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30 Years Removed, Oil-Spill Liability Insurance's Evolution since the 1989 Exxon Valdez Incident

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30 YEARS REMOVED, OIL-SPILL LIABILITY INSURANCE'S EVOLUTION SINCE THE 1989 *EXXON VALDEZ* INCIDENT

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ABSTRACT

In the thirty years since the Exxon Valdez incident, much has changed. This article looks back at the events of the accident and the subsequent changes to the marine pollution insurance industry, from the statutes regulating oil tankers in 1989 to the Oil Pollution Act of the 1990. The regulatory framework resulting from the Exxon Valdez is examined and compared to the litigation deriving from the spill.

INTRODUCTION

During the early hours of March 24, 1989, the *Exxon Valdez* ran into Bligh Reef off the coast of Prince William Sound, Alaska and immediately changed the surrounding environment and the marine pollution insurance industry forever. Now some thirty years removed, this Article adds a new perspective to the matter and analyzes how the resulting insurance claims were resolved. To do this we discuss the lifespan of the *Exxon Valdez* itself; the events that transpired that fateful night; the insurance requirements the *Exxon Valdez* was subject to at the time of incident; federal regulation drafted in response to the incident; and how coverage litigation was resolved.

I. THE EXXON VALDEZ

The *Exxon Valdez* was a modern tankship design of all welded steel construction made by the National Steel and Shipbuilding Company of San Diego, California.[1] Its design met the standards of the International Convention for the Prevention of Pollution from Ships (MARPOL) of 1978 and it measured in at 987 feet long, by 166 feet wide, by 88 feet deep, from the main deck to flat keel.[2] Upon delivery to Exxon on December 11, 1986, it was the largest ship ever built on the West Coast of the United States.[3]

1. Auke Visser, *Exxon Valdez - (1986 -1990)*, http://www.aukevisser.nl/exxon/id83.htm (last visited Aug. 22, 2023) [https://perma.cc/LRC2-6GB4].

2. *Id.*

3. *Id.*

Image of the *Exxon Valdez* shortly after delivery.[4]

In July 1989, the *Exxon Valdez* was sailed from Prince William Sound to San Diego to be drydocked in its birthplace.[5] As a result of the incident on March 24, 1989, the *Exxon Valdez* was effectively singled-out and banned from operation in Prince William Sound, Alaska by passage of the Oil Pollution Act of 1990 ("OPA 90").[6]

The ship emerged a year later as the *Exxon Mediterranean* and had its operational area shifted to the Mediterranean and Middle East.[7] "In 1993, Exxon spun off its shipping arm to a subsidiary, Sea River Maritime, Inc., and the *Exxon Mediterranean* became the *Sea River Mediterranean*," then *S/R Mediterranean*,[8] and then in 2005, just *Mediterranean*.[9] In 2008 Sea River sold the *Mediterranean* to Hong Kong Bloom Shipping, Ltd., which renamed it the *Dong Fang Ocean*.[10] The ship was renamed the *Oriental*

4. *Id.*

5. *After the Big Spill, What Happened to the Ship Exxon Valdez?*, NOAA, https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/after-big-spill-what-happened-s (Nov. 8, 2022, 1:46 PM) [https://perma.cc/U5XE-L64S].

6. 33 U.S.C. § 2737 (stating "[n]otwithstanding any other law, tank vessels that have spilled more than [one million] gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska.").

7. *After the Big Spill, What Happened to the Ship Exxon Valdez?*, *supra* note 5.

8. *Id.*

9. Visser, *supra* note 1.

10. *Id.*

Nicety in 2011 and then sold to Priya Blue Industries as the *Oriental N.* in 2012 where it was subsequently sold for scrap.[11]

II. BLIGH REEF IN PRINCE WILLIAM SOUND, ALASKA: MARCH 24, 1989

On March 24, 1989, the 987-foot oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska.[12] The reef and nearby Bligh Island have been known to navigators since 1794.[13] The ship contained 1,263,000 barrels of crude oil at the time and as a result of the incident, eight cargo tanks ruptured releasing 258,000 barrels into the Sound.[14]

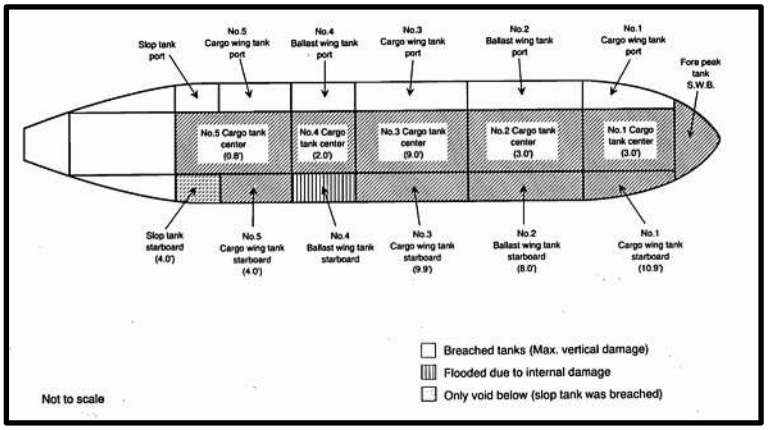

Image advising rupture points on *Exxon Valdez* from striking Bligh Reef.[15]

While no specific cause is attributed for the incident, there were some deviations from best practices on that night that likely contributed.[16] Namely, the ship, on Captain's orders, deviated from an established sea

11. *Id.*

12. National Response Team*, The Exxon Valdez Oil Spill: A Report to the President (Executive Summary)*, EPA, https://www.epa.gov/archive/epa/ aboutepa/exxon-valdez-oil-spill-report-president-executive-summary.html (Sept. 22, 2016) [https://perma.cc/EZ8T-V4MS].

