit is 4,510,000 SDR plus 631 SDR for each additional unit of tonnage.⁴⁵ For a ship carrying 14000 units of gross

³⁹ See e.g. Gotthard Gauci, "Compulsory Insurance under EC Directive 2009/20/EC - An Adequate solution for Victims, or Is It Also Time for the Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer of Last Resort?" (2014) 45:1 J Mar L & Com 77 at 93; Karine Fiore, "No-Fault Compensation Systems" in Michael Faure, ed, *Tort Law and Economics* (Cheltenham: Edward Elgar, 2009) 406 at 418. Muhammad Masum Billah, "Economic Analysis of Limitation of Shipowners' Liability" (2006-2007) 19:2 USF Mar LJ 297 at 298 [Billah, 2007].

⁴⁰ Thomas Mensah, "The IOPC Funds: How it all started" in International Oil Pollution Compensation Funds, *The IOPC Funds' 25 Years of Compensating Victims of Oil Pollution Incidents* (Kent, UK: Impact PR & Design Limited, 2003) 45 at 46, describing the arguments at the negotiation of the 1969 CLC; Neil Hawke & Pamela Hargreaves, "Environmental Compensation Schemes: Experience and Prospects" (2003) 5:1 *Env't L Rev* 9 at 16, 17; White Paper, *supra* note 9 at 24.

⁴¹ Gotthard Gauci, "Limitation of liability in maritime law: an anachronism?" (1995) 19:1 *Marine Policy* 65 at 66, 67; Michael Faure & Hui Wang, "Financial caps for oil pollution damage: A historical mistake?" (2008) 32:4 *Marine Policy* 592 at 594, 599; Fiore, *supra* note 39 at 419; Anthony Heyes & Catherine Liston-Heyes, "Capping Environmental Liability: The Case of North American Nuclear Power" (2000) 25:2 *Geneva Papers on Risk & Insurance - Issues & Practice* 196 at 196, 201; Jean-Robert Tyrant & Peter Zweifel, "Environmental risk internalization through capital markets (ERICAM): The case of nuclear power" (1993) 13:4 *Intl Rev L & Econ* 431 at 435; Marcus Radetzki & Marian Radetzki, "Private Arrangements to Cover Large-Scale Liabilities Caused by Nuclear and Other Industrial Catastrophes" (2000) 25:2 *Geneva Papers on Risk & Insurance - Issues and Practice* 180 at 180.

⁴² 1992 CLC, *supra* note 25, Art V(1).

⁴³ "Unit of account" is defined in 1992 CLC, *ibid*, Art V(9a) and refers to Special Drawing Right (SDR). Special Drawing Right (SDR) is defined by the International Monetary Fund (IMF) as follows: "The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves. Its value is based on a basket of four key international currencies, and SDRs can be exchanged for freely usable currencies." (International Monetary Fund (IMF), "Factsheet Special Drawing Rights (SDRs)" (09 April 2015), online: IMF <www.imf.org/external/np/exr/facts/sdr.HTM>.

⁴⁴ 4,510,000 SDRs translate to USD 6,356,884.82. All SDR conversions were made on 10 February 2015 with Coinmill currency converter, online: <coinmill.com/SDR_calculator.html>. No further reference will be made to Coinmill.

⁴⁵ 631 SDRs translate to USD 889.40.

tonnage or over, the CLC limit is 89,770,000⁴⁶ SDR.

The owner is only allowed to limit liability if it is proved that the pollution damage did not result from a personal act or omission by the owner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.⁴⁷ If the owner loses his right to limit liability he will be subject to unlimited liability.

