Section I

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OFFSHORE OIL POLLUTION:
LAW AND ENFORCEMENT

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ABSTRACT

The Torrey Canyon (1967) and Santa Barbara (1969) occurrences dramatized the unique nature of offshore oil pollution risks and the lack of a definitive legal system for dealing effectively with prevention, cleanup, and compensation.

Although it is not the major part of the far more serious problem of marine pollution and is caused mainly by land-sourced activity, offshore oil pollution constitutes an increasingly important hazard because of the expanded, accelerating offshore search for alternate petroleum sources and unparalleled technological innovation.

As offshore petroleum activity is essentially a transplant of land-based activity to a marine environment, the law of the sea and certain traditional legal principles are in an evolutionary process of adaptation to new factual situations. Considerable progress has occurred during the last two decades, but law and enforcement at international and regional levels are still not effective, while national regimes in the context of increasing nationalization of the sea by coastal states are in danger of becoming chaotically inconsistent.

Two approaches hold realistic promise: first, industry's voluntary programs, which are impressive in scope and efficiency; secondly, joint government/industry consultation, cooperation, and action, which accentuates the strengths and minimizes the weaknesses of the only two parties capable of protecting and advancing the public interest and encourages more effective law and enforcement.

The central purpose of this study is to cover broadly in non-technical terms the salient aspects of law and enforcement as related to offshore oil pollution so as to achieve a practical overall perspective. The subject has become so increasingly complicated by interrelated factors that governmental and petroleum industry personnel are in danger of being submerged in an ever-expanding volume of detail and piecemeal knowledge.

General

The worldwide energy supply situation, coupled with an unprecedented degree of direct governmental intervention in virtually all aspects of the international petroleum industry, has exploded in the context of the most unstable economic and monetary conditions the world has known since World War II. One of the most evident by-products of this unique situation, which will affect all economic, social, and political institutions, is the burgeoning offshore search for oil and gas, an extraordinary development destined to continue with unabated intensity during at least the next two decades as the industrialized nations struggle to preserve their economic and political status by developing reliable alternate sources of petroleum as rapidly as possible.

Marine pollution

The magnitude of this gigantic offshore effort underscores the gravity of another great challenge of our times: marine pollution, which many regard as our most serious environmental problem, noting that the marine environment is the heart of our global environment since oceans cover some 70% of our planet and perform a critical role in their influence on climatic conditions, the creating of oxygen, and the supply of protein.

Offshore oil pollution. The increasing hazard to the marine environment posed by the accelerating worldwide offshore petroleum search is the inevitable result of widespread activity in the context of galloping technology: more and bigger tankers, superports, offshore storage of crude oil, submarine pipelines, and an incredible variety of sea-based operations, including "wet" Christmas trees.

Offshore oil production by 1980 will equal or exceed 1970's total onshore and offshore free-world production of more than 40 million barrels per day, and deep water "pay" may contain more oil than has been discovered to date both on land and offshore.

The capability for drilling in water depths of 10,000 feet or more already exists; and the technology is well on its way for truly deep-sea production and transportation.

Oil pollution of the marine environment can be caused by atmospheric fallout; leakage from vessels, whether afloat or not; marine collisions (vessel/vessel, vessel/fixed natural object, vessel/fixed platforms or other offshore oil facilities); bilge pumping, tank cleaning, debollarding of vessels; loading and unloading of tankers; rupture of submarine pipelines and storage facilities; operational mishaps in offshore drilling and production including well blowouts; leakage from subsea strata; and drainage from onshore facilities (for example, from rivers or from dumping of waste oil into sewers).

Offshore oil pollution in proper perspective. Offshore oil pollution is by no means the major part of the deadly serious marine pollution problem caused by more and more people dumping more and more waste and noxious substances into the oceans. The major source of offshore oil pollution is land based. The British government has estimated that about 80% of ocean pollution is land based. Others estimate that 90% of the 2 to 5 million metric tons of oil entering the oceans each year is also land sourced.

Another popular misconception needs correcting: it is wrong to accuse the international petroleum industry of disregard for humanity, overconcern for short-range economic benefits, incompetence, or inaction regarding offshore oil pollution by generalizing out of all proper proportion from isolated, well-publicized specific occurrences. Impartial observers recognize that petroleum companies of every nationality have been, and remain, vulnerable to unfair attack by extremists, political and otherwise, because of the structure of the industry. Today's international petroleum industry is exceedingly diverse, with a wide range of participants, activities, actions, attitudes, and interests. It is as wrong to condemn the industry for the isolated actions of a relatively few companies as it would be to condemn all governments for the actions (or inaction) of a few governmental units.

What is today's law and enforcement picture regarding oil pollution of the marine environment? Have law and enforcement developed in realistic tandem with offshore petroleum activities?
Law of the sea—historical perspective

We are directly concerned with oceans and, therefore, the law of the sea. The law of the sea has always been influenced, if not in fact determined by, economic considerations. As the economic value of the seabed was not of major importance until the mid-1950s, regulating the ocean floor was not a matter of active concern. However, it is now widely recognized that the treasure of the seabed is enormous and available. Arab economic and political policies have further emphasized the economic attractiveness of this relatively new source of wealth, which has created an active, sometimes militant, desire to exercise sovereign rights over the bottom of the sea. This has led to efforts by coastal states to exercise increased control over activities in superjacent waters, and at least 118 of the world’s 145 nations possess a coast line.