13. *In re* Exxon Valdez, 270 F.3d 1215, 1221 (2001).

14. OFF. OF SURFACE TRANSP. SAFETY, NAT'L SAFETY TRANSP. BD., GROUNDING OF THE U.S. TANKSHIP EXXON VALDEZ ON BLIGH REEF, PRINCE WILLIAM SOUND, NEAR VALDEZ, ALASKA MARCH 24, 1989 (1990).

15. *Id.*

16. *See* National Response Team, *supra* note 12.

lane that takes vessels to the west of Blight Reef so that the ship could avoid a heavy concentration of ice in the shipping lane, a serious hazard unto itself.[17] This was made more difficult because the ice was only visible at night by radar.[18] The court found the captain of the *Exxon Valdez*, Captain Joseph Hazelwood, did not break any law or regulation due to the deviation in course.[19]

The same maneuver had been executed by other ships earlier in the night without incident.[20] To execute the maneuver properly, experts testified at trial that all that needed to be done was "to bear west about the time the ship got abeam of the navigation light at Busby Island."[21] That said, there was less than a mile between the ice and the reef and tanker ships are difficult to maneuver.[22] The Plaintiff's expert witness, Captain Michael Clark, compared maneuvering a tanker ship to "steering a car on ice; you turn the wheel and just keep going the same direction. Eventually you'll start to turn and move in the direction you're headed for."[23]

Due to the difficulty of the passage, a special license is needed to navigate a tanker through the part of Prince William Sound that the *Exxon Valdez* sought to traverse.[24] On the night of March 24, 1989, Captain Hazelwood was the only person onboard the *Exxon Valdez* with the required license.[25] Just two minutes before the turn needed to be commenced, Captain Hazelwood left the bridge and went down to his cabin to do paperwork.[26] Prior to leaving, Captain Hazelwood put the ship on autopilot, causing the ship to speed up, and told the third mate to "turn back into the shipping lane once the ship was abeam of Busby Light."[27]

17. *In re* Exxon Valdez, 270 F.3d at 1222.
18. *Id.*
19. *Id.*, at 1221-22.
20. OFF. OF SURFACE TRANSP. SAFETY, NAT'L SAFETY TRANSP. BD., *supra* note 14.
21. *In re* Exxon Valdez, 270 F.3d at 1222.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *In re* Exxon Valdez, 270 F.3d at 1223.

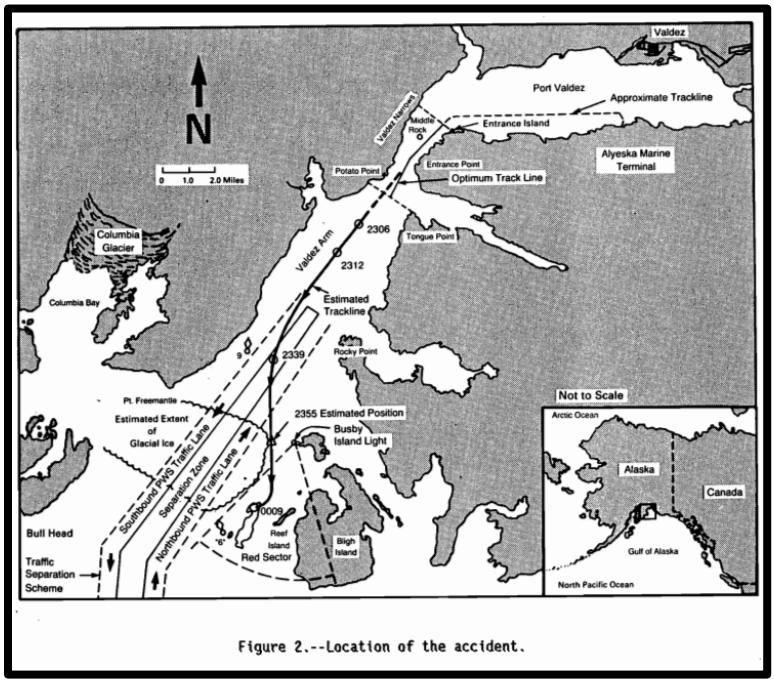

Image from NTSB advising Location of Accident.[28]

28. OFF. OF SURFACE TRANSP. SAFETY, NAT'L SAFETY TRANSP. BD., *supra* note 14.

Shortly after midnight, the *Exxon Valdez* ran into Bligh Reef, tearing open the ship's hull and exposing Prince William Sound to over 11,000,000 gallons of crude oil.[29] The oil slick spread over 3,000 square miles and washed ashore on 350 miles of beaches.[30]

Aerial shot of the 1989 *Exxon Valdez* oil spill.[31]

III. OIL TANKER REGULATION

While our topic is the impact of the *Exxon Valdez* incident on the marine pollution insurance industry, no discussion on modern maritime pollution coverage can begin without first discussing the *Torrey Canyon* incident.

On March 18, 1967, the United States-owned[32] tanker ship *Torrey Canyon*, struck a reef off the coast of south-west England resulting in a massive oil spill that polluted the shores of Cornwall, Devon, the Channel

29. *Id.*

30. National Response Team, *supra* note 12.

31. *Flashback in history: Exxon Valdez oil spill*, MARITIME CYPRUS (March 28, 2016), https://maritimecyprus.com/2016/03/28/flashback-in-history-exxon-valdez-oil-spill-24-march-1989/ [https://perma.cc/7SGE-JPBX].