The assignment of liability to the responsible party does not automatically ensure that the responsible party is able to financially pay the accident costs or to compensate victims. That is why financial assurance provisions must complement liability rules. Under the CLC system the Shipowners must carry a proof of financial security, typically in form of insurance that covers the liability amount.⁴⁸

c. 1992 FC

The 1992 CLC alone does not provide adequate compensation, which means that accident costs are not fully internalised. That is why the regime has implemented two additional compensation funds: the International Oil Pollution Compensation Fund (IOPCF) and the Supplementary Fund (SF).⁴⁹

The 1992 FC has two main purposes. One goal is to provide full compensation for oil pollution victims to the greatest extent possible, acknowledging that the 1992 CLC might not have accomplished this goal.⁵⁰ A second underlying goal of the 1992 FC is to distribute costs between the shipping industry and the oil cargo interests, i.e. the oil receiving industry.⁵¹ This means, that the shipping industry bears the liability and compensation burden or accident costs under the CLC, whereas the 1992 FC imposes the duty to finance the IOPCF on the oil cargo/oil receiving industry.

The IOPCF has a substitute and a supplemental function.⁵² The substitute function of the IOPCF comes to the fore when the shipowner

⁴⁶ 89,770,000 SDRs translate to USD 126,531,607.53.

⁴⁷ 1992 CLC, *supra* note 25, Art V(2).

⁴⁸ 1992 CLC, *ibid*, Art VII(1). During the initial negotiations about the 1969 CLC, compulsory financial security was not appreciated by all States. But the US and France insisted on this provision because they considered it as a guarantee for compensation and also as an enforcing or supporting factor for strict liability which otherwise would be an empty shell. Wu, *supra* note 29 at 66-67.

⁴⁹ 1992 FC, *supra* note 26, Art 2(1) established the IOPCF. SFP, *supra* note 27, Art 2(1) established the SF.

⁵⁰ 1992 FC, *ibid*, Preamble 6 and 8, Art 2(1).

⁵¹ 1992 FC, *ibid*, Preamble 7.

⁵² Verheij, *supra* note 37 at 142; Wu, *supra* note 29 at 80-82.

cannot be held liable under the CLC regime, for example, in the event of *force majeure*, or the ship responsible for the accident cannot be identified.⁵³ The IOPCF provides supplemental compensation if the damage exceeds the liability limits under the CLC regime.⁵⁴

The IOPCF must pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the 1992 CLC.⁵⁵ However, the IOPCF is exempted from its obligation to pay compensation, for example if the pollution damage resulted from an act of war, hostilities, civil war or insurrection etc.⁵⁶ The IOPCF's obligation to pay compensation is limited per incident and must not exceed 203,000,000⁵⁷ units of account, including the compensation amount paid under the 1992 CLC.⁵⁸

The IOPCF is financed by initial and annual contributions. Annual contributions to the Fund must be made in respect of each Contracting State by any person who, in the calendar year has received more than 150,000 tonnes in the ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations.⁵⁹ The Assembly, consisting of all Contracting States to the FC, decides the total amount of contributions to be levied.⁶⁰ Each (oil receiving) entity must pay the calculated amount of its annual contribution directly to the IOPCF.⁶¹ The levies are based on the reported amounts of received oil in every country and

⁵³ Verheij, *ibid*, at 142.

⁵⁴ Verheij, *ibid*, at 142.

⁵⁵ 1992 FC, *supra* note 26, Art 4(1).

⁵⁶ 1992 FC, *ibid*, Art 4(2). Further exonerations provides 1992 FC, Art 4(3).

⁵⁷ 203,000,000 SDRs translate to USD 286,130,292.18.

⁵⁸ 1992 FC, *supra* note 26, Art 4(4a).

⁵⁹ See the wording of 1992 FC, *ibid*, Art 10(1)(a), (b) for all cases which trigger annual contributions. That includes also coastal deliveries of oil which are then reshipped by coastal transport. As a result, contributing oil can be counted several times for the purpose of Art 10. This way of calculating can lead a state to pay high contributions because it received a high amount of delivered oil although its national imports for domestic purposes are relatively low. But this "reflects, or is intended to reflect, the risk in that state of pollution damage being suffered as a result of an escape or discharge of oil from a ship." Colin de La Rue & Charles B Anderson, eds, *Shipping and the Environment: Law and Practice* (London: LLP Reference Publishing, 1998) at 131.

⁶⁰ 1992 FC, *ibid*, Art 12.