Changed economic (and other) circumstances have brought under increasingly critical examination the so-called international law of the sea.

Roman law. Roman law asserted that the sea was free to all and belonged to human society as a whole, since the vast expanses of the ocean could not become the possession of anyone. But prior to the end of the 13th century, Venice asserted supremacy over the entire Adriatic, and other Mediterranean and Scandinavian countries followed similar policies [1].

Mare Liberum versus Mare Clausum. For the purpose of establishing the right of the Dutch to trade with the Indies, contrary to the papal bull of 1493 giving the Portuguese dominion over the area, a young jurist, Hugo Grotius, was hired by the Dutch East India Company and wrote Mare Liberum which asserted the doctrine of freedom of the seas: since the oceans could not be possessed or occupied, they were common to all. The British wanted to control the seas surrounding them and employed a legal scholar, John Selden, whose book Mare Clausum sought in 1635 to establish the king’s right to exercise sovereign control over the British seas.

Grotius’s views became more accepted than those of Selden, but in reality a compromise evolved. Although freedom of the high seas was accepted (effective international law depends on general acceptability), certain areas of the sea adjacent to coastal states which could be controlled militarily from shore came to be recognized as subject to the general sovereignty of those states. But neither the dimensions of these adjacent sea areas (the territorial sea) nor the exact scope of coastal state jurisdiction was ever really settled.

In this context, numerous efforts have been made on an international, regional, and national scale to arrive at a reasonably definite legal framework for handling the increasing conflicts and uncertainties of jurisdiction in ocean waters.

International law

Traditional international case law still has not dealt in any significant, specific manner with offshore oil pollution; nor is there any system for compulsory adjudication. Substantial uncertainty and vagueness exist as to guiding legal principles, the trial forum, trial procedures, and enforcement of awards or judgments rendered.

A state has exclusive control over its territory and what takes place there, despite hopeful pronouncements that “under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the property or persons therein . . . .” [2].

Apart from myriad legal difficulties, the outlines of increasing global conflict between the developing countries’ much needed economic expansion and the developed countries’ relatively recent concern for environmental protection are plain.

The sudden clamor for international standards of pollution control is viewed with suspicion by most planners in the developing world. Ever present is the thought that this sudden emphasis on pollution control is simply a device to impose unfair costs on infant industries in the developing world that manufacturers in the developed world never had to face at a comparable stage of development . . . .” [3].

The clear consensus of informed opinion is that international environmental conflicts and claims can only be dealt with effectively by an agreed international regime.

International regime—conference and conventions. Many important international governmental conferences involving, in part, offshore oil pollution have been held since the late 1950s. A detailed explanation of these is outside the scope of this paper; but, in general, the core of the problem remains the same: the nature and extent of sovereignty to be exercised by coastal states. And what has been accomplished by international agreement during the past 50 years does not generate optimism. No effective international regime exists; and the practical perspective is that one can only come about by a very slow evolutionary process.

United Nations—IMCO. After the League of Nations ceased to exist, the United Nations became: the logical vehicle for dealing with the expanding international conflict over a legal regime to cover exploration and development of ocean-bed natural resources and other law of the sea aspects.

One of the U.N.’s many specialized agencies interested in different portions of the overall maritime problem is the Inter-governmental Maritime Consultative Organization (IMCO).1

Geneva conventions—1958 and 1960. An international conference of plenipotentiaries was convened in Geneva in 1958. Four separate conventions were agreed to: Territorial Sea and Contiguous Zone; High Seas; Fishing and Conservation of the Living Resources of the High Seas; and the Continental Shelf.

The Convention on the Continental Shelf established that, every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoils, taking account of existing treaty provisions on the subject.

The Convention on the Territorial Sea and Contiguous Zone has been construed to extend the jurisdiction (although qualified) of littoral states beyond the limits of their territorial seas with respect to “customs, fiscal, immigration or sanitary regulations within its territory or territorial sea.” It has been argued that the reference to “sanitary regulations” could extend to oil pollution, but the convention provided no effective enforcement procedures.

The 1960 Geneva Conference on the Law of the Sea, attended by 88 states, failed to reach agreement on any of the main issues involved.

International Convention on Civil Liability for Oil Pollution Casualties, Brussels, 1969, and supplemental convention, 1971. The 1969 convention was designed to compensate persons for loss suffered through oil pollution damage incurred within the territory or the territorial sea of a contracting state and for the preventive measures required to be undertaken to prevent or minimize such damage. A modified form of strict liability (as discussed infra under 1IMCO accepted in 1959 the oil pollution functions voted to the United Nations at the 1954 London conference. During its early formative years, IMCO was relatively inactive in the field of oil pollution; but it has since performed an increasingly active, important role in the area of shipping. The unfortunate reality, however, is that virtually none of the international conventions it has generated has ever officially come into force, due to insufficient ratifications. This, in turn, has meant less than adequate legal coverage of the areas intended to be dealt with in the various conventions. Further, it has been pointed out by some that none of the conventions provides meaningful incentives for shipowners to undertake prevention measures (other than that motivated by a desire to avoid paying compensation for oil spills).

By Resolution A. 297 (VIII) adopted on November 23, 1973, IMCO, in recognition of the increasing extent and importance of its activities relative to the prevention of pollution by oil from ships operating in the marine environment, established a Marine Environment Protection Committee as a permanent subsidiary body to assist in its consultations with other bodies within the United Nations system and with other international organizations and expert agencies in the field of marine pollution.
CRISTAL) was imposed, with liability limited in any one incident to a maximum of $134 per adjusted ton of the ship involved and a ceiling of $14 million.