32. A business entity organized under the laws of the United States of America.

Islands, and Brittany.[33] The public response was harsh, and in 1968, five major oil companies set up the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and then invited tanker owners to join the International Tanker Indemnity Association Ltd. (ITIA).[34] Oil companies were then asked to join the Contract Regarding a Supplement to Tanker Owner Liability for Oil Pollution (CRISTAL).[35]

TOVALOP is a private agreement that creates obligations and rights among the signatory regarding issues concerning "liability and compensation among the parties and persons injured by oil discharged at sea."[36] When the discharge incident involves a tanker owned by a party to TOVALOP, and the oil cargo is owned by an oil company party to CRISTAL, then the terms of the "TOVALOP Supplement" apply.[37] With regards to the *Exxon Valdez* incident, TOVALOP established tanker owner liability for removal of oil discharged by Exxon's tankers and offered some compensation for pollution damage.[38]

A. Oil Vessel Regulation as of March 1989

1. TOVALOP 1984

Per the terms of TOVALOP's 1984 Revision (TOVALOP 84): (1) the maximum tanker owner liability limit was $16,800,000; (2) tanker owners were responsible to persons generally, not only governments; (3) the International Convention on Civil Liability for Oil Pollution Damage's strict liability standard, with limited exceptions, was put in force; and (4) the agreement was broadened to apply where contamination was to territory and to the territorial sea of a State.[39] The TOVALOP 1987 Supplement (TOVALOP Supplement) further raised tanker owner liability limits to $70,000,000 depending on the gross registered tonnage of the vessel.[40]

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33. *Striding ahead*, GARD NEWS (Nov. 1, 2007), https://www.gard.no/web/updates/content/52504/striding-ahead [https:// perma.cc/N36F-ERPC].

34. *Id.*

35. Bernadette V. Brennan, *Liability and Compensation for Oil Pollution from Tankers under Private International Law: TOVALOP, CRISTAL, and the Exxon Valdez*, 2 GEO. INT'L EVNTL. L. REV. 1, 2 (1989).

36. *Id.*

37. *Id.*

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.* at 5.

On March 24, 1989, the *Exxon Valdez* was subject to the terms imposed by TOVALOP 84.[41] Exxon also owned the oil cargo and was a party to CRISTAL, so the TOVALOP Supplement limits applied.[42]

2. Federal Water Pollution Control Act (Clean Water Act)

The Federal Water Pollution Control Act of 1948 was the first major Federal law to address water pollution.[43] Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972 and took on the adage of the Clean Water Act ("CWA").[44] Under Section 311 of the CWA, the discharge of oil or hazardous substances are prohibited, and persons in charge of the vessel must immediately report any spill or discharge.[45] The CWA also provides administrative and civil penalties[46] while the OPA provides strict liability for damages and removal costs.[47]

3. Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA)

On December 11, 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") which "created a tax on the chemical petroleum industries and provided broad Federal authority to respond directly to releases, or those threatened, of hazardous substances that may endanger public health or the environment."[48] "CERCLA imposes strict and joint and several liability on the owner or operator of a vessel or facility as well as a variety of other parties."[49] Responsible parties assumed these liabilities not to exceed:

41. Brennan, *supra* note 35, at 3-4.

42. *See id.*

43. *History of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act (June 22, 2023) [https://perma.cc/E4GF-UTBF].

44. *Id.*

45. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 18-3, at 352 (Practitioner Treatise Series) (6th ed. 2018).

46. 33 U.S.C. § 1321(b)(6)-(7).

47. SCHOENBAUM, *supra* note 45, at 337, 352.

48. *Superfund: CERCLA Overview,* EPA, https:// www.epa.gov/ superfund/ superfund-cercla-overview (Jan. 24, 2023) [https://perma.cc/ATN8-4TY9].

49. SCHOENBAUM, *supra* note 45, at 359.

Class	Limit
Any vessel, except incineration vessels, carrying any hazardous substance as cargo or residue	The greater of either: A) $300 per gross ton; or B) $5,000,000.00[50]
Any other vessel, except incineration vessels	The greater of either: A) $300 per gross ton; or B) $500,000.00[51]

4. Other Federal Oil Pollution Statutes

Prior to OPA 90, three (3) Federal laws dealt with recovery for oil pollution in connection with certain oil production activities: (1) the Outer Continental Shelf Lands Acts; (2) the Trans-Alaska Pipeline Authorization Action; and (3) the Deepwater Port Act.[52] Each advised on specific oil production activity within the regions they were occurring, thus none applied to the *Exxon Valdez* at the time of incident.

