OPA 90 AND THE INTERNATIONAL REGIMES CONCERNING OIL POLLUTION LIABILITY AND COMPENSATION: ARE THEY SO FAR APART, MUST THEY REMAIN SO?[1]

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ABSTRACT: *The Oil Pollution Act of 1990 (OPA 90) set a new course for the United States with respect to oil spill liability and compensation. For 15 years preceding the passage of OPA 90, the United States sought to become party to the international regimes. A 1984 international conference was held at the request of the United States, to modify provisions of existing conventions. Passage of OPA 90 rejected those efforts and implemented a more comprehensive and farther reaching regime. Structurally, the regimes are similar, yet they are far apart with respect to key issues of levels of liability, ease with which those limits may be broken, and scope and extent of compensable damages. The issue examined is whether they must remain so far apart and whether there is a mechanism to bring them back together.*

Section 3001 of the Oil Pollution Act of 1990 (OPA 90) states:

It is the sense of Congress that it is in the best interests of the United States to participate in an international liability and compensation regime that is at least as effective as Federal and State Laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

Prior to the *Exxon Valdez* incident, there was substantial movement within the United States toward ratification of the two 1984 protocols that amended the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. There had been an underlying recognition that the U.S. liability and compensation regime was inadequate and that there was much to be gained by becoming party to the international regime. I will leave to others a detailed examination of what derailed that effort, but suffice it to say, it was a combination of deliberate obstruction by some components of the U.S. oil and maritime industry and bad luck in terms of timing. It is interesting to note that many of the opponents of ratification now wish in light of Title I of OPA that they had supported ratification rather than obstructed it.

My premise is that, even if the United States had become party to the protocols, there would have been a wholesale, detailed review and subsequent amendment of them because of the *Exxon Valdez* incident. It might have been a more orderly and predictable process; however, amendments to international conventions and indeed the origins of many, are founded in tragic maritime events. The international maritime community, under the auspices of the International Maritime Organization (IMO), moves at an orderly and progressive pace until confronted with such seminal events, which create a significant increase in requirements.

This paper explores the hypothesis that the Section 3001 objective previously quoted is achievable, is in the interest of the international community, and can serve the best interest of individual states.

Are the regimes so different?

Structurally the regimes are not very different at all—they address common points and are premised on the concept that the polluter pays, pays quickly, and pays with surety. The drafters of Title I of OPA 90 had been examining and crafting liability and compensation legislation for 15 years prior to its enactment. It was logical and natural to include the best provisions of the international regimes and to expand on those areas where experience, such as that gained by the *Exxon Valdez* experience, had shown that improvements could be made. It is also logical and natural that the potential polluters would not willingly embrace these new and expanded requirements. Tables 1, 2, and 3 provide a comparison of the regimes.

The three tables provide a snapshot of the salient components of financial responsibility and liability under Title I of OPA 90, the 1969 International Convention on Civil Liability for Oil Pollution Damage (1979 CLC), and its 1992 protocol. The 1969 CLC entered into force in 1975, but its 1992 protocol is not in force. (The 1992 protocol in essence replaces a 1984 protocol that never entered into force. The 1992 protocol adopts the limits of liability that were in the 1984 protocol.) The United States is not a party to the 1969 CLC and has not ratified the protocol. These charts are intended to provide a quick comparison of OPA 90, 1969 CLC, and 1992 CLC, but the actual texts of OPA 90 and the CLC documents should be consulted for the precise requirements. (These charts were prepared by the Coast Guard's National Pollution Funds Center.)

The following generalizations about the two regimes can be made.

- Both have limits of liability for shipowners—OPA 90's is higher
- Both have limits that can be broken—OPA 90's is easier to break
- Both describe damages that are compensable—OPA 90's are broader and more extensive, particularly in the area of natural resource damages
- Both require certification of ability to meet potential limits of liability
- Both permit third-party direct action against guarantors
- Both limit policy defenses of guarantors
- Both have funds for damages and removal costs in excess of shipowners' liability and both are funded by oil imports.