This convention has not received the requisite number of ratifications to bring it into force, nor has the 1971 supplemental convention which was intended to supplement the 1969 convention (while forcing cargo owners to share liability with shippers) by establishing a maximum total amount of compensation payable under both conventions to $30 million per incident or resulting from a natural phenomenon of an exceptional, inevitable, and irresistible character.

Third U.N. Conference on the Law of the Sea, 1974. The Cacas conference, with nearly 150 participating governments, failed to resolve any important issues, but did agree to reconvene in Geneva in March, 1975. It remains to be seen, given the political realities of the situation and the nearly 90 subhead agenda topics, whether the U.N. strategy of seeking an over-all agreement on the law of the sea, rather than piecemeal understandings, was sound.

There was general agreement to extend territorial waters from 3 miles to 12 (but not as to the consequent effect on international straits) and on the concept of a 200 mile economic zone (but not as to the extent of sovereignty to be exercised over the zone). Some coastal states sought the broad right to enforce pollution regulations within the economic zone. The maritime powers generally opposed this, asserting that it would lead to chaotic results with different states imposing different regulations for offshore operations involving the possibility of oil pollution.

Disagreements concerning an international regime to control exploration and exploitation of seabed resources beyond the national economic zones produced clear confrontations; and the taproot issue of policing and enforceability was barely touched.

Regional regimes. The European countries have been particularly active in this area. There are conventions regarding prevention of water pollution applicable to inland waters (such as, Lakes Leman, Como, Constance), rivers (Rhine, Saar, Mosel), and border-crossing rivers between Belgium, France, and Luxembourg and between Germany and the Netherlands, as well as special sea areas, such as the Arctic Ocean, the Baltic Sea, the North Sea, North Atlantic, and the Mediterranean. These deal with discharges of oil and wastes from land-based sources, dumping, and pollution by offshore operations.

The conventions suggest the need for harmonization of national environmental legislation. While the older conventions focus on general recommendations to reduce pollution or abate spills, the newer conventions envisage prosecution of polluters and increased severity of penalties to encourage serious preventive efforts.

Among the noteworthy examples of regional regimes are:

(a) the 1969 Bonn Agreement (West German Republic, Belgium, France, the Netherlands, Norway, Sweden, and the U.K.) which promotes cooperative reaction to marine pollution in the Channel, the North Sea, and the Skagerrak by designating "responsibility zones" within which the designated country will estimate the importance and movement of oil spills (whatever the origin of the occurrence), alert the other signatories, and organize, if necessary with their help, appropriate preventive measures;

(b) the Oslo Convention of 1972 regulating discharges into the Arctic Ocean and the North Atlantic (ratified by, among others, West Germany, Belgium, Spain, and France) "recognizing that concerted action by Government at national, regional, and global levels is essential to prevent and combat marine pollution";

(c) the 1974 Paris Convention (ratified by Holland, Spain, France, and West Germany), which notes "that international action to control the pollution of the sea from land-based sources can and should be taken without delay, as part of progressive and coherent measures to protect the marine environment";

(d) the 1974 Helsinki Convention (Denmark, Finland, the German Democratic Republic (East Germany), the Federal Republic of Germany (West Germany), Poland, Sweden, and the U.S.S.R.), intended to protect the Baltic Sea area from offshore oil pollution resulting from exploration or exploitation of the seabed and its subsoil and to ensure adequate equipment to take immediate action for pollution abatement; and

(e) the 1974 Nordic Environmental Protection Convention (Denmark, Finland, Norway, and Sweden), designed to deal on a coordinated regional basis with oil discharges.

Joint Government/Industry Regional Initiatives. Regional initiatives are occurring with increasing frequency in the context (one way or another) of joint government/industry action. Examples of this approach in Canada, Europe, the Persian Gulf, and the United States are supported in a substantial manner with trained personnel, specialized materials and equipment, telecommunication systems, helicopters, and elaborate contingency plans.

A plan of this sort (Gulf Area Oil Companies Mutual Aid Organization) has existed since January 1973 among the operating companies in the Persian Gulf, with the aid of the governments in the area. Another example is the North Sea Operators Clean Seas Committee, which contemplates membership of offshore North Sea operators, grouped into local committees in Denmark, France, the Netherlands, Norway, Sweden, the U.K., and Western Germany to support the development of antipollution methods on a joint basis and to keep permanent preventive means at locations near exposed zones around the North Sea.

National regimes—general

The principal disadvantages of national regimes are (a) the usual defects which stem from a fragmented approach to an integrated problem, (b) the uncertainty and inconsistency of scope and application of different rules and regulations, and (c) the fact that national regimes often encourage the concurrent, inconsistent exercise of jurisdiction by local political units or agencies.

Unilateral national declarations. The central concept in the law of the sea for 300 years or so has been freedom of the seas, a term intended to mean [4]:

that, as to the bulk of the ocean, each nation has been free to do what it pleased in an effort to enlarge its share of the ocean’s benefits, so long as it did not unreasonably diminish the similar freedom of others or inflict legal injury upon them. What constitutes the criteria of unreasonableness or injury has been only vaguely defined in the law and practice of nations, and . . . States have been limited fundamentally only by their technological capacities and their own perceptions of self-interest.