5. International Regulation

In 1969, in response to the *Torrey Canyon* incident, the Inter-Governmental Maritime Consultative Organization (now the International Maritime Organization ("IMO")) introduced the International Convention on Civil Liability for Oil Pollution Damage ("CLC").[53] It was quickly adopted but did not go into effect until 1975.[54] Significant changes included: (1) imposition of strict liability on registered ship owners; (2) doubling the requirement to maintain shipowner's liability limits to 133 SDR per ton,[55] with a maximum liability of 14,000,000 SDR;[56] and (3) permitting claims from any person after an incident has occurred to prevent or minimize pollution damage.[57]

To facilitate a compromise between parties disputing the scope of the liability obligation, in 1971 the IMO introduced the International Convention on the Establishment of an International Fund for

50. 42 U.S.C. § 9607(c)(1)(A).
51. *Id.* § 9607(c)(1)(B).
52. SCHOENBAUM, *supra* note 45, at 334.
53. R. C. Springall, *P & I Insurance and Oil Pollution*, 6 J. ENERGY & NAT. RES. L. 25, 32 (1988).
54. *Id.*
55. Special Drawing Right as defined by the International Monetary Fund.
56. Springall, *supra* note 53, at 33.
57. *Id.*

Compensation for Oil Pollution Damage ("The Fund Convention 71").[58] In addition to providing additional compensation to victims of oil pollution where their claims exceeded liability imposed by the CLC, it raised the maximum recoverable sum from the fund for any one incident to $54,000,000.[59] Then, after the 1978 wreck of the *Amoco Cadiz* and the 1980 *Tanio* incident resulted in claim payouts falling short, the CLC Protocol was introduced in 1984 that imposed higher limits.[60]

While it was believed that the U.S. would join these protocols since they had a hand in drafting them, Congress never ratified such acts.[61] Instead, through passage of OPA 90 the U.S. rejected established international conventions on civil liability and created a split between the U.S. and international markets.[62]

B. Post Incident Obligations

Under TOVALOP, Exxon's obligations consisted of three tasks: (1) recover the 42,000,000 gallons left on the *Exxon Valdez*; (2) remove the 10,000,000 gallon oil slick; and (3) remove the oil from the coast line.[63] Alyeska, the association that represents seven oil companies who operate in Valdez, AK, including Exxon, first assumed responsibility for the cleanup, in accordance with the area's contingency planning.[64] This then shifted to the Exxon Shipping Company ("ESC") and then Exxon when ESC could no longer shoulder the burden. As of 2015 the affected areas and wildlife populations have rebounded to their pre-incident conditions.[65]

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58. *Id.*; *see also* International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 61.

59. Springall, *supra* note 53, at 33-34.

60. *Id.* at 36; *see also* Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, 23 I.L.M. 177 (CLC Protocol of 1984) reprinted in 15 J. Mar. L. & Com. 613, 613-22 (1984); Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1971, 23 I.L.M. 195 (Fund Protocol of 1984) reprinted in 15 J. Mar. L. & Com. 623, 623-33 (1984).

61. SCHOENBAUM, *supra* note 45, at 334-35.

62. *Id.*

63. Brennan, *supra* note 35, at 9.

64. *Exxon Valdez Spill Profile*, EPA, https://www.epa.gov/emergency-response/exxon-valdez-spill-profile (Nov. 29, 2022) [https://perma.cc/R8EL-BR36].

65. Rachel Waldholz, *Hearing ends 26 years of litigation over Exxon Valdez oil spill*, ALASKA PUB. MEDIA (Oct. 15, 2015), https://alaskapublic.org/2015/ 10/15/hearing-ends-26-years-of-litigation-over-exxon-valdez-oil-spill/ [https://perma.cc/XRN4-97MU].

C. Oil Pollution Act of 1990 (OPA 90)

While the media attention from the *Torrey Canyon* incident and other ecological losses in the 1960s spurred the passage of a variety of Federal and State laws to address environmental protection concerns, oil pollution did not receive a comprehensive approach until the passage of the OPA 90. Drafted in response to the 1989 *Exxon Valdez* oil spill, OPA 90 substantially increased both the regulation and pollution liabilities of entities engaged in the transportation and production of oil within the jurisdiction of the United States.[66] Prior to OPA 90, the Shipowners' Limitation of Liability Act of 1851 had at least limited applicability to oil spills, but OPA 90 has superseded it with regards to damages and removal costs under both Federal and State law.[67]

1. Responsible Parties

OPA 90 makes the "responsible party" for a vessel from which oil is discharged or threatened, strictly liable for removal costs and damages.[68] The focus on quick claim resolution is so critical to the legislation that it imposes the accruing of interest on any claim not paid by the thirtieth (30th) day after submission.[69] Yet, while the scope of "responsible party" is broad[70] and liability imposed is joint and several; cargo owners are not included in that definition.[71] Well, not initially. It was not until October 15, 2010, when in response to the *Deepwater Horizon* incident on April 2010, the next great oil pollution incident, that 33 U.S.C. § 2701(32)(A) was revised to include "the owner of oil being transported in a tank vessel with a single hull after December 31, 2010."[72]

2. Limits of Liability

Under Section 2704 of OPA 90, the total liability for removal costs and damages for "responsible part[ies]"[73] is advised.[74] The chart below

66. SCHOENBAUM, *supra* note 45, at 334-35.
67. *Id.* at 342-43.
68. *Id.* at 343.
69. 33 U.S.C. § 2705(b)(1) (2023).
70. *Id*. § 2701(32)(A) ("In the case of a vessel, any person owning, operating, or demise chartering the vessel.").
71. *Id.* § 2701(32).
72. *Id.*
73. *Id.*
74. *Id.* § 2704.

summarizes how these limits have changed in the various updates for vessel owners like the *Exxon Valdez*.[75]

Effective Term	**Tank vessel up to 3,000 gross tons; the greater of either:**	**Vessel greater than 3,000 gross tons:**	**Any other vessel; the greater of either:**
1990 to July 11, 2006	A) $1,200 per gross ton; or B) $2,000,000.00	$10,000,000.00;	A) $600 per gross ton; or B) $500,000.00
July 11, 2006 to Current	A) $3,000 per gross ton; or B) $6,000,000.00	$22,000,000.00;	A) $950 per gross ton; or B) $800,000.00