While the devil is in the details, the regimes are structurally similar.

1. The views presented in this paper are those of the author and do not necessarily reflect those of the U.S. Coast Guard.

Table 1. Liability under three regimes

Requirement	OPA 90	1969 CLC	1992 CLC
Parties liable	Responsible party (RP) (vessel owner and operator)	Owner	Owner
For what	Discharge or substantial threat of a discharge of oil by any vessel	Escape or discharge of persistent oil from a laden ship (seagoing vessel carrying persistent oil in bulk as cargo)	Escape or discharge of persistent oil from a laden ship (seagoing vessel carrying persistent oil in bulk as cargo), or unladen ship carrying residue, or threat of such discharge
Locus of damage	NW of U.S. Exclusive economic zone (EEZ) in foreign waters (under limited circumstances)	Wherever the escape or discharge causes "pollution damage" on the territory (including territorial sea) of a party	Wherever the escape or discharge causes "pollution damage" on the territory (including territorial sea) and EEZ of a party
Defenses	Solely caused by an act of God, war, or act or omission of third party	"Act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character" "Wholly caused by act or omission done with intent to cause damage by a third party" "Wholly caused by negligence or other wrongful act of any government or other authority responsible for maintenance of lights or other navigational aids"	"Act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character" "Wholly caused by act or omission done with intent to cause damage by a third party" "Wholly caused by negligence or other wrongful act of any government or other authority responsible for maintenance of lights or other navigational aids"
Limits of liability	Tanker greater than 3,000 gross tons: the greater of $1200/gr ton or $10 million Tanker less than or equal to 3,000 gr tons: the greater of $1200/gr ton or $2 million Non-tanker: the greater of $600/gr ton or $500,000	133 units of account per limitation ton, up to a maximum of 14 million units of account at current exchange rates, a maximum of about $20 million ("unit of account" = SDR; limitation ton is net tonnage plus the amount deducted from gross tonnage on account of engine space)	3 million units of account for a ship less than or equal to 5,000 gross tons; for a ship greater than 5,000 gr tons, additional 420 units of account per gross ton; maximum amount of 59.7 million units of account, at the current exchange rates, a maximum of about $83 million (gr ton = Tonnage Measurement Convention gross ton; unit of account = SDR)
Breaking limits	Incident proximately caused by willful misconduct, gross negligence, or violation of federal safety, construction, or operating regulation Failure of RP to report incident, to provide reasonable cooperation to officials in removal activities, to comply with an order under §311(c) or (e) of Clean Water Act or Intervention Act	Actual fault or privity of owner	Pollution damage resulted from owner's "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."
Claimants	Any party (federal government, state or local government, natural resource trustees, private claimants)	Any party suffering pollution damage (loss or damage caused outside the ship)	Any party suffering pollution damage
Damages recoverable	Removal costs Natural resource damages (including assessment) Real and personal property damages Subsistence use of natural resources Lost revenues by government Profits, earning capacity Costs of providing increased public services	Loss or damage caused outside the ship, including costs of preventive measures (may vary by country) IOPC Fund will consider payment of cleanup Replacement and repair costs Economic loss (excluding claims for noneconomic environmental damage based on calculations made on the basis of theoretical models)	Loss or damage caused outside the ship, including costs of preventive measures (may vary by country), but compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken

Will the international regime come closer to the U.S. system embodied in OPA 90?

The regimes are already beginning to converge; the reasons for this convergence are as follows.

- Oil spills are increasingly costly to clean up and are getting more expensive on a worldwide basis. The current limits of shipowner liability and fund availability contained in the international regimes are going to prove to be too low and will require eventual adjustment.
- Damages caused by oil spills as embodied in OPA 90 are real, and are being experienced by countries that are currently party to the international regimes, but many are currently not compensable under those regimes. The International Oil Pollution Compensation Fund (IOPCF) Assembly is deliberating these issues. It is my view that the scope of damages in these regimes will be modified to more closely align with OPA 90.