There has always been, in actual practice, a narrow strip of adjacent ocean over which each coastal state effectively exercised control simply because it could. The matter of coastal state control became a matter of acute concern beginning with the unilateral declaration known as the 1945 Truman Proclamation, which dealt with U.S. retention of “jurisdiction and control” rights over natural resources of the seabed and subsoil of the continental shelf.

Thereafter, Chile, Ecuador, and Peru issued unilateral proclamations purporting to extend almost complete territorial sovereignty over adjacent waters some 200 miles in breadth. In fact, just since 1967 there have been 50 or more claims of separate extension of national jurisdiction in some form or other to a seaward distance of 12 miles and about 30 such claims to distances beyond the 12 mile limit out to 200 miles.

One of the most innovative unilateral national actions is Canada’s 1970 Arctic Waters Pollution Prevention Act [5,6], in which Canada asserted a broad right to prevent and control oil pollution in arctic waters extending 100 miles seaward of the Canadian coast. Virtual absolute liability is imposed on cargo owners and shippers.

The point of most direct concern is that the adjacent water area covered by the increasing nationalization of the sea by coastal states is precisely the area where most offshore oil pollution occurs and where the greatest threat exists.

Comparative analysis of different national legal regimes.

As M. Bernard-Andre Dubais has noted [7,] “In the absence of a necessary harmonization in private law, a comparative study of the two main legal systems—‘Civil’ and ‘Common’ Law—shows just...
how much the prospective victims have to rely on the imagination of the courts to receive fair compensation... (and that the) basis of responsibility varies depending on whether the question is (a) direct pollution damage or (b) preventive measures.

(a) Direct pollution damage. With direct pollution damage

[7,]

the logical Civil Law criteria are more promising for the victim than the traditionally impredictable Common Law system... However, we are led to the conclusion that, in both cases, the contemporary jurisprudence is not really adapted to our problem. An evolution of ideas is doubtless necessary. The first steps in such an evolution are to be found in 'doctrine.'

France. Contrary to general impression, offshore drilling cannot be compared to the catastrophe-danger that is evident in... the transport of explosives... It is not possible, therefore, to apply absolute responsibility (without regard to fault or negligence)... It must be conceded, however, that offshore drilling presents a certain danger which allows it to be classed, from a legal point of view, with other activities said to be dangerous.

In the case of pollution damage affecting goods or private interests... (under) the French legal system: 'One is responsible not only for the damage that one causes by one's own conduct, but also that which results from things which one has under one's own care.' Consequently, the victim has only to show the causal link between the thing (occurrence) and the damage [7,].

U.K. The Continental Shelf (Jurisdiction) Order, 1968, regulates conflicts among the three different systems of law—English, Scottish, and that of Northern Ireland—in extending, together with the U.K. Continental Shelf Act, 1964, the applicable rules of civil and penal law to U.K. offshore petroleum operations. The continental shelf has been divided into zones, and the legal system applicable in each zone has been specified.

In the case of damage by oil pollution, four legal doctrines on which to base recovery may be applicable, dependent on the specific facts and the forum involved: negligence, nuisance, the Rylands v. Fletcher rule, and breach of statutory duty.

The negligence theory of recovery requires proof of causation (relatively easy to prove in most cases of major oil pollution) and a failure to exercise due care in the context of an obligation to have foreseen the results of the act or a failure to act which caused the damage. The damage must have been caused by the negligent act without the intervention of any independent act breaking the chain of causation. Damage which is too "remote" is not recoverable; and the recovery of pecuniary loss presents problems. Operators are not vicariously liable for the negligent acts or omissions of independent contractors.

A private nuisance involves unreasonable interference with another's use of the land (Polluting a person's beach), and a public nuisance is something which adversely affects the public at large (oil discharged in territorial waters), with private persons having a recovery right if "special damage" is incurred (boats). But liability for either private or public nuisance requires an uncertain quantum of "fault." There is no vicarious liability of the operator for the acts of its independent contractors. U.K. and U.S. jurisprudence are not consistent in their respective standards of proof required in litigation based on the nuisance theory. The Rylands v. Fletcher rule is applicable where a person brings something on his land which is likely to cause damage if it escapes, when the object brought on is not naturally adapted to the land (that is, involves a nonnatural user of the land). Under these circumstances, there is a type of responsibility without fault for any damages caused by the escape of the object, even if the object itself is innocuous. However, the Rylands v. Fletcher type of "strict" liability still leaves open technical legal questions of remoteness of damage and is of questionable applicability to offshore operations (as distinguished, for example, from a pipeline break onshore).

Permits for exploration and development in the U.K. North Sea are issued under statutory regulations and the Continental Shelf Act, 1964. Breaches of permit terms can give rise to obligations to the Government but, apart from specific defenses established by the statutes (all reasonable measures were taken to prevent or stop a discharge of oil), there is substantial uncertainty as to whether and when breach of a statutory duty creates a private cause of action.