3. Certificate of Financial Responsibility

As a precondition for conducting business, any vessel over three hundred gross tons, using any place under U.S. jurisdiction, or any vessel that operates in the exclusive economic zone of the U.S. to transport oil, must provide evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subject.[76] This is typically done by the submission of Certificates of Financial Responsibility ("COFR") to the United States Coast Guard prior to undertaking operations. Failure to do so can result in sanctions that include: (1) withholding clearance; (2) denying entry to or detaining vessels; or (3) seizure of vessels.[77]

Traditionally, financial responsibility has been evidenced through insurance, but self-insurance provisions are available as well. "Protection & Indemnity Clubs (P&I Clubs) have been the primary providers of oil pollution liability insurance, as well as of financial responsibility guaranties."[78] "The Coast Guard requires that the financial guarantor comply with all of the self-insurance provisions and be able to demonstrate that its amounts of working capital and net worth are no less than the

75. *See id.* § 2737.
76. *Id.* § 2716(a).
77. *Id.* § 2716(b).
78. Inho Kim, *Financial Responsibility Rules Under the Oil Pollution Act of 1990*, 42 NAT. RES. J. 565, 571 (2002).

aggregate applicable amounts of financial responsibility underwritten as a guarantor and self-insurer."[79]

The caveat of OPA 90 which causes the most issue is that it required the insurer to be sued directly as a guarantor from all potential claimants, not only the federal government.[80] As a result, the grantor is limited to the same defenses as the responsible party and may not assert any policy defenses it may have against the insured, therefore limiting their ability to invoke the "pay to be paid" clause.[81] In response P&I Clubs have either decided to not write vessels that conduct business with the U.S. or utilize an intermediary guarantor which issues COFRs on the P&I Club's behalf while still allowing the Member to satisfy their obligations to the P&I Club otherwise in accordance with their rules.[82]

IV. THE POLICIES

A. Oil-Spill Liability Insurance

Exxon Shipping Company was a member of Bermuda-based[83] P&I Club named International Tanker Indemnity Association Ltd. ("ITIA") at the time of the *Exxon Valdez* incident.[84]

Oil pollution liability has been provided on limited, but progressively increasing limits from 1969 on.[85] The reinsurance limit for shipowners' oil pollution liability risk increased from $10,000,000 in 1969 to $100,000,000 in 1980 to $400,000,000 as of 1988.[86] The following are excerpts from the 1969 ITIA Club Rules.

79. *Id.* at 571.

80. *Id.* at 572.

81. Based on the structure of the coverage, P&I Club rules often require members to first resolve all claims arising from the incident at issue and then submit their expenses to the P&I Club for reimbursement. Practice is common when coverage is for indemnity only rather than liability coverage.

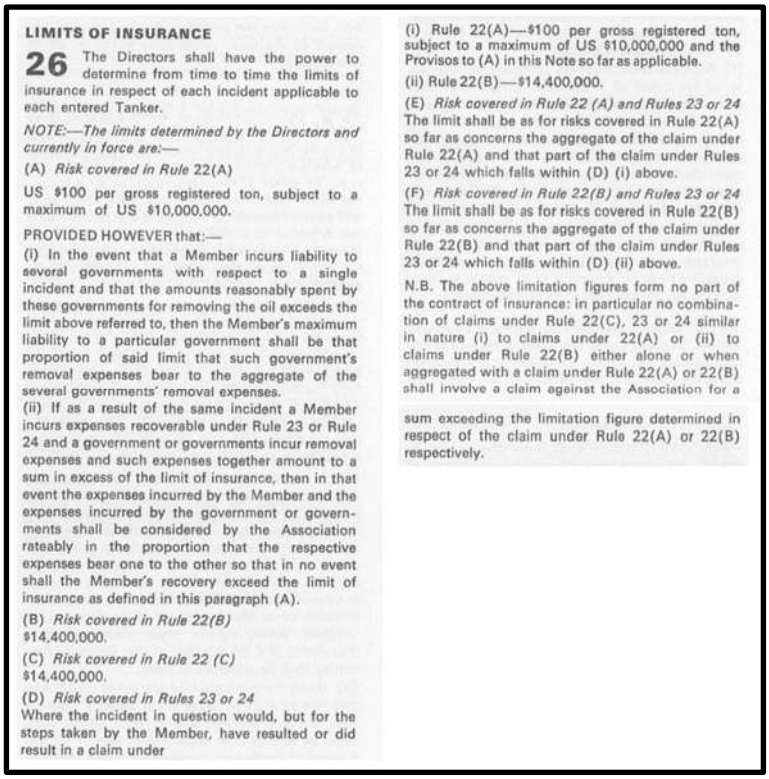
82. Kim, *supra* note 78, at 578.

83. A business entity organized under the laws of Bermuda.

84. Mitchell F. Dolin, *An Overview of the Exxon Valdez Insurance Coverage Dispute*, 5 INT'L INS. L. REV. 314 (1997).

85. Springall, *supra* note 53, at 29.

86. *Id.*



LIMITS OF INSURANCE

26 The Directors shall have the power to determine from time to time the limits of insurance in respect of each incident applicable to each entered Tanker.

NOTE:—The limits determined by the Directors and currently in force are:—

(A) *Risk covered in Rule* 22(A)

US $100 per gross registered ton, subject to a maximum of US $10,000,000.