Liability and compensation regimes for oil spills are one part of the overall oil spill prevention system. It is my premise that it is an unequal, and indeed subordinate, partner to the design, construction, and operation regimes embodied in the comprehensive international system. This inequity is created by:

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Table 2. Financial responsibility under the different regimes

	OPA 90	1969 CLC	1992 CLC
Vessels	Greater than 300 gross tons Lightering vessels	Ship carrying more than 2,000 tons of oil in bulk as cargo	Ship carrying more than 2,000 tons of oil in bulk as cargo
Methods	Insurance Surety Bond Financial Guarantee Self-Insurance Letter of Credit Other Evidence	Insurance or other financial security	Insurance or other financial security
Defenses	Those responsible party (RP) can raise Willful misconduct of RP Other specified by secretary	Defenses that owner could invoke (other than bankruptcy or winding up of owner) Willful misconduct of owner	Defenses that owner could invoke (other than bankruptcy or winding up of owner) Willful misconduct of owner
Financial responsibility provider liability limit	Amount of financial responsibility provided	Amount of financial responsibility provided	Amount of financial responsibility provided
Direct action	Yes, by all claimants	Yes, by all claimants	Yes, by all claimants
Sanctions	Denial of entry Withholding clearance Seizure and forfeiture Civil penalties (up to $25,000 per day) Injunction or other judicial action	Denial of entry or departure	Denial of entry or departure

- The relatively low limit under the international regime that a shipowner/operator is responsible for in a spill.
- The substantial protection afforded the shipowner/operator through the limitation of liability clause. Breaking limits is exceptionally difficult and provides more protection than deterrence.

On the other hand, Title I of OPA 90 is truly an equal, and some opine, superior partner in terms of prevention. The methods and ease with which limits may be broken in the international regime will no doubt come under heavy fire and require adjustment. Additionally, the shipowner/operator share contributed will also need to be adjusted upward.

None of this will happen in the short term, but will, in my estimation, proceed along a natural and evolutionary course over the next 10 to 15 years.

Should the U.S. participate, and how could it become a partner in the international regime?

There are impediments to accomplishing the objectives of Section 3001. The first is one of credibility. The United States led the effort to develop the 1984 protocols and was unsuccessful in obtaining ratification. Leading the charge to amend the not-yet-in-force 1992 protocols will no doubt raise the refrain from the warriors of the 1984 protocol battles, "Here they go again." My response is that, at the end of the day, the 1992 protocols will soon come into force and will be a major step forward, but not the last step forward. The purpose of this paper is to elicit debate and focus on a long-range strategic approach—in which I firmly believe the United States needs to participate.

The second impediment concerns the issue of nonpreemption of state laws, arguably a fundamental principle of OPA 90. Is this principle inviolable? I believe not, and suggest that a modification in terms of Title I might be justified and achievable if coupled with other concurrent actions. To briefly reiterate the problem, while OPA 90 does have federal limits of liability that are more easily broken than those of predecessor legislation, the act specifically does not preempt state liability and compensation regimes from exceeding those in U.S. law. States can have laws, and several do, which provide no limitation on liability. There is an old saying among federal policy makers, that "Policy without commensurate funds to implement and sustain that policy is not policy." To my mind, there is a corollary to the state unlimited liability issue for oil spills. You can have the principle embodied in law, but if there are no funds to compensate for full damages,

Table 3. Backup funds[1]

Requirement	OPA 90	1971 Fund	1992 Fund Protocol
When fund pays	Provides funds when responsible party does not pay, and for amounts exceeding responsible party's limits	Provides compensation to any person suffering pollution damage if that person has been unable to obtain full and adequate compensation under 1969 CLC	Provides compensation to any person suffering pollution damage if that person has been unable to obtain full and adequate compensation under 1992 CLC
Fund limits	$1 billion per incident, of which not more than $500 million can be paid for natural resource damage assessments and claims	Up to about $83 million (aggregate compensation from CLC plus Fund)	Up to about $188 million (aggregate compensation from CLC plus Fund)

1. Shipowner/operator liability is one part of the compensation equation. The other part concerns the supplementary monies made available to damaged parties through "backup" funds. In OPA 90, it is the Oil Spill Liability Trust Fund (OSLTF); in the international regime, it is the International Oil Pollution Compensation Fund established by the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, which entered into force in 1978. The United States is not party to this convention. The 1971 Fund Convention will be updated when a 1992 Protocol enters into force. The comparison of fund compensation amounts provided in OPA 90, the 1971 Fund, and 1992 Fund Protocol is shown in this table.