United States—private remedies. Liability for pollution in the U.S. may derive from state or federal law, or from the general maritime law and the liability exposure of offshore operators to private persons, since oil pollution is a maritime tort. Under the Extension of Admiralty Jurisdiction Act of 1948, damage to shorefront property or persons caused by a vessel on navigable water comes within the admiralty jurisdiction of the U.S., as a consequence of which claimants have access to a variety of forums, federal and state, with the basis and scope of liability depending often on an overlapping blend of substantive law derived from general maritime law and state law based on common law developments. Direct pollution damage claims in the U.S., apart from statutory liabilities, involve generally the same legal theories which originated in England (negligence, trespass, and nuisance). American jurisprudence has also developed an empirical doctrine of strict or absolute liability (sometimes called "no fault") in the context of activities judicially or legislatively determined to be ultrahazardous (well blowouts, for example). In general, recovery is based on simple proof of the occurrence causing the damage, and frequently, punitive damages are also recoverable.

(b) Preventive measures. Direct oil pollution damage usually occurs within the jurisdiction of a nation-state, whereas offshore pollution cleanup and other preventive measures will more likely occur on the high seas beyond territorial waters. In the former case, there is no problem finding a court with jurisdiction (if nothing else, the oil company's offshore exploration rights stem from contracts linking it to the grantor country); but in the latter case, what legal recourse is there when the accident occurs on the high seas or in the territorial waters of a nation other than, or in addition to, the country threatened with substantial direct pollution damages? There are no international conventions which allow a country to extend its absolute jurisdiction over all of the sea adjacent to it. Determination of forum and applicable law present formidable problems but are not only obstacles as far as possible private remedies are concerned. On what basis can the person who has taken preventive measures to limit the effects of an oil spill at sea oblige the pertinent operator to reimburse costs incurred?

As M. Dubais sees it [7,].

The clarity of the answer is as pronounced in Civil Law as it is confusing in Common Law. In those countries with a legal tradition coming from the codified Roman Law, the solution would seem to be found in the idea of negotiorum gestio ([gestion d'affaires]). As illustrated under French law, the intervening third person can take any initiative which seems necessary, being held only to the obligation that he act as a responsible man, which could include employing the services of specialized companies to carry out oil spill cleanup services and thereafter receive reimbursement from the operator. The intervention must, however, be "spontaneous and disinterested" (in the sense that only reimbursement of costs can be recovered).

Japan, Latin American, Continental Europe. The French rules in this regard appear to be followed generally in Japan and Latin America, as well as on Continental Europe.

Adequacy of legal systems.

Apart from specific statutory provisions, the pragmatic conclusion is substantial uncertainty as to the scope of recovery under all legal systems, including the English and American systems. The application of classical legal concepts to factual situations not envisaged at the time those concepts came into being remains problematical and unclear. Legal theory and practice have not kept pace with events.
the 1945 Truman Proclamation sparked the worldwide trend towards coastal states’ nationalization of immense sea areas (perhaps 20% of total ocean area), so have U.S. oil pollution prevention and control measures served as the precedent for action by other nations, although some have declined to adopt the more extreme liability features of the U.S. system.

The Federal Refuse Act of 1899 (River and Harbor Act) prohibits the discharge of refuse into the navigable waters of the U.S. The act acquired considerable importance in the area of oil pollution, since negligence is not a prerequisite to liability.

However, the 1914 Oil Pollution Act was the first broad federal legislation enacted specifically to regulate the discharge of oil into the "coastal navigable waters of the United States." Although violations involve a fine up to $2,500 or imprisonment up to one year, or both, as well as suspension or revocation of ship officers’ licenses, exceptions were allowed for certain emergency situations and "unavoidable" accidents.

The Oil Pollution Act of 1961 was passed to implement a resolution adopted at the 1954 London conference which recommended the establishment of national committees to study and regulate oil pollution but did not modify the 1924 act.

The Pollution of the Sea by Oil Act was adopted in 1966 to implement that 1954 London conference. It extended coverage to include discharge upon navigable waters other than coastal as well as shorelines, and for the first time Congress addressed the problem of controlling the oil pollutant once it had been discharged. Although strict removal and cost obligations were imposed, the act was eviscerated by the Congressional definition of "discharge" as "any grossly negligent or willful spilling...of oil..." which imposed an impossible proof requirement.

The next federal enactment was the Federal Water Pollution Control Act of 1948, dealing primarily with pollution of navigable waterways within the U.S. The Water Quality Improvement Act (WQIA) of 1970 amended the 1948 act and repealed the Oil Pollution Act of 1924. It extended to discharges of oil by a vessel "into or upon the navigable waters of the U.S., adjoining shorelines or into or upon waters of the contiguous zone in harmful quantities" and was concerned with federal government cleanup costs, not with property and commercial or consequential injury. A civil penalty of up to $10,000 was provided, and in the event of failure to immediately notify the appropriate government agency of a discharge, a criminal fine or imprisonment could be imposed. In the event of "willful negligence or willful misconduct with intent to defraud or gratify the curiosity of the owner or operator" was required to assume the entire cleanup cost. Otherwise, the government would be entitled to recover cleanup costs up to the lesser of $100 per gross ton or $14 million per year (for pollution resulting from offshore drilling operations), except where an owner or operator can prove that a discharge was caused solely by (a) an Act of God, (b) an act of war, (c) negligence on the part of the U.S. Government, or (d) an act of omission of a third party (whether negligent or not) . . . or any combination of the foregoing . . . .

The liability limitation had the effect of superseding the 1851 Limitation of Liability Act allowing the owner to limit his liability for property damage to the value of the vessel and its freight after the damage caused.

The federal government’s control over oil pollution was more effectively established by the Federal Water Pollution Control Act, as amended in 1972 (FWPCA), the act’s objective being to deal with oil pollution (and "hazardous" substances) from vessels and fixed structures.