PROVIDED HOWEVER that:—

(i) In the event that a Member incurs liability to several governments with respect to a single incident and that the amounts reasonably spent by these governments for removing the oil exceeds the limit above referred to, then the Member's maximum liability to a particular government shall be that proportion of said limit that such government's removal expenses bear to the aggregate of the several governments' removal expenses.

(ii) If as a result of the same incident a Member incurs expenses recoverable under Rule 23 or Rule 24 and a government or governments incur removal expenses and such expenses together amount to a sum in excess of the limit of insurance, then in that event the expenses incurred by the Member and the expenses incurred by the government or governments shall be considered by the Association rateably in the proportion that the respective expenses bear one to the other so that in no event shall the Member's recovery exceed the limit of insurance as defined in this paragraph (A).

(B) *Risk covered in Rule 22(B)*
$14,400,000.

(C) *Risk covered in Rule 22 (C)*
$14,400,000.

(D) *Risk covered in Rules 23 or 24*
Where the incident in question would, but for the steps taken by the Member, have resulted or did result in a claim under

(i) Rule 22(A)—$100 per gross registered ton, subject to a maximum of US $10,000,000 and the Provisos to (A) in this Note so far as applicable.

(ii) Rule 22(B)—$14,400,000.

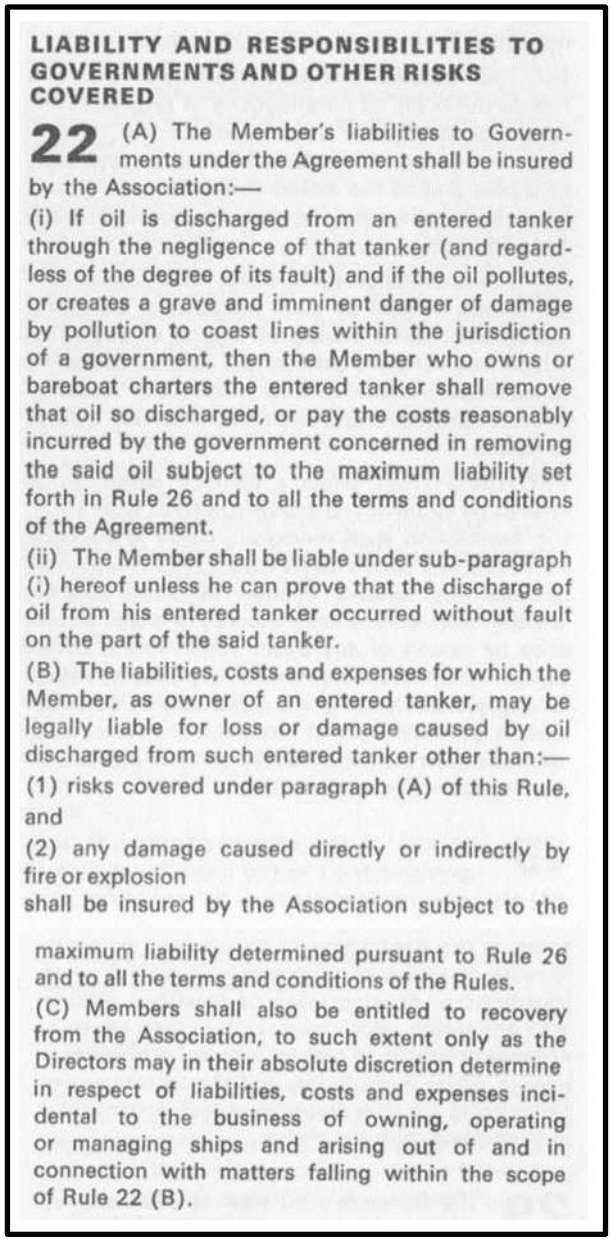
(E) *Risk covered in Rule 22 (A) and Rules 23 or 24*
The limit shall be as for risks covered in Rule 22(A) so far as concerns the aggregate of the claim under Rule 22(A) and that part of the claim under Rules 23 or 24 which falls within (D) (i) above.

(F) *Risk covered in Rule 22(B) and Rules 23 or 24*
The limit shall be as for risks covered in Rule 22(B) so far as concerns the aggregate of the claim under Rule 22(B) and that part of the claim under Rules 23 or 24 which falls within (D) (ii) above.

N.B. The above limitation figures form no part of the contract of insurance: in particular no combination of claims under Rule 22(C), 23 or 24 similar in nature (i) to claims under 22(A) or (ii) to claims under Rule 22(B) either alone or when aggregated with a claim under Rule 22(A) or 22(B) shall involve a claim against the Association for a sum exceeding the limitation figure determined in respect of the claim under Rule 22(A) or 22(B) respectively.

Club Rules on Limits of Insurance.[87]

87. RULES 1969 INTERNATIONAL TANKER INDEMNITY ASSOCIATION LIMITED 11 (1969), http://archives.ubalt.edu/hdb/pdfs/R0051_HDB_S03_B144_ F006.pdf [https://perma.cc/JP6F-74KG]



LIABILITY AND RESPONSIBILITIES TO GOVERNMENTS AND OTHER RISKS COVERED

22 (A) The Member's liabilities to Governments under the Agreement shall be insured by the Association:—

(i) If oil is discharged from an entered tanker through the negligence of that tanker (and regardless of the degree of its fault) and if the oil pollutes, or creates a grave and imminent danger of damage by pollution to coast lines within the jurisdiction of a government, then the Member who owns or bareboat charters the entered tanker shall remove that oil so discharged, or pay the costs reasonably incurred by the government concerned in removing the said oil subject to the maximum liability set forth in Rule 26 and to all the terms and conditions of the Agreement.