⁶¹ 1992 FC, *ibid*, Arts 12(2), 10(1). For 2014, the Fund Administrative Council calculated contributions to the General Fund of £3,8 million (USD 5,78,926) based on 1,533,549,797 tonnes of oil received. Thus, the levy was £0.0024779 per tonne (USD 0.00378). The main contributors to the 1992 IOPCF were Japan (15%), India (13%), Republic of Korea (9%), Netherlands (8%), Italy (8%), Singapore (7%), Spain (5%), France (4%), United Kingdom (4%), Canada (4%) and others (23%). IOPCF, *International Oil Pollution Compensation Funds, Annual Report 2014* (London: IOPCF, 2014) at 19 [IOPC Funds - AR 2014].

used for the administration of the funds and to pay claims.⁶²

d. SFP

The goal of the Supplementary Fund Protocol (SFP) is to provide more compensation.⁶³ The SF adds compensation to the amounts available under the 1992 CLC and 1992 FC, if those injured by the event have been unable to obtain full compensation for such damage.⁶⁴ The maximum amount of compensation payable by the SF in respect of any one incident is limited to 750 million units of account (USD 1,057,131,621.34), including the amount of compensation paid under the 1992 CLC and 1992 FC.⁶⁵ So far, there have been no incidents involving the SF.⁶⁶

The financing mechanism of the SF follows a similar financing procedure adopted by the IOPCF. Annual contributions to the SF must be made in respect of each Contracting State by any entity which, in the relevant calendar year, has received in total quantities exceeding 150,000 tonnes of contributing oil.⁶⁷ One difference between the financing mechanism of the IOPCF and the SF is that the SFP assumes a minimum receipt of one million tonnes of contributing oil in each Contracting State for the purpose of paying contributions.⁶⁸

⁶² The IOPC Funds explains their invoicing system as such: “[a] system of deferred invoicing exists whereby the total amount to be levied in contributions for a given calendar year is fixed, but only a specific lower total amount is invoiced for payment by 1 March, and the remaining amount or a part thereof, is invoiced later in the year if necessary.” IOPC Funds – AR 2014, *ibid* at 19; IOPCF, *Internal Regulations of the International Oil Pollution Compensation Fund established under the 1992 Fund Convention*, Administrative Council, 10th session (2012) at 3.6.

⁶³ SFP, *supra* note 27, Preamble 5, 6, 7.

⁶⁴ Insufficient compensation may occur, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation laid down in Art 4(4) of the 1992 FC (*supra* note 26) in respect of any one incident. SFP, *ibid*, Art 4(1).

⁶⁵ SFP, *ibid*, Art 4(2a).

⁶⁶ IOPC Funds –AR 2014, *supra* note 61 at 21.

⁶⁷ SFP, *supra* note 27, Art 10(1).

⁶⁸ SFP, *ibid*, Art 14(1). Subparagraph Art 14(2) of the SFP further provides that when the aggregate quantity of contributing oil received in a Contracting State is less than 1 million tonnes, the Contracting State shall assume the obligations that would be incumbent under this Protocol on any person who would be liable to contribute to the SF in respect of oil received within the territory of that State, in so far as no liable person exists for the aggregated quantity of oil received. The difference between the IOPCF and SF is that compensation from the IOPCF is guaranteed even for those Contracting States that do not contribute to the Fund, because they have not received the minimum amount of oil. Whereas the SF requires contributions from each Contracting Party even if they have received less than one million tonnes of contributing oil.

e. **The role of the State in the CLC, FC, SFP and Canada's modification of the regime**

The roles of the Contracting States in the conventions are limited. Generally the tanker owners (CLC) and the oil industry (FC, SFP) are held liable. However, in specific cases, the Contracting State can also be held liable. Under the 1992 FC and SFP, a Contracting State must communicate the name and address of any person who is liable to contribute to the Fund and the relevant quantities of contributing oil to the Director.⁶⁹ Where a Contracting State does not fulfill its obligations to submit to the Director and that omission results in a financial loss for the Fund, that Contracting State shall be liable to compensate the Fund for such loss.⁷⁰