The limitations of liability (except in cases of willful negligence or misconduct) are, in the case of vessels, $100 per gross ton or $14 million, whichever is less; in the case of offshore facilities (meaning a fixed structure, $50 million or the actual cleanup cost, whichever is less; and, in the case of onshore facilities, graduated amounts tied to barrels in aboveground or underground storage up to $8 million. Liability is not absolute. If the owner or operator can prove that the discharge of oil was occasioned by an Act of God, an act of war, negligence on the part of the U.S. Government, or an act of omission of a third party (whether negligent or not), liability can be avoided.

A violation of the duty imposed on the person in charge of the vessel or offshore facility to notify the government of any leakage involves a fine of $10,000 or one year in prison or both and a possible civil penalty of $5,000.

Specific petroleum development regulations. In 1953 Congress enacted the Outer Continental Shelf Lands Act, which extended federal laws to the outer continental shelf (OCS), vested jurisdiction in the U.S. District Court of the nearest adjacent state, and provided that the civil and criminal laws (including environmental laws) of each adjacent state as of August 7, 1953, were declared to be the law of the United States for that portion of the subsoil or seabed of the OCS which would be within the area of the state if the boundaries were extended seaward to the outer margins of the OCS. Accordingly [8],
in each instance where a question of liability exists in the OCS, it is necessary to review state and federal law to determine if there is a conflict . . . and review the Regulations adopted by the Secretary of the Interior pursuant to the OCS Act . . . .

Because of the Santa Barbara occurrence, a well blowout in the Gulf of Mexico in 1970, and other spills in the state of Washington occurring during tanker loadings at refineries, statutes were changed or enacted and regulations covering OCS leases were amended, all designed to assure the maximum protection of the environment through the prevention of oil pollution of U.S. waters. The OCS lessee is now flatly prohibited from polluting land or water; and if operations carried out by or on behalf of the lessee result in pollution of the sea, the control and total removal of the pollutant would be at the expense of the lessee. If the lessee fails to control and remove the pollutant, appropriate governmental agencies have the right to do so at the lessee’s cost. The liability of the lessee to third parties is governed by applicable state law.

Concurrently with adoption of the regulations relating to liability, certain OCS orders were modified to require government approval of the design, features, and plans for installation of platforms, fixed structures, artificial islands, and oil and gas pipelines, all for the purpose of insuring adequate safety and pollution devices. Each order effectively provides the penalty of lease cancellation for lack of compliance.

Further changes in the Department of Interior lease form for submerged lands included a broad requirement that the lessee indemnify and hold the U.S. harmless against all claims resulting from any operations on the leased area conducted by or on behalf of the lessee, and the limited exceptions do not extend to general causation beyond the lessee’s control.

In addition to the numerous burdens, potential liabilities, and penalties applicable to an offshore operator under existing statutes and regulations, there are always the threats of citizens’ suits and class actions.

The strict-liability attitude of the U.S. Congress in matters affecting the environment is further illustrated by the Trans Alaska Pipeline Authorization Act, which provides that except where damages result from acts of war, negligence of the U.S. or the damaged party, the holder of a government right-of-way will be liable to all damaged parties, public or private, without regard to fault, up to $50 million for any one incident. The holder of the right-of-way or permit is also required to provide emergency subsistence and other aid to any person pending filing and determination of a claim. As in all recently enacted environmental statutes, any area within or without the right-of-way is polluted by any activities of the right-of-way holder and the pollution threatens to damage aquatic life, wildlife, or other public or private property, the right-of-way holder is responsible for the control and total removal of the pollutant, failing which the government agency may do so and submit a cost bill for reimbursement.

A unique feature of the Trans Alaska Pipeline Authorization Act was the creation of a $100 million Trans Alaska Pipeline liability fund for the purpose of cleaning up oil spills and satisfying damages sustained by any person or entity, public or private, including residents of Canada, as a result of oil discharges from vessels
carrying oil between the port of Valdez and another port in the United States. Except for acts of war or negligence of the U.S. or the claimant, strict liability is imposed for all claims arising out of any one incident up to $100 million. The owner or operator of a vessel that is transporting North Slope oil and which discharges oil will be liable for the first $14 million of such claims awarded and the liability fund then becomes available for payment of claims. The owner of oil loaded on a vessel must pay 5¢ per barrel into the liability fund.

The statute also provides that the liability sections do not preempt the right of strict liability or preclude any state from imposing additional requirements.

The DOJ contends that the liability sections do not preempt the right of strict liability under state law. The U.S. Court of Appeals for the Ninth Circuit has held that Congress did not preempt the state oil pollution law, so that numerous pollution claims can be brought under state law. The U.S. Supreme Court has held that Congress did not preempt the offshore oil pollution field, so that numerous pollution claims can be brought under state law. The U.S. Supreme Court has held that Congress did not preempt the offshore oil pollution field, so that numerous pollution claims can be brought under state law. The U.S. Supreme Court has held that Congress did not preempt the offshore oil pollution field, so that numerous pollution claims can be brought under state law.

Many states have passed laws (e.g., the Florida Oil Spill Prevention and Control Act as amended) covering the same subject matter as the FWPCA, and some state enactments are more stringent than the federal legislation. Most state laws establish no limitation of liability, and the spill is liable for the full cost of cleanup, restoring riverbanks and beaches, and other similar items of damage. Also, noting the $35 million revolving fund established by the FWPCA to be used to pay for cleanup costs (fines and penalties are paid into the fund), at least six states have established similar funds.