(ii) The Member shall be liable under sub-paragraph (i) hereof unless he can prove that the discharge of oil from his entered tanker occurred without fault on the part of the said tanker.

(B) The liabilities, costs and expenses for which the Member, as owner of an entered tanker, may be legally liable for loss or damage caused by oil discharged from such entered tanker other than:—

(1) risks covered under paragraph (A) of this Rule, and

(2) any damage caused directly or indirectly by fire or explosion

shall be insured by the Association subject to the maximum liability determined pursuant to Rule 26 and to all the terms and conditions of the Rules.

(C) Members shall also be entitled to recovery from the Association, to such extent only as the Directors may in their absolute discretion determine in respect of liabilities, costs and expenses incidental to the business of owning, operating or managing ships and arising out of and in connection with matters falling within the scope of Rule 22 (B).

Club Rules on Liability and Responsibilities to Governments and Other Risks Covered[88]

88. *Id.* at 10-11 (ITIA Rule 22, reflecting the limits of insurance and oil liability coverage advised in 1969 Club Rules).

In 1988, a typical provision in P&I Club rules would grant coverage in respect to pollution risks as follows:

> The liabilities, losses, damages, costs and expenses set out in paragraphs (a) to (e) below when and to when the extent that they are caused by or incurred in consequence of the discharge or escape from an entered ship of oil or any other substance, or the threat of such discharge or escape:
>
> (a) Liability for loss, damage[,] or contamination.
>
> (b) Any loss, damage or expense which the Owner incurs, or for which he is liable, as a party to TOVALOP (*i.e.*[,] The Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution)[] or any other agreement approved by directors, including the costs and expenses incurred by the owner in performing his obligations under such agreements.
>
> (c) The costs of any measures reasonably taken for the purpose of avoiding or minimising [sic] pollution or any resulting loss or damage together with any liability for loss of or damage to property caused by measures so taken.
>
> (d) The costs of any measures reasonably taken to prevent the imminent danger of discharge or escape from the entered ship of oil or any substance which may cause pollution.
>
> (e) The costs or liabilities incurred as a result of compliance with any order or direction given by any government or authority, for the purpose of preventing or reducing pollution or the risk of pollution, provided always that such costs or liabilities are not recoverable under the Hull Policies of the entered ship.[89]

Per *King v. Brandywine Reinsurance Co.*, ITIA was a mutual P&I insurer set up in the aftermath of the 1967 *Torrey Cannon* disaster to cover

89. Springall, *supra* note 53, at 29-30.

oil pollution risks, specifically for those assumed under TOVALOP.[90] In 1989, the ITIA rules provided:

> (A) The liabilities, costs and expenses in respect whereof Owners and Co-Assureds shall be insured by the Association in respect of their interest in the Entered Tanker . . . are limited to the following:
>
> (i) Those for which the Owner may, as a party to [TOVALOP] be liable.
>
> (ii) Those for which the Owner or Co-Assured may be legally liable under statute or otherwise . . . by reason of the discharge or threatened discharge of oil, other than any damage, except pollution damage, caused directly or indirectly by fire or explosion . . . .[91]

ESC received a $400,000,000 recovery from ITIA several months after the incident without the filing of any litigation.[92] In 1996, shipping news source TradeWinds reported that ITIA was set to cease underwriting and begin the process of liquidating the twenty-seven-year-old club.[93]

B. Cargo Liability - Crude Oil

Organized by their insurance broker Marsh & McClennan, Exxon and its affiliates were provided worldwide catastrophic coverage through a program known as their Global Corporate Excess policies (GCE Package).[94] GCE Package included coverage for first-party losses, marine liabilities, and general third-party liabilities. From the term of November 1, 1988, to November 1, 1989, the Janson Green marine syndicate at Lloyd's of London lead a large group of international underwriters comprising the program.[95]

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90. King v. Brandywine Reinsurance Co. [2005] EWCA (Civ) 235, 1 C.L.C. 283, 288 (Eng.).

91. *Id.* at 288-89.

92. Dolin, *supra* note 84, at 314.

93. Jim Mulrenan, *Oil spill club ITIA faces liquidation*, TRADEWINDS (June 20, 1996, 10:00 PM GMT), https://www.tradewindsnews.com/weekly/oil-spill-club-itia-faces-liquidation/1-1-152588 [https://perma.cc/DD6X-VZRL].

94. Dolin, *supra* note 84, at 313-14.

95. *Id.*

Limits afforded, and key language[96] were as follows:

Coverage	Limit	Key Terms
Section I – First-party property, removal of debris, etc.	$600,000,000 per occurrence in excess of $410,000,000 in deductibles	A) Provides for losses of "crude oil" based on "replacement price" and "expenses incurred in removal or attempted removal of debris or wreck [of] property"[97] B) Under general coverage clause, Underwriters are required to pay "[a]ll sums which the insured pays or incurs as costs/or expenses on account of Removal or attempted Removal of Debris or Wreck of Property"[98]
Section IIIA – Marine liabilities, etc.	$250,000,000 per occurrence, in excess of $210,000,000 in deductibles	A) Via endorsement added to the 1985-86 GCE package and integrated into the body of the 1988-89 policy, coverage included a clause providing for "the legal and/or contractual liability of the Insured as Charterers of any vessel and/or watercraft and/or Cargo owners, including their legal and/or contractual liability as Cargo owners for demurrage and/or accidental seepage and/or pollution and/or contamination"[99]
Section IIIB – General third-party liabilities, etc.	$250,000,000 per occurrence, in excess of $210,000,000 in deductibles	