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the principle is hollow and ineffectual. I could point out that the same could be said for OPA 90 as well with respect to the breaking of limits. The breaking of a responsible party's limits is no guarantee that adequate compensation exists.

For the purpose of illustration the following scenario is provided:

A tanker has a spill, and the spill is in a state that has unlimited liability. The spill is in an ecologically sensitive area, which is also a resort area, and bottles up a major waterway for months. The tanker has a federal limit of liability of $150 million and is able to limit its liability. Over the course of the next several years, the total cost of the spill is $3.5 billion. The vessel's insurers have paid $500 million, which includes the $150 million limit of liability. The ship is a one-ship company and its only assets are the ship, which is now worth only $10 million. The state, its constituents, the federal natural resource trustees, and the myriad other businesses look to OPA 90's Oil Spill Liability Trust Fund (OSLTF) for compensation.

For the purposes of this scenario, let's say that the fund expends $1 billion in settling the claims presented. The fund is limited by OPA 90 to expending no more than $1 billion per incident (and of that, only $500 million may be spent on natural resource damages). There are still approximately $2 billion in outstanding damages. The fact that the state had an unlimited liability statute does little to provide compensation for those that remain damaged. The argument could be made, "Look at what Exxon has done in Alaska." The counter is that all companies are not Exxon and that many oil companies with the fiscal ability to perform in a similar manner are getting out of the shipping business.

Is there a possibility that states might agree to federal preemption in this area of the law? I surely cannot speak for the states, but would observe that, when faced with the issue of not having the availability of large private oil spill responders due to the lack of state oil spill responder immunity provisions, all coastal states enacted such legislation. This, by my observation, is a victory for pragmatism over a potentially hollow principle. The greater good of their coastlines was served by providing a means of protecting the environment.

Similarly, I believe that state legislatures faced with the scenario previously detailed would opt for true availability of compensation rather than for the principle that provided partial compensation.

How might both purposes be served?

Shipowners and operators have often indicated that they engage in a "you bet your company lottery" when they trade to the United States. As a result of this, several shipowners' associations have proposed the creation of a Mandatory Excess Insurance Facility (MEIF) to address the potential problems they might face when trading to the U.S. Specifically, the MEIF would legislatively mandate a high level of liability insurance. The current proposal would require each tank vessel owner/operator to carry $2 billion worth of coverage. A government-sponsored enterprise would provide the initial method of capitalization through the sale of bonds. The corpus fund would be maintained through charging of premiums, which would eventually retire the bond debt, and the venture would be self-sustaining.

My hypothesis is that the MEIF, or similar concept, might eventually serve as the vehicle or catalyst to permit the crafting of a truly international regime, a regime that accommodates the principle of "the polluter pays," and that provides the necessary capital to pay in those cases where the damages exceed the federal limits of liability. The MEIF could initially be a U.S. program that would ultimately become part of a mandatory international regime.

The proponents of the MEIF are currently pursuing their proposal within the executive and legislative branches of the U.S. government. There are policy and fiscal issues that will be examined in depth. Much of the impetus for the MEIF comes from the unlimited liability provision contained in state law.

If I were one of the proponents of the MEIF, I would approach the 26 coastal states and seek to obtain a qualified modification of OPA 90 to preempt state law with respect to Title I. This preemption could be self-executing only after the formation, execution, and implementation of the MEIF.

Conclusions

If the MEIF, or some other proposal, were able to accomplish an incremental reassertion of federal preemption with respect to Title I and provided higher potential limits of compensation, it might pave the way for the United States to achieve the goals set out in Section 3001 of OPA 90.

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