The clear state trend is imposition of absolute liability for all damages incurred by the state as a result of an oil spill and the establishment of compulsory funds to defray cleanup and related expenses incurred. Further extension of the absolute liability (no fault) concept to the area of satisfaction of private damage claims is expected.

Industry actions

Some commentators argue that the petroleum industry has been reluctant to accept formalized legal regulations. This alleged industry attitude stems from a genuine distrust of the technical capabilities and enforcement procedures involved in rigid, often politically oriented, governmental units. On the other hand, although sometimes influenced governmental bodies to a greater degree than is publicly acknowledged, industry has a consistently impressive record of voluntary action in cooperating jointly with responsible governmental bodies.

The unsatisfactory status of legal rights, obligations, and remedies concerning offshore oil pollution has encouraged joint industry efforts of major scale. The most important of these, apart from cooperative prevention and cleanup programs in the Gulf of Mexico, various other regions of the U.S., Canada, Europe, the North Sea, and the Persian Gulf, are:

(a) TOVALOP—Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution;
(b) CRISTAL—Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution;
(c) OPOL—Offshore Pollution Liability Agreement;
(d) O.I.L.—Oil Insurance Limited.

(a) TOVALOP. TOVALOP came into effect in 1969 and includes virtually all tanker owners. The preamble of the voluntary agreement states, the Parties...are Tanker Owners whose vessels are engaged in the transportation of Oil in bulk by sea, and who recognize that Coast Lines may on occasion sustain Damage by Pollution as a result of Oil discharged when marine casualties occur. They are furthermore aware of the fact that traditional maritime laws and practice do not always provide an adequate means for reimbursing Governments which incur expenditures to avoid or mitigate such damage, as well as Tanker Owners who, on their own initiative, incur such expenditures. They recognize also that traditional legal regimes do not encourage joint measures by Governments and Tanker Owners against such damage.

TOVALOP obligates the tanker owner involved in a negligent discharge of oil causing or threatening damage by pollution to coastlines to reimburse the government concerned for removal costs up to a maximum of $100 per gross registered ton of the vessel involved or $10 million, whichever is less. There are provisions designed to encourage tanker owners to take prompt action to avoid or mitigate pollution damage. Negligence of the tanker is presumed unless the owner proves otherwise.

TOVALOP does not establish no-fault liability or provide reimbursement for prevention or cleanup costs incurred by private parties nor apply to consequential or ecological damage. It does, however, provide remedies and recoveries not readily available under present legal regimes.

(b) CRISTAL. CRISTAL, a voluntary compensation fund, became effective in 1971 when oil companies receiving in excess of 70% of the world's crude and fuel oil became parties. The amount of compensation available per incident for reimbursement of tanker cleanup costs is $30 million less $125 per gross registered ton of the tanker or $10 million, whichever is the lesser. The ship must be a participating tanker in TOVALOP and carrying oil in bulk as cargo at the time of the incident.

CRISTAL was intended to supplement compensation for cleanup costs available under TOVALOP and to compensate others who sustain pollution damage from an oil spill who otherwise might not receive adequate (or any) compensation. CRISTAL does not provide no-fault recovery. Compensation for cleanup costs and pollution damage is conditioned on, among other things, the proviso that the owners of the ship would have been liable under the 1969 Brussels Civil Liability Convention (had it been in effect), which establishes liability unless the carrier-owner can prove that the pollution damage results from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable, and irresistible character or was wholly caused by an act or omission done with intent to cause damage to a third party or by the negligence or other wrongful act of any government or other authority responsible for the maintenance of navigational aids. If the owner can prove the pollution damage resulted wholly or partially from an act or omission occurring with intent to cause damage by the person who suffered the pollution damage or from the negligence of that person, the shipowner may be wholly or partially exonerated from liability.

Neither the 1969 convention nor the 1971 supplemental convention has come into force. There is, therefore, no international legal structure for compensating cleanup costs or damages resulting from oil pollution other than the private arrangements of tanker and oil interests incorporated in TOVALOP, CRISTAL, and OPOL.

(c) OPOL. Certain North Sea operators, in consultation with the U.K. Department of Trade and Industry, voluntarily entered into OPOL on August 4, 1974, thus establishing the world's first voluntary arrangement for compensating and reimbursing (1) any person sustaining pollution damage and (2) any state taking "remedial measures" as the result of a discharge of oil from any "offshore facility" located within the jurisdictional waters of the U.K. other than a tanker vessel used for transportation.

Reimbursement for remedial measures and compensation for pollution damages cannot exceed $16 million per incident less the costs of any remedial measures taken by the Operator of the offshore facility involved. Compensation is conditioned on the same provisions established in CRISTAL.

(d) O.I.L. The fundamentals of the offshore oil pollution problem are: (1) prevention of oil pollution and (2) compensation for prevention costs and damages. The legal trend towards imposing strict or absolute liability on shipowners and offshore operators is the result of first, the inadequacy of existing regimes to deal with the effects and hazards of technological developments, and second, the belief that imposition of onerous compensation obligations...
largely unrelated to concepts of fault or negligence will encourage prevention of oil spills.

What is the role of insurance?