96. *Id.* at 314.
97. *Id.*
98. *Id.*
99. *Id.*

A coverage dispute did arise, but it concerned Exxon only as a cargo owner, which subjected them to Alaskan strict liability statutes on cargo owners for the "costs of response, containment, removal, or remedial action incurred"[100] by public entities and the costs of projects and events that are delayed or lost because of the public entity's efforts resulting from an unpermitted release. [101] When discussing the Scope of Damages covered by Debris Removal Supplemental Coverage, the policy referenced limits sections for Section I and Section IIIA.[102] While attributable to being a manuscript policy that specifically addressed loss exposures faced by a unique entity, this coverage is very different from what could be found today for oil or hazardous substance transporters in the Cargo Owner marketplace in terms of breadth.[103]

The Water Quality Insurance Syndicate is currently the largest underwriter of vessel pollution liability insurance for vessels in the U.S.[104] Under WQIS's Cargo Owner Policy Form, indemnification is provided to the owner of a cargo of oil or hazardous substances for its legal liability arising from the discharge, emission, release, spillage or leakage, of the threat thereof, of such cargo from a vessel, with respect to specific statutes within OPA 90; CERCLA; and CWA while addressing State laws generally.[105]

V. THE COURTS

A. Coverage Dispute: GCE Package Policy

As mentioned above, Exxon only experienced one coverage dispute in relation to the 1989 *Exxon Valdez* oil spill and that was regarding the response of their Cargo policy to Alaska's strict liability statutes.[106] The parties resolved this matter via a settlement after years of litigation, with the Section I claims being resolved for $300,000,000 and Section IIIA and

100. ALASKA STAT. ANN. § 46.03.822(a) (West 2022).
101. Dolin, *supra* note 84, at 313.
102. *Id.* at 316.
103. *Id.* at 314.
104. *About – WQIS*, WQIS, https://www.wqis.com/about-wqis/ (last visited Aug. 22, 2023) [https://perma.cc/2BA2-UCDQ].
105. WATER QUALITY INS. SYNDICATE, CARGO OWNER POLICY FORM 1 (2000)., *Cargo Owner Policy Form* (2000).
106. Dolin, *supra* note 84, at 313.

IIIB claims being resolved for $480,000,000, resulting in a total recovery of $780,000,000.[107]

B. Environmental Damage Claims: Federal and State Governments

On March 24, 1989, Exxon agreed to settle all Federal and State civil action claims resulting from the *Exxon Valdez* oil spill by payment of $900,000,000 in damages.[108] In addition, ESC pled guilty to violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.[109] Exxon Corporation pled guilty to violating the Migratory Bird Treaty Act.[110]

"The settlement also has a reopener clause stating Exxon may incur an additional $100 million for natural resource damages not currently foreseen."[111] In 2015, the Federal and State governments decided not to pursue a final $100,000,000 from ExxonMobil.[112] The State of Alaska had previously filed for the additional settlement funds in 2006, citing impacts on harlequin ducks and sea otters from oil still lingering under the surface on Alaska beaches, but State and Department of Justice officials determined those species had recovered – leaving no grounds to continue pursuing those funds.[113]

C. Environmental Damage: Civil Lawsuits

Private litigation brought on behalf of fishermen and local residents ended in 2008, when the Supreme Court approved a $500 million settlement, even though the original jury award had been $5,000,000,000.[114] "In July [1994], while the jury was deliberating the fishermen's claims, Exxon reached a $20,000,000 settlement with Alaska

107. *Id.* at 317.

108. *Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaskan Oil Spill*, EPA (Mar. 13, 1991), https://www.epa.gov/archive/epa/aboutepa/exxon-pay-record-one-billion-dollars-criminal-fines-and-civil-damages-connection-alaskan.html [https://perma.cc/328U-MXT3].

109. *Id.*

110. *Id.*

111. *Id.*

112. Waldholz, *supra* note 65.

113. *Id.*

114. *Id.*

native groups who [were] parties to the same suit."[115] This effectively ended all litigation deriving from the *Exxon Valdez* oil-spill.

CONCLUSION

The 1989 *Exxon Valdez* oil spill exposed the world to the ecological dangers of oil spills through our television screens. These images of defenseless animals covered in oil struck the heart strings of viewers causing passage of the Oil Pollution Act in blistering speed. Another incident of this magnitude would not occur until the *Deepwater Horizon* incident of 2010.

While I had hoped to provide a coverage analysis that advised how policy language emerged from the incident and then was modified as a result of litigation, this decisive role was played by OPA 90. As a result of that litigation, P&I clubs began to discuss the marine pollution insurance marketplace in terms of the World and the U.S. It marked a concerted deviation from prior international efforts and showed that ensuring America's majesty is a price willingly paid through its economy.

Having visited Alaska, I can attest that it's worth the expense to preserve. I encourage you to take the trip as well. Hopefully you'll get an opportunity to play golf while there. I missed my chance, despite my best, last-minute efforts. Thank you for your time, I wish you all the best.

115. Patrick Lee, *Exxon to Pay $287 Million to Alaska Fishermen: Environment: The award in the federal case, reached after 23 days' deliberation, is to cover actual losses to business*, LOS ANGELES TIMES (Aug. 12, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-08-12-fi-26514-story.html.