In addition, the 1992 FC provides each Contracting State with the option to declare that it assumes obligations that are incumbent under this Convention for any person who is liable to contribute to the Fund.⁷¹ Also, the SFP stipulates that a Contracting State itself may assume the obligation to pay contributions to the Supplementary Fund.⁷² These latter provisions make a paramount difference in the Canadian implementation of the international oil tanker regime into its domestic law. Finally, the SFP stipulates that if contributing oil is less than one million tonnes, the Contracting State is liable to pay the annual contribution to the SF.⁷³

⁶⁹ 1992 FC, *supra* note 26, Art 15(2); SFP, *ibid*, Art. 13(1).

⁷⁰ 1992 FC, *ibid*, Art 15(4); SFP, *ibid*, Art 13(2).

⁷¹ 1992 FC, *ibid*, Art 14(1).

⁷² SFP, *supra* note 27, Art 12(2).

⁷³ SFP, *ibid*, Art 14(2). When the aggregate quantity of contributing oil received in a Contracting State is less than 1 million tonnes, the Contracting State shall assume the obligations that would be incumbent under the SFP on any person who would be liable to contribute to the SF in respect of oil received within the territory of that State, in so far as no liable person exists for the aggregated quantity of oil received. The SF's financing mechanism has been criticized for the required minimum contribution, which puts economically weak developing countries at a disadvantage. Billah criticizes the compensation formula of the SF from an environmental and also fairness point of view. Because the SFP requires all Contracting States to make a minimum contribution developing states have to contribute the minimum although they usually have weaker economies and receive less oil usually in smaller tankers. Past experience shows that the most disastrous oil spills take place in the waters of developed countries (examples are the *Deepwater Horizon* in the US, *Torrey Canyon*, *Amoco Cadiz*, *Exxon Valdez* in the US, *Erika*, *Nakhodka* and *Prestige*). However, there is always the chance that oil spill accidents could happen in the waters of developing nations, because many transport routes lead through waters of developing countries, and thus would not trigger compensation from the Supplementary Fund. In other words, developing countries need compensation from the SF, but have difficulties affording the financial minimum contribution. Therefore Billah argues that "clean-up operations and adequate compensation should not be affected by a state's financial ability to contribute to the Supplementary Fund. (...) Yet, if a serious oil pollution incident occurs in those countries, compensation will not be forthcoming from the Supplementary Fund because these countries are not parties to the Supplementary Fund Protocol, having been discouraged by its compulsory

When Canada accessed the 1992 FC it declared: “[b]y virtue of Article 14 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, the Government of Canada assumes responsibility for the payment of the obligations contained in Article 10, paragraph 1.”⁷⁴

f. Canada’s SOPF

The SOPF is a special account established in the accounts of Canada.⁷⁵ The SOPF is liable if the international regime does not provide compensation at all or if compensation is insufficient.⁷⁶ That means the SOPF is a fund of last resort but also a fund of first resort. The SOPF compensates claimants⁷⁷ who have been unable to obtain full compensation from the ship owner or any other party. In addition, the SOPF is fund of first resort because claimants may choose to file their claims directly with the SOPF. In case the SOPF compensates the claimant, the claimant’s rights are subrogated to the SOPF, which then takes recourse against the responsible party.

Liability of the SOPF is limited to claims arising in the territory or in the territorial sea or internal waters of Canada and the EEZ.⁷⁸ The SOPF’s scope is broader than the IOPCF and SF. The SOPF covers all classes of ships and oil spills of persistent and non-persistent oil. The SOPF’s compensation is also limited in amount like the IOPCF and SF.⁷⁹ The liability limit varies from year to year. In the fiscal year 2014 the SOPF provided a maximum liability of CAD 162,745,303 (USD 130,236,000) for all claims per oil spill in

minimum contribution.” Billah, *supra* note 2 at 69, 70.

⁷⁴ International Maritime Organization (IMO), *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions* (London: IMO, 14 August 2015) at 288. Israel also made such declarations where they assume financial responsibility for payments to the funds.