The bedrock function of insurance is to lift the risk of loss from the insured and spread it over many entities. As the first U.K. legislation put it in 1601:

...by means of which policies of assurance it cometh to pass, on loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than upon heavier few, and rather upon them that adventure more than those that do. ...The efficient performance of this function protects capital and encourages maximum productivity.

The classic role of insurance in the capital intensive petroleum industry has been obvious for years. What is new, however, is that offshore risks have become enormous potential operating costs, and reasonably available insurance protection for certain risks consequently ceased to exist.

Apart from the learning curve which accompanies any new technology, unit values and the concentration of unit values in offshore petroleum activities have increased tremendously. These factors are interacting in a syndrome of severe financial stress arising from monetary instability, floating exchange rates, inflation, rising costs and the sheer magnitude of petroleum-related investment.

Has any new offshore petroleum insurance technology evolved to keep pace with offshore developments? In 1971 the need to provide adequate insurance protection and assure the ready availability of funds for reasonable compensation purposes led to the organization of O.I.L., a Bermuda-based mutual insurance company, now owned on a multinational basis (no corporate group has as much as a 10% participation interest) by American, Belgian, British, Canadian, Dutch, French, and Italian interests having gross assets in excess of $70 billion.

O.I.L. was specifically structured to serve the expanding offshore development needs of the international petroleum industry on an efficient cost basis and to provide uniform, all-risk, package coverage of certain catastrophic risks—worldwide, onshore, and offshore—including property loss or damage, well control, removal of debris, and pollution liability.

With the advent of OPOL, O.I.L. reacted by enlarging coverage so as to furnish additional insurance protection in the context of the added financial risks thereby assumed by its policyholders operating in the U.K. North Sea.

Overall perspective

The major threat to the world’s marine environment does not come from the quantities of oil entering the seas, but rather because, in an era of increasing industrialization, expanding populations are continuing to use the oceans as the ultimate disposal area for more and more industrial wastes, domestic effluents, and other noxious substances.

Offshore oil pollution is caused mainly by land-based operations, although the hazard inherent in sea-based activities is of increasing importance due to the greatly intensified offshore search for alternate sources of oil and gas. Offshore petroleum activity is mainly a transplant of traditionally land-based activity to a marine environment. This has generated massive technological change with a learning-curve increase in qualitative and quantitative risks.

Large cost petroleum activity in a marine environment has focused attention on the law of the sea and revived, in a new factual context, the centuries-old controversy about freedom of the seas. Offshore activities remind us that the economic-political syndrome shapes law and enforcement, not the other way around. The law, seldom an intentionally innovative force, but rather one which tends to reflect or react to changed circumstances, is in the process of gradual adjustment to the new challenges.

Despite the obvious need for a comprehensive, effective international legal framework, none exists and none can reasonably be expected in the foreseeable future. Instead, there has been a rapidly expanding nationalization of the sea by coastal states, so that some 20% of total ocean space is now subject to varying degrees of national control. The actual and potential danger of chaotic inconsistency of national regulatory control has been demonstrated. The extent to which effective international controls can be superimposed on national regimes remains the central unsolved problem.

Neither private nor public international law has developed in realistic tandem with actual offshore petroleum developments, principally due to nation-state political concepts of self-interest with an accompanying unwillingness to submit to supranational controls.

Regional governmental agreements have progressed more satisfactorily than global international efforts but are still in the formative stages.

At a national level, no consistent, coherent pattern of control exists. The spectrum extends from total lack of national concern to what some regard as a punitive, overreaction by the U.S., where statutory and regulatory controls at federal and state levels have been comprehensive. Although the U.S. trend is towards virtual no-fault liability imposed for the ostensible objective of encouraging prevention, many think the pendulum has swung too far and will prove counterproductive by retarding energy developments vital to the security and well-being of the public. Others, however, regard strict or absolute liability, even when unlimited as to amount, as a socially satisfactory way of spreading the costs inherent in a hazardous business.

From a pragmatic standpoint, two approaches for dealing competently and constructively with offshore oil pollution have proved more effective and promising than anything which has occurred under international (global), regional, and national regimes. The first of these is voluntary industry action. Although the term "voluntary" admittedly is a relative one, with industry sometimes being strongly encouraged, even pressured, by governments before reacting positively, the industry’s record of voluntary action is outstanding. Industry traditionally questions the objectivity and technical competence of sometimes politically oriented governmental regulatory intervention. Often for the purpose of avoiding such intervention and, more frequently, as an actual demonstration of social responsibility, petroleum companies have voluntarily implemented costly, complicated programs for the prevention and handling of occurrences, including compensation funds for both governments and private persons, rather than subject either to costly and normally ineffectual legal remedies. Predictably, voluntary industry action will persist, with additional emphasis on keeping private persons whole.

The second major approach is joint government/industry consultation, cooperation, and action. The ineptness or incapacity of industry to deal with broad social problems and socioeconomic conflicts, which are more properly the function of government, is often matched, and occasionally surpassed, by technically uniformed, incompetent, politically oriented governmental intervention. A joint government/industry approach accentuates the relative strengths and minimizes the respective weaknesses of the only two parties who can protect and advance the public interest. To put it in petroleum industry terms, law and enforcement in any constructive social sense can only result from a successful joint venture between those who govern and those who are governed, including private industry.

Furthermore, joint government/industry action will encourage the evolution of reasonably consistent national and regional regimes, which may in the long term lead to effective law and enforcement on a global scale.

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