⁷⁵ Administrator of the Ship-source Oil Pollution Fund, *Ship-source Oil Pollution Fund – the Administrator’s Annual Report 2013-2014* (Ottawa: the Administrator of the Ship-source Oil Pollution Fund, 2014) at 1 [SOPF-2013/2014]. The SOPF’s revenue is based on interest received on the fund’s balance and income from recovery claims against responsible parties.

⁷⁶ *Marine Liability Act*, *supra* note 22, s 101(1).

⁷⁷ “Any person in Canada, including corporations and the Crown, who has sustained loss or damage, or incurred costs and expenses, in respect of oil pollution may file a claim directly with the Administrator of the SOPF”: Canada, Ship-source Oil Pollution Fund, “Claims Eligibility” (1 December 2014), online: Canada <www.ssopfund.ca/en/how-to-file-a-claim/claims-eligibility>. However, see *Marine Liability Act*, *ibid*, s 107 for claims of loss of income in relation to fishing activities.

⁷⁸ *Marine Liability Act*, *ibid*, s 104.

⁷⁹ *Ibid*, s 110.

Canadian waters.⁸⁰

The Minister of Transport is entitled to impose a levy per metric ton of oil imported by ship into or shipped from a place in Canada in bulk as cargo of a ship.⁸¹ The levy would be fed into the SOPF. For the Financial Year 2013/2014 the levy was 48.81 cents.⁸² However, despite the option to impose levies on the oil receiving industry the levy has been suspended since 1976. The SOPF is the successor to the Maritime Pollution Claims Fund (MPCF), which was established in 1973. The MPCF was financed by oil companies, power generating authorities, pulp and paper manufacturers, chemical plants and other heavy industries.⁸³ By 1989 the MPCF accumulated CAD 149,618,850.24. This amount was transferred to the SOPF.

With respect to the contributions to the IOPCF and SF, the SOPF is obliged to pay these contributions on behalf of the Canadian oil receivers.⁸⁴ The SOPF is responsible to report to the IOPCF the annual amount of Canadian contributing oil. The Administrator of the SOPF consolidates the national figure and then reports it to the Secretariat of the IOPCF.⁸⁵ The IOPCF then determines the amount Canada must contribute.

III. COMMENTARY: WHO IS PAYING THE ACCIDENT COSTS FROM OIL TANKER SPILLS IN CANADIAN WATERS?

Canada's approach to the financing of oil tanker pollution could be criticised because it appears to run contrary to the PPP, cost internalisation and potentially subsidizes the Canadian oil industry. Further, the Canadian regime distorts the equal cost balancing structure of the international regime because the oil tanker regime is only financed by two means: the shipping industry and the SOPF.

The international regime's primary policy goal is to provide full compensation. Although the 1969 CLC predates the uprising of cost internalisation and the PPP and they are not officially declared goals of the CLC, FC and SFP, this paper argues that the international regime accommodates and accomplishes the PPP and provides a strong basis for cost internalisation. It accommodates the PPP by assigning primary liability to the

⁸⁰ SOPF-2013/2014, *supra* note 75 at iii.

⁸¹ *Marine Liability Act*, *supra* note 22, ss 112, 114.

⁸² SOPF-2013/2014, *supra* note 75 at iii.

⁸³ *Ibid* at 1.

⁸⁴ *Marine Liability Act*, *supra* note 22, s 117; SOPF-2013/2014, *ibid* at 2.

⁸⁵ SOPF-2013/2014, *ibid* at 2.

shipowner and secondary financial liability to another group of contributors to the oil spill risk – the oil receiving industry – which make contributions to the funds. Thus, two major groups of responsible parties are paying for oil spill accidents.

Cost internalisation is the economic aspect of the PPP. In theory, the international regime thus provides a strong basis for cost internalisation. Although realistically even within the international regime, the prices of oil spill accidents may be allocated to the consumer of oil.

In general, the international regime is considered to be successful within its scope of application because during its history the compensation amounts available for oil pollution victims increased from the 1971 FC with 60 million SDR to the 2003 SFP to 750 million SDR which is a twelvefold increase.⁸⁶ The historical development shows that inadequate liability and compensation amounts led the Contracting States to increase the compensation level and to hold the main responsible parties (shipping and oil receiving industry) accountable for accidents costs. Increased liability and compensation levels also mean that accident costs are internalised according to the applicable levels.

Further, the implementation of compensation funds as a tool to ensure the financial liability of responsible parties illustrates that the Contracting States aim to adhere to the goal of full victim compensation. One of the key design features of a compensation fund is its financing mechanism, because it determines the overall compensation capacity and indicates whether the polluter pays and accident costs are internalised or externalised if the state assumes financial responsibility.⁸⁷ The financing mechanism touches on important issues, such as who should finance the fund; what is the financing source; and how financial contributions to the fund should be generated and assessed.

Contemplation of who is best suited to finance the fund could be answered by considering the PPP indicating that the polluter must pay.⁸⁸ The injurer or group of injurers who caused damage must pay for the damage.⁸⁹

⁸⁶ Reinhard H Ganten, "Developments in Oil Pollution Liability" (2008) 38:6 *Envtl Pol'y & L* 312 at 313; Wu, *supra* note 29 at 109.

⁸⁷ Hawke & Hargreaves, *supra* note 40 at 10; Andrew R Klein, "A Legislative Alternative to 'No Cause' Liability in Blood Products Litigation" (1995) 12:1 *Yale J on Reg* 107 at 115.

⁸⁸ The PPP lacks contour. For example, the issue is that we sometimes do not know who exactly the polluter is, in a possibly long chain of participants, such as primary polluter, beneficiary and consumer (for whom hazardous activities are carried out (socially beneficial for society)).

⁸⁹ Volker Thiem, "Environmental Damage Funds" in OECD, ed, *Compensation for Pollution Damage* (Paris: OECD, 1981) at 149, 169.

Preferably, the risk community of potential injurers should finance the fund as opposed to the state.⁹⁰ The international oil tanker regime shares the costs of oil pollution from tankers between the shipowners and the oil industry. The first part of the compensation comes from the shipowner's liability and its financial security provider. Additional compensation comes from the IOPCF and SF, which are financed by the oil industry upon whose demand the oil is shipped.⁹¹ Thus, the international regime successfully integrates two major groups of contributors to the risk of oil pollution, who are financially responsible in different compensation tiers.

States are not ordinarily involved in the payment of compensation or contributions to the funds. As shown above, only if the Contracting State chooses, it will be financially responsible for paying contributions to the funds. Canada made that choice and assumes financial responsibility through payments by the SOPF to the IOPCF and SF.⁹² That means the shipping industry is paying its liabilities under the CLC, but the Canadian oil receiving industry is currently exempted from contributing towards the payment of accident costs. Thus, it appears that the Canadian regime distorts the PPP, cost internalisation and accident prevention incentives.

In addition, state financed compensation funds are criticised because they are based on taxes on the public at large rather than the responsible parties.⁹³ A state that finances a fund implicitly transfers responsibility to itself, which neither promotes prevention of damage nor realises the polluter-pays principle in the sense of an internalisation of costs.⁹⁴ Only in exceptional cases would be a state financed fund a viable option. For example, an appropriate circumstance may be where the group of injurers cannot be identified and significant financial burden would fall on the victims.

Levies to a compensation fund should differentiate and thus reflect the quantity and quality of the respective activity by the potential injurer.⁹⁵ For example, in the case of environmental pollution, incentives to reduce environmental harm can be achieved by connecting the financial contribution to the fund in proportion to the amount of the pollutant

⁹⁰ Hawke & Hargreaves, *supra* note 40 at 10.

⁹¹ The SF is financed by the oil cargo/ oil industry, but the shipowners through the P&I Clubs reimburse the SF 50% under the TOPIA agreement. For TOPIA see *supra* note 28.

⁹² Since 1989 the SOPF paid approximately CAD 54 million to the funds. SOPF AR 2013/14, *supra* note 75 at 7.

⁹³ Thiem, *supra* note 89 at 149.

⁹⁴ Thiem, *ibid* at 174.

⁹⁵ Thiem, *ibid* at 175.

generated or some proxy such as generating capacity.⁹⁶ Contributions to the IOPCF and SF are dependent on the amount of contributing oil. The contributions to the compensation funds reflect the amounts of oil received, or in other words, the contribution to the oil spill risk.⁹⁷

For the Fiscal Year 2013/14 the SOPF paid CAD 1,028,982.01 to the IOPCF and SF.⁹⁸ The SOPF closed the Fiscal Year (FY) 2014 with a balance of CAD 406,005,275.⁹⁹ The SOPF's only revenue in FY 2014 is interest and recoveries related to previously awarded settlements both totalling CAD 8,964,917.¹⁰⁰ The question here is whether the SOPF has ever received any money from the State since the levy to the SOPF was suspended in 1976. In 1976 the predecessor fund to the SOPF had a balance of CAD 34,866,459.88 collected from 65 contributors including oil companies, power generating authorities, pulp and paper manufacturers, chemical plants and other heavy industries.¹⁰¹ If the State made contributions to the SOPF during its existence it would have to be criticised because as laid out above, a state financed fund neither promotes prevention of damage nor realises the polluter-pays principle in the sense of an internalisation of costs. If the SOPF never received any State money and survived from its 1976 balance and subsequently gained interests then it is a sensible decision to not impose the levies to the SOPF. Generally it is not recommended for compensation funds to accumulate huge amount of money before accidents occur because the management and administration of large financial amounts is complex and costly. Currently, the SOPF is financially healthy, indicating that there might be no need for further payments into the SOPF by the Canadian oil receiving industry. A re-imposed levy to the SOPF would increase the income of the fund, but on the other hand the contributions to the IOPCF and SF are relatively low compared to the fund's balance. Of course, a catastrophic oil spill can occur at any time and thus more contributions to the international funds and the SOPF are required.

⁹⁶ Hawke & Hargreaves, *supra* note 40 at 12.

⁹⁷ In the first liability tier of the oil tanker pollution regimes, the liability rule and the shipowner's right to limit liability also consider the contribution to the risk. The limitation of liability is determined by the tanker's tonnage. The more tonnage the tanker is transporting the higher the risk of oil spilled in an accident.

⁹⁸ SOPF-2013/2014, *supra* note 75 at 7. From the Financial Year 1989/1990 until 2013/2014, the SOPF has paid in total CAD 53,898,708.97 to the IOPCF and SF.

⁹⁹ SOPF-2013/2014, *ibid* at 6.

¹⁰⁰ SOPF-2013/2014, *ibid* at 4.

¹⁰¹ SOPF-2013/2014, *ibid* at 1. The balance of the Maritime Pollution Claims Fund was transferred to the SOPF in 1989.

However, another concern with the suspended levies to the SOPF and its contributions to the international funds is that this system destroys any incentives for the oil receiving industry to contribute to prevent oil spill accidents.¹⁰² Prevention is best achieved through safety regulations and technical standards.¹⁰³ The SOPF's contributions on behalf of the oil industry eliminate the financial responsibility of possibly careless actions under the civil oil tanker pollution regime and thus distort the regime's indirect incentives to prevent accidents. Admittedly, it is a difficult task to provide incentives for prevention and at the same time to avoid accumulating huge amounts of money. A recommendation for the future could be to consider re-imposing the levy on the oil industry if the SOPF's balance depletes.

CONCLUSION

The evolution of the international oil spill liability and compensation regime was one of the most important reactions of the international community to the *Torrey Canyon* incident.¹⁰⁴ In comparing pre-1969 circumstances to today, scholars deem the international regime as successful. The total amounts available for the compensation of oil pollution victims increased from the 1971 FC with 60 million SDR to the 2003 SFP to 750 million SDR, a twelvefold increase.¹⁰⁵ The increasing number of states ratifying the conventions demonstrates that governments consider the liability and compensation regime effective.¹⁰⁶ In addition, the conventions have served as a model for other liability and compensation regimes, for example with respect to the carriage of hazardous and noxious substances by sea.¹⁰⁷

The tanker regime's main philosophy is to balance the financial

¹⁰² Preventative measures include for example ensuring to employ competent shipowners, masters and crews and to avoid using substandard ships. Jingjing Xu, "The Law and Economics of Pollution Damage arising from Carriage of Oil by Sea" (2009) 36:4 *Maritime Policy & Management* 309 at 314.

¹⁰³ For the discussion on liability versus regulations see reference in n 4.

¹⁰⁴ Other parallel actions taken by the international community resulted in the 1973 Convention on the Prevention of Pollution from Ships. M'Gonigle & Zacher, *supra* note 37 at 192.

¹⁰⁵ Ganten, *supra* note 86 at 313; Wu, *supra* note 29 at 109.

¹⁰⁶ Måns Jacobsson, "The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage" in Jürgen Basedow & Ulrich Magnus, eds, *Pollution of the Sea – Prevention and Compensation* (Berlin, Heidelberg: Springer-Verlag, 2007) 137 at 148.

¹⁰⁷ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 3 May 1996 (not in force); William O' Neil, "The International Compensation Regime from an IMO Perspective" in the International Oil Pollution Compensation Funds, *The IOPC Funds' 25 Years of Compensating Victims of Oil Pollution Incidents* (Kent, UK: Impact PR & Design Limited, 2003) 29 at 31; Jacobsson, *ibid* at 24.

burden equally or equitably between the shipping and oil industry.¹⁰⁸ This is achieved by assigning primary liability to the shipping industry (CLC) and levying fund contributions on the oil industry (FC, SFP).

Canada is a Contracting State to the 1992 CLC, 1992 FC and SFP. The design of the international regime promotes the PPP to a great extent because the two major groups of responsible parties are held (financially) liable. In theory, the regime provides a strong basis for the internalisation of accident costs. The international oil tanker liability and compensation regime can be described as a successful civil liability regime that is financed by shipowners, insurers and the oil receiving industry without relying on financial aid through the Contracting States. Despite the international regime's success in compensating oil pollution victims and sharing accident costs between the shipowners and the oil receiving industry, Canada opted to modify the regime. Canada's regime maintains the preventive incentives set through the liability of the shipowner under the 1992 CLC. The Canadian regime also increases the overall compensation capacity with a third compensation fund in addition to the international funds. But instead of keeping the financial responsibility of the oil receiving industry, Canada obligated the SOPF to make the contributions to the international funds. The obligation of the SOPF to pay the contributions and to not impose levies on the oil receiving industry distorts the PPP because the oil receiving industry must be considered as one of the major polluter groups. Thus, SOPF payments also distort the basis for internalisation of costs. However, when considering the current balance of the SOPF and the contributions the SOPF pays to the international funds it currently does not appear to be financially necessary to collect further money from the oil receiving industry. On the other hand, the disadvantage of exempting the oil receiving industry from paying contributions into the funds eliminates incentives to apply preventive measures and relieves them from the financial liability (PPP, cost internalisation).

Canada is looking into the option to increase maritime oil transport to gain access to new markets such as the Pacific Rim area. Increased oil transport might also increase the risks of oil tanker spills. Oil tanker spills in Canadian waters will be compensated by the shipowners and the SOPF. The

¹⁰⁸ Töpfer, *supra* note 29 at 38. This cost distribution between two groups of responsible parties is to be assessed positively in light of the PPP. Here, it has to be noted that the international oil pollution regime is not based on the PPP, because the PPP evolved only after the conventions were adopted. However, from today's perspective the international tanker oil pollution regime can serve as a good example of the PPP even if this was not envisaged in the beginning.

oil receiving industry is exempted from taking financial responsibility. Canada could easily modify its system if the SOPF is in financial distress and re-impose levies to the SOPF on the oil receiving industry. This modification would align Canada's regime with the standard design of the civil liability regime for oil tanker pollution and thus accomplish prevention, the PPP and cost internalisation to a greater